HCJ 11225/03

MK Dr Azmi Bishara
v.
1. Attorney-General
2. Knesset
3. Nazareth Magistrates Court

The Supreme Court sitting as the High Court of Justice
[1 February 2006]
Before President A. Barak and Justices E. Rivlin, E. Hayut

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In 2000 and 2001, while the petitioner was a member of the Fifteenth Knesset, he made two speeches. These speeches expressed support and approval for the Hezbollah organization, which in Israel has been declared a terrorist organization, and the petitioner was indicted for offences of supporting a terrorist organization.

In 2002, prior to the elections for the Sixteenth Knesset, applications were made to the Central Elections Committee to disqualify the candidacy of the petitioner in those elections, because of what he said in the two speeches. The Central Elections Committee disqualified the petitioner from standing for election, but this decision was set aside by the Supreme Court in *Central Elections Committee for the Sixteenth Knesset v. Tibi*, on the grounds that it was not convinced that the petitioner had expressed support for 'an armed struggle of a terrorist organization against the State of Israel,' as distinct merely from expressing support for a terrorist organization.

Meanwhile, the petitioner raised a preliminary argument in the criminal trial against him that he had substantive immunity against prosecution for the two speeches, since he made them while he was a member of the Knesset. The Nazareth Magistrates Court, which was hearing the trial, held that it would decide the question of substantive immunity after hearing the evidence in the trial. The petitioner then applied to the Supreme Court to set aside the decision of the Nazareth Magistrates Court.

Held: (Majority opinion — President Barak and Justice Rivlin) Under the Immunity Law, expressions of support for 'an armed struggle of a terrorist organization against the State of Israel' are not protected by parliamentary immunity. This exclusion of immunity should be interpreted strictly. It does not include all expressions of support

for a terrorist organization, only those that contain support for *an armed struggle* of a terrorist organization against the State of Israel. As the court held in *Central Elections Committee for the Sixteenth Knesset v. Tibi*, the petitioner's speeches did not contain clear support for an armed struggle of a terrorist organization against the State of Israel, although they did contain support for a terrorist organization. Consequently the statutory exclusion of immunity does not apply. The petitioner's speeches should be considered under the case law rules for excluding immunity, according to the 'margin of natural risk' test. Although the petitioner's statements and the circumstances in which they were made were close to the line beyond which it would not be possible to say that they fall within the scope of the natural risk involved in carrying out the duties of a member of the Knesset, the 'margin of natural risk' test is satisfied in this case.

(Minority opinion —Justice Hayut) The petitioner's two speeches are not protected by substantive immunity, since they expressed support for an armed struggle of a terrorist organization against the State of Israel. In *Central Elections Committee for the Sixteenth Knesset v. Tibi* the petitioner was not disqualified from standing for election to the Knesset, but the premise for considering the scope of substantive immunity is completely different from the criteria that the court adopts when considering whether to disqualify a candidate from standing for office. The question of substantive immunity naturally arises with regard to a specific case, whereas for the purpose of disqualification in elections it is necessary to show that we are speaking of dominant characteristics that are central to the activities or the statements of the prospective member of Knesset in general. Moreover, for the purpose of preventing participation in the elections, 'convincing, clear and unambiguous evidence' must be presented as to the purposes and acts of the candidate. By contrast, the premise for determining the scope of substantive immunity is that the facts of the indictment will be proved.

Petition granted by majority opinion (President Barak, Justice Rivlin), Justice Hayut dissenting.

Legislation cited:

Basic Law: the Knesset, ss. 7A, 7A(2), 7A(a)(1), 7A(a)(3), 7A(b), 17.

Immunity, Rights and Duties of Knesset Members Law, 5711-1951, ss. 1, 1(a1), 1(a1)(3), 2, 2A, 3, 4, 13, 13(a).

Immunity, Rights and Duties of Knesset Members Law (Amendment no. 29), 5762-2002.

Penal Law (Amendment no. 66), 5762-2002.

Political Parties Law, 5752-1992, ss. 2, 5, 5(2).

Prevention of Terrorism Ordinance, 5708-1948, ss. 4, 4(a), 4(b), 4(g), 8.

Israeli Supreme Court cases cited:

[1] CrimApp 9516/01 *Bishara v. State of Israel* (unreported).
[2] EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2003] IsrSC 57(4) 1.
[3] CrimA 255/68 *State of Israel v. Ben-Moshe* [1968] IsrSC 22(2) 427.
[4] HCJ 620/85 *Miari v. Knesset Speaker* [1985] IsrSC 41(4) 169.
[5] HCJ 1843/93 *Pinhasi v. Knesset* [1995] IsrSC 49(1) 661.
[6] HCJ 5151/95 *Cohen v. Attorney-General* [1995] IsrSC 49(5) 245.
[7] HCJ 11298/03 *Movement for Quality Government in Israel v. Knesset Committee* (not yet reported).
[8] HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [1993] IsrSC 47(2) 229; **[1992-4] IsrLR 19**.
[9] HCJ 507/81 *Abu-Hatzeira MK v. Attorney-General* [1981] IsrSC 35(4) 561.
[10] LCA 7504/95 *Yassin v. Parties Registrar* [1996] IsrSC 50(2) 45.
[11] LCA 2316/96 *Isaacson v. Parties Registrar* [1996] IsrSC 50(2) 529.
[12] LCA 3527/96 *Axelbrod v. Property Tax Director, Hadera Region* [1998] IsrSC 52(5) 385.
[13] EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; **IsrSJ 8 83**.
[14] HCJ 6271/96 *Be'eri v. Attorney-General* [1996] IsrSC 50(4) 425.
[15] HCJ 588/94 *Schlanger v. Attorney-General* [1994] IsrSC 48(3) 40.
[16] HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485.
[17] HCJ 4723/96 *Atiya v. Attorney-General* [1997] IsrSC 51(3) 714.
[18] CrimFH 8613/96 *Jabarin v. State of Israel* [2000] IsrSC 54(5) 193.
[19] HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [1995] IsrSC 49(1) 758.
[20] EA 2600/99 *Erlich v. Chairman of Central Elections Committee* [1999] IsrSC 53(3) 38.
[21] HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
[22] CA 214/89 *Avneri v. Shapira* [1989] IsrSC 43(3) 840.
[23] EA 1/88 *Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [1988] IsrSC 42(4) 177.
[24] EA 2/88 *Ben-Shalom v. Central Elections Committee for the Twelfth Knesset* [1989] IsrSC 43(4) 221.
[25] CrimA 2831/95 *Alba v. State of Israel* [1996] IsrSC 50(5) 221.
[26] HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [2003] IsrSC 57(6) 817; **[2002-3] IsrLR 311**.
[27] HCJ 1398/04 *Ben-Horin v. Registrar of Amutot* (not yet reported).

Israeli Magistrates Court cases cited:

[28] CrimC (Naz) 1087/02 *State of Israel v. Bishara* (decision of 12 November 2003) (unreported).

American cases cited:

[29] *United States v. Carolene Products Co*., 304 U.S. 144 (1938).

[30] *Jones v. Opelika*, 316 U.S. 584 (1942).

For the petitioner — H. Jabareen, M. Dalal.
For the respondents — O. Koren, E. Gideoni.

JUDGMENT

Justice E. Hayut

The petitioner is the leader of the National Democratic Assembly party and has served as a member of the Knesset for that party since the fourteenth Knesset. While he was a member of the fifteenth Knesset, the petitioner made speeches on two different occasions outside the Knesset, one in the town of Um al-Fahem and the other in Syria. Because of what he said during these speeches, the attorney-general decided to indict him of an offence of supporting a terrorist organization, under the Prevention of Terrorism Ordinance, 5708-1948. The main question that the petition raises is whether the remarks for which the petitioner was indicted were made in the course of his duties as a member of the Knesset and whether he therefore has substantive immunity?

The facts

1. On 9 September 2001 the first respondent submitted to the Speaker of the Knesset an application to lift the petitioner's immunity in order to indict him in a criminal trial. The application related to the indictments which the first respondent decided to file against the petitioner. One is the indictment that is relevant to the petition before us, in which the petitioner is alleged to have committed an offence of supporting a terrorist organization on two occasions for remarks that he made during speeches that he gave outside the Knesset. The second concerns offences of aiding an unlawful departure from Israel, which were attributed to the petitioner because of his involvement in organizing trips of Israeli citizens to Syria. The second indictment has meanwhile been cancelled by the Nazareth Magistrates Court and the parties

do not address it in this petition. Consequently we too will focus our deliberations on the first indictment. This indictment relates to two incidents. One is a conference that the National Democratic Assembly held on 5 June 2000 at the Al-Anis Hall in Um Al-Fahem to mark the thirty-third anniversary of the Six Day War. In the invitation to the conference, which took place approximately two weeks after the Israel Defence Forces withdrew from South Lebanon, it says that it is taking place 'in an atmosphere of the victory of the Lebanese resistance and the liberation of South Lebanon…'. In the main speech that was given by the petitioner at the conference (hereafter — 'the Um Al-Fahem speech'), he said, *inter alia*, the following:

> 'The Hezbollah have won, and for the first time since 1967 we have tasted victory. Hezbollah's right to be proud of its achievement and to humiliate Israel… Lebanon, the weakest of the Arab states, has presented a tiny model which, if we look in depth, can lead us to draw the necessary conclusions for success and victory — a clear purpose and a fierce desire to win, and preparing the essential means needed for achieving this purpose… the Hezbollah recognized the mood in the Israeli street and exploited it to the full. It made sure that its guerilla warfare was fully reported in the media, and each of its achievements had a significant effect on the morale of the people in Israel who gradually lost patience in view of the losses that they suffered from the Hezbollah' (see para. 8 of the indictment).

The second event to which the indictment relates concerns a speech that the petitioner made in Syria approximately one year after the Um Al-Fahem speech, during a memorial service for Syrian president, Hafez Al-Assad (hereafter — 'the Syrian speech'). At the ceremony, which was attended by Ahmad Jibril, the leader of the Popular Front for the Liberation of Palestine and Hassan Nasrallah, the leader of the Hezbollah, the petitioner said, *inter alia*:

> 'It is no longer possible to continue without widening the margin between the possibility of total war and the fact that surrender is impossible. What characterizes the Sharon government is that after the victory of the Lebanese "resistance" which derived a benefit from this margin that Syria constantly widened, between accepting the Israeli conditions called a lasting complete peace,

> and the military option. This margin helped the steadfastness and persistence and heroism of the leadership and fighters of the Lebanese "resistance." But after the victory of the "resistance" and after Geneva and after the failure of "Camp David," the Israeli government tried to reduce this margin in order to present a choice with the formula: either acceptance of the Israeli conditions, or total war. Thus it will be impossible to continue with the third option, which is the option of the "resistance," other than by widening this margin once again, so that people can carry out the struggle and the "resistance." It is not possible to widen this margin other than by means of a united and effective Arab political position in the international arena, and indeed the time has now come for this' (see para. 12 of the indictment).

Because of these remarks of the petitioner in the Um Al-Fahem speech and the Syrian speech, the indictment attributes to him two offences of supporting a terrorist organization, under s. 4(a) of the Prevention of Terrorism Ordinance, which was in force at that time but has meanwhile been repealed by the Penal Law (Amendment no. 66), 5762-2002, and also under ss. 4(b) and 4(g) of the Prevention of Terrorism Ordinance.

2. The premise that was adopted by the first respondent with regard to the application for lifting the petitioner's immunity was that in the circumstances of the case he did not have substantive immunity by virtue of s. 1 of the Immunity, Rights and Duties of Knesset Members Law, 5711-1951 (hereafter — 'the Immunity Law'), since the Knesset cannot lift substantive immunity. On the basis of this premise and pursuant to the provisions of s. 13 of the Immunity Law, the first respondent sought to lift the petitioner's procedural immunity. The Knesset Committee held two sessions in this regard, on 25 September 2001 and on 30 October 2001, during which the first respondent presented the grounds for his application, experts on constitutional law and the immunity of Knesset members were heard and the petitioner's position was heard. Following these sessions, the Committee decided on 5 November 2001 to recommend that the Knesset should lift the petitioner's immunity. This recommendation was discussed in the plenum of the Knesset on 6 November 2001, and following that session the Knesset decided on 7 November 2001 to adopt the Committee's recommendation.

3. The indictment against the petitioner was filed first in the Jerusalem Magistrates Court, but was transferred to the Nazareth Magistrates Court at

the request of the petitioner (see CrimApp 9516/01 *Bishara v. State of Israel* [1]). In his preliminary arguments in the criminal proceeding, the petitioner raised, *inter alia*, the argument that he was immune from criminal liability for the statements referred to in the indictment, because of s. 1 of the Immunity Law, which gives him substantive immunity as a member of the Knesset when expressing an opinion in the course of carrying out his duties or for the purpose of carrying out his duties. The Magistrates Court was of the opinion that the decision on the question of the substantive immunity raised by the petitioner involved questions of fact that should be heard in the main proceeding, and it therefore decided not to hear the argument in the preliminary stage of the trial but to leave it to a stage after hearing the evidence (see CrimC (Naz) 1087/02 *State of Israel v. Bishara* (decision of 12 November 2003) [28]). Following this decision, the petitioner filed the petition before us. This petition gives rise to questions that concern the proper forum and the proper time for raising arguments concerning substantive immunity, but we do not need to decide these questions since the respondents gave notice of their consent to hold a hearing of the petition on its merits (see their statement of 1 February 2005).

To complete the factual picture, we should note another important development concerning this case. The indictment that we are discussing relates, as we have said, to two events that took place in the course of the fifteenth Knesset and it was filed on 12 November 2001, shortly after the fifteenth Knesset decided to lift the petitioner's immunity. While the indictment was pending, the elections for the sixteenth Knesset were held, and prior to those elections the Central Elections Committee for the Sixteenth Knesset (hereafter — 'the Elections Committee') and this court were called upon to hear various proceedings that were initiated by certain parties with the aim of preventing the petitioner from standing as a candidate in those elections. One of the main arguments that those applicants raised in this context concerned the remarks that the petitioner made in the Um Al-Fahem speech and in the Syrian speech, as well as the indictment that was filed against him for those remarks after his immunity was lifted. The Elections Committee accepted the arguments and decided by a majority, against the dissenting view of the chairman of the Elections Committee, Justice M. Cheshin, to prevent the petitioner from standing as a candidate for the sixteenth Knesset. The Elections Committee held that the petitioner fell within the scope of the ground in s. 7A(a)(1) of the Basic Law: the Knesset, with regard to denying the existence of the State of Israel as a Jewish and democratic state, as well as the ground in s. 7A(a)(3) of that Basic Law,

which concerns support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel. This decision was brought to this court for approval pursuant to s. 7A(b) of the Basic Law, and the court held, by a majority, that the decision of the Elections Committee to prevent the petitioner standing as a candidate for the sixteenth Knesset should not be approved. The court held, *inter alia*, that it was not convinced, to the degree of certainty required in cases of election disqualification, that the petitioner's statements amounted to support for an armed struggle of a terrorist organization (see EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]). The court also held in that case that the participation of the National Democratic Assembly party in the elections for the Sixteenth Knesset should not be prevented. Following the judgment in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], the National Democratic Assembly party participated in the elections, in which it won three seats, and the petitioner served as a member of the sixteenth Knesset on behalf of that party.

The arguments of the parties

4. The main argument of the petitioner before us is that the statements attributed to him in the indictment are merely the expression of an opinion on what are clearly political issues, and that they were uttered in the course of carrying out his duties and for the purpose of carrying out his duties as a member of the Knesset. They are therefore protected, in his opinion, by substantive immunity, which cannot be lifted. The petitioner further argues that this conclusion is dictated by the purposes of substantive immunity, which are to allow the member of the Knesset to express political positions freely and to represent the public that voted for him without fear. This protection is especially warranted, in the petitioner's opinion, when we are speaking of members of the Knesset from parties that represent minority groups, like the petitioner's party. The petitioner further argues that in his speeches he expressed the positions of the National Democratic Assembly that are set out in the party manifesto, and these positions were approved in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] as satisfying the conditions in s. 7A of the Basic Law: the Knesset. The petitioner also complains, in the alternative, of the impropriety of the process of removing the procedural immunity. According to him, there were significant defects in the proceeding that justify its being set aside. *First*, the full facts were not presented to the members of the Knesset. In particular, the members of the Knesset were not informed of the fact that the police recommended that the investigation file against the petitioner should be

closed, in so far as the Um Al-Fahem speech was concerned. In addition, the complete speeches of the petitioner were not brought before the members of the Knesset; they were only presented with fragments, and even these were not exact. *Second*, the Knesset Committee did not hold a hearing on the actual parts of the speeches that were brought before it, and it ignored the petitioner's explanations with regard to their significance and the circumstances in which they were made. *Third*, the members of the Knesset did not consider all the factors that they should have considered before they voted on the proposal to lift the petitioner's immunity, and in particular the members of the Knesset ignored the possibility that irrelevant considerations lay at the heart of the decisions of the first respondent to file an indictment against the petitioner. *Fourth*, the vote of the Knesset Committee, in which it decided to recommend to the Knesset that it should lift the petitioner's immunity, was made after party consultations, and this gives rise to the suspicion that irrelevant considerations lay at the heart of the voting of at least some members of the Knesset.

5. The respondents' position is that the statements attributed to the petitioner fall outside the scope of substantive immunity. According to them, the provision which states that substantive immunity will apply to 'expressing an opinion… in the course of carrying out his duties and for the purpose of carrying out his duties as a member of the Knesset' should be interpreted in view of the basic constitutional principles of the State of Israel. This interpretation leads to the conclusion that statements whose content is support for an armed struggle of a terrorist organization against the State of Israel cannot be considered to be expressing an opinion in the course of carrying out his duties and for the purpose of carrying out his duties as a member of the Knesset, and these statements do not fall within the scope of substantive immunity. This is the case in the absence of a provision of statute that expressly provides this. In the respondents' opinion, a democratic state does not need to allow activity, which clearly seeks to undermine its ongoing struggle against terrorism in order to protect its citizens, to benefit from substantive immunity, even if it is done under a cloak of legitimate parliamentary activity. The respondents do not dispute the importance of freedom of speech in general and of elected representatives in particular, or the importance of open and free political debate. Notwithstanding, according to them, support of an armed struggle of a terrorist organization against the state falls outside the scope of democratic debate and discussion and outside the scope of the legitimate expression of public representatives.

The respondents also are of the opinion that there were no defects in the process of lifting the immunity. According to them, the Knesset was not competent to examine the indictment on its merits, and this also means that it was not competent to examine the strength of the evidence. Consequently, the material that was presented to the Knesset was sufficient. *First*, the evidence on which the indictment is based was presented comprehensively to the members of the Knesset. The police recommendation to close the investigation file constitutes an internal opinion and it has no objective value nor does it constitute any evidence when examining the request of the attorney-general to lift the petitioner's immunity. *Second*, the question whether substantive immunity applies to the statements that led to the indictment was considered extensively and thoroughly by the Knesset Committee. The text of the speeches that led to the filing of the indictment was submitted to the members of the Committee, and a discussion was held with regard to them. *Third*, the petitioner's argument according to which irrelevant considerations lay at the basis of the attorney-general's decision was presented to the Committee, examined on its merits and rejected by the Committee. *Fourth*, the petitioner did not properly prove his claim concerning the party consultations before the vote in the Knesset Committee, or his claim that these consultations, even if they took place, affected the position of the Knesset members on the merits of the issue. In view of all this the respondents request that we deny the petition.

Deliberations

Substantive immunity — the normative framework and the purposes underlying it

6. Section 17 of the Basic Law: the Knesset provides that 'Members of the Knesset have immunity; details shall be provided in statute.' Thereby the Israeli legal system adopted an importance principle that is the essence of the democratic system, whereby a member of parliament has immunity from legal proceedings. Immunity is intended to ensure that a member of the Knesset can properly discharge his duties and represent the public that elected him by giving free and full expression to his opinions and outlooks, without concern or fear that this may result in a criminal conviction or a personal pecuniary liability in a civil proceeding. In CrimA 255/68 *State of Israel v. Ben-Moshe* [3], at p. 439, President Agranat explained the importance and purposes of the immunity granted to members of the Knesset when he said:

> 'Before us we have a privilege of supreme constitutional importance, in that it is intended to guarantee that members of the legislative house of the state have freedom of opinion, expression and debate, so that they can discharge their duties, as such, without feeling fear or trepidation and without being concerned that they may have to answer for this to any person or authority; *for the whole nation has a clear essential interest in the realization of this right*, so that it does not suffer a major or minor violation by anyone; without it the democratic process cannot exist effectively and it will become valueless.'

Thus we see that the independence of members of the Knesset is essential for the proper functioning of a democracy. In discussing this rationale that underlies subjective immunity, President Shamgar said in HCJ 620/85 *Miari v. Knesset Speaker* [4], at p. 207:

> 'A member of the Knesset, who cannot express himself without concern for the legal consequences of his remarks, cannot discharge his duty to the voter. The representatives of the people… have the task of conducting the political debate. The freedom of political debate requires that no restriction is placed upon the ability and right of free expression of the elected representatives.'

An additional central purpose that can be identified in the historical development of parliamentary immunity concerns the desire to preserve the separation of powers and to protect the proper activity of the legislature so that the executive authority does not intervene in it (see HCJ 1843/93 *Pinhasi v. Knesset* [5], at pp. 678-679; S. Nevot, *The Subjective (Professional) Immunity of Knesset Members* (Doctoral Thesis — Hebrew University, 1997), at pp. 147-150).

7. There are various models of parliamentary immunity around the world. There are legal systems that give a member of parliament substantive immunity while limiting it only to the activity that is done in the parliament building itself (the United States, England, Canada, Australia, Germany and Holland). Other countries (France, Italy and Spain) do not attribute any importance to the place where the activity protected by immunity is carried out and the immunity extends both to activity carried out inside parliament and to activity outside it, provided that there is an objective-functional connection between the activity and the duties of the member of parliament. Some countries give the member of parliament immunity only for a vote or

expressing an opinion and a few give immunity also for an act (for a detailed comparative discussion of the various models of substantive immunity, see Nevot, *The Subjective (Professional) Immunity of Knesset Members*, *supra*, at pp. 98-142).

The Israeli legislature adopted a broad model of substantive immunity, which is regulated in s. 1 of the Immunity Law, according to which:

> 'Immunity in carrying out duties
>
> 1. (a) A member of the Knesset shall not have criminal or civil liability, and he shall be immune from any legal action, for a vote or for expressing an opinion orally or in writing, or for an act that he carried out — in the Knesset or outside it — if the vote, expressing the opinion or the act were in the course of carrying out his duties, or for the purpose of carrying out his duties, as a member of the Knesset.
>
> …'

From this we see that the substantive immunity of members of the Knesset extends also to acts and not merely to a vote or opinion, and it includes the activity of the member of the Knesset whether it is carried out inside the Knesset or outside it, provided that there is an objective-functional connection between this activity and his position as a member of the Knesset. This substantive immunity cannot be lifted (s. 13(a) of the law) and it continues even after the member of the Knesset leaves office (s. 1(c) of the law) (for the significance of substantive immunity and the tests concerning the scope of its application, see *Miari v. Knesset Speaker* [4], *Pinhasi v. Knesset* [5]; HCJ 5151/95 *Cohen v. Attorney-General* [6]; HCJ 11298/03 *Movement for Quality Government in Israel v. Knesset Committee* [7]). Alongside the substantive immunity, the Immunity Law further provides a procedural immunity. The procedural immunity, as distinct from the substantive immunity, protects a member of the Knesset from being indicted in criminal proceedings for offences *that he did not commit* in the course of carrying out his duties or for the purpose of carrying out his duties as a member of the Knesset. This immunity is provided in section 4 of the Immunity Law and it applies to offences that were committed while a member of the Knesset holds office and also to offences that were committed

before a member of the Knesset held office, unless the Knesset decides to lift the immunity. Lifting procedural immunity is done by means of the process set out in s. 13 of the law and subject to the conditions set out therein. The Immunity Law further provides specific provisions concerning the immunity of members of the Knesset from searches, eavesdropping and arrest (see ss. 2, 2A and 3 of the Immunity Law respectively).

8. The purposes underlying the substantive immunity that is granted to members of the Knesset, which we listed above, no matter how important and significant they may be, do not reflect absolute values. On the contrary, substantive immunity as a legal institution directly conflicts with other basic principles that lie at the heart of our legal system, such as the principle of the rule of law according to which there is no person or corporation or authority in a democracy that is above the law (see HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [8], at p. 274 {82}). Indeed, every person is forbidden to break the law. It is even more forbidden for a public figure, a member of the legislature, who is supposed to serve as an example and a civic standard for upholding and protecting the law. A member of the Knesset who breaks the law undermines public confidence in the organs of government. An additional basic principle that conflicts with the institution of substantive immunity is the principle of equality. This principle implies, *inter alia*, the outlook that everyone is equal before the law and also the outlook that every act of legislation is intended to realize the principle of equality, and not to conflict with it (see HCJ 507/81 *Abu-Hatzeira MK v. Attorney-General* [9], at p. 585). Substantive immunity violates the principle of equality. According to it, a member of the Knesset has no criminal liability for prohibited acts for which an ordinary citizen, were he to commit them, would be held accountable.

How is it possible to reconcile the conflicts and the inconsistency between the basic principles of the legal system that are created by substantive immunity? Where should we place the boundaries of substantive immunity in order that we do not overstep the proper balance for realizing its purposes? This was discussed extensively by President Barak in *Pinhasi v. Knesset* [5], where he said:

> 'The purpose of the immunity is to prevent a situation in which a member of the Knesset is prevented from carrying out permitted acts, because of the concern that they might marginally overstep the boundary of what is prohibited. Immunity "covers" this margin. In the balance between refraining from carrying out

> lawful acts that are a part of the functions of a member of the Knesset and committing unlawful acts that fall within the margin of risk of the lawful acts, the Immunity Law preferred the second alternative. Indeed, in order to preserve the independence and freedom of action of a member of the Knesset, as well as the proper functioning of the Knesset itself, the Knesset member is given substantive immunity. This immunity is given to him with regard to any unlawful act that can be regarded as an improper way of carrying out a lawful act which falls with the scope of his role as a member of the Knesset, provided that this unlawful act is sufficiently close, from a substantive viewpoint, to the role of being a member of the Knesset, so that it can be said that it is a part of it and it constitutes a part of the natural risk to which every member of the Knesset is exposed. This approach with regard to the proper balancing point ensures that substantive immunity acts as a shield against risks that are inherent and natural to the position of being a member of the Knesset, without it becoming a *carte blanche* for abusing the position' (*ibid*. [5], at p. 686).

Thus we see that the 'margin of natural risk' test that was formulated by President Barak in *Pinhasi v. Knesset* [5], which was adopted as the decisive test for interpreting the expression 'in the course of carrying out his duties or for the purpose of carrying out his duties' in s. 1 of the Immunity Law (see *Movement for Quality Government in Israel v. Knesset Committee* [7]), tells us that the premise for substantive immunity is the rule of law (see S. Nevot, 'The Immunity of a Member of Knesset for "Expressing an Opinion and an Act in Carrying out his Duties" — New Tests in the Case Law of the Supreme Court,' 4 *HaMishpat* (1999) 61, at p. 93). Therefore, as a rule a member of the Knesset should carry out his duties within the framework of the law while taking care to uphold it. Notwithstanding, the Immunity Law gives a member of the Knesset a 'safety net' in those cases where he overstepped the mark in the course of carrying out his duties or for the purpose of carrying out his duties and entered the prohibited margin, provided that these fall within the scope of the natural risk of his activity as a member of Knesset. This 'safety net' is intended to protect the independence and freedom of action of a member of the Knesset so that he is not intimidated when voting, expressing an opinion and doing acts that are an integral part of his duties, because of a fear that he might have to stand trial for these actions. By contrast, substantive immunity is not intended to protect

prohibited activity that is planned in advance, which a member of the Knesset commits by abusing his status (see *Pinhasi v. Knesset* [5], at p. 687). Likewise, as we shall explain below, prohibited activity of members of the Knesset that endangers democracy and seeks to undermine the foundations of the state as a Jewish and democratic state is excluded from the scope of substantive immunity. Such activity, whether it is carried out in the Knesset itself or outside the Knesset, should not be regarded, *ab initio*, as activity in the course of carrying out the duties of a member of Knesset or for the purpose of carrying out those duties. This approach derives from the recognition that Israeli democracy, as a defensive democracy, is entitled to lay down 'red lines' that a member of the Knesset may not cross and for which he will not have substantive immunity, if he crosses them.

Substantive immunity and the reciprocal relationship between it and other legislative arrangements

9. In order to demarcate these 'red lines,' we should examine the institution of substantive immunity in its broad context. We should address the interaction and reciprocal relationship between substantive immunity and the provisions of s. 5 of the Political Parties Law, 5752-1992, and particularly the interaction and reciprocal relationship between substantive immunity and the provisions of s. 7A of the Basic Law: the Knesset. Indeed, holding office and acting as a member of Knesset are merely the ultimate goal of the democratic process in which the members of the Knesset are appointed to office. The beginning of this process is the registration of the party under the Political Parties Law. This registration is a necessary condition for the party competing in the elections to the Knesset (see s. 2 of the Political Parties Law). Already at this preliminary stage the legislator, in s. 5 of the Political Parties Law, establishes 'red lines,' which, if crossed, disqualify the party from being lawfully registered. Section 5 provides the following:

'Restrictions upon registering a political party

> 5. A political party shall not be registered if any of its purposes or acts, expressly or by implication, contains one of the following:
>
> (1) Denying the existence of the State of Israel as a Jewish and democratic state;
>
> (2) Incitement to racism;

(2a) Support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel;

(3) A reasonable ground for concluding that the political party will serve as a cloak for unlawful acts.'

A similar barrier is placed before lists of candidates for the Knesset and before a candidate for the elections to the Knesset in s. 7A of the Basic Law: the Knesset, which provides:

'Preventing the participation of a list of candidates

7A. A list of candidates shall not participate in elections to the Knesset nor shall a person be a candidate in elections to the Knesset if the purposes or acts of the list or the acts of the person, as applicable, expressly or by implication contain one of the following:

(1) Denying the existence of the State of Israel as a Jewish and democratic state;

(2) Incitement to racism;

(3) Support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel.'

The correlation between the legislative arrangements in s. 5 of the Political Parties Law and those in s. 7A of the Basic Law: the Knesset is obvious: both of them concern the power of a political party and the power of its candidates to participate in elections; both of them violate similar freedoms and both of them are intended to protect similar values. For this reason, each of them delineates similar 'red lines' that a person cannot cross if he wishes to be able to serve as a member of the Knesset (see LCA 7504/95 *Yassin v. Parties Registrar* [10], at p. 68; LCA 2316/96 *Isaacson v. Parties Registrar* [11], at pp. 539-540).

10. The Immunity, Rights and Duties of Knesset Members Law (Amendment no. 29), 5762-2002 (hereafter — Amendment no. 29), which

was enacted after the events that are the subject of the indictment in our case, also enshrined these 'red lines' in the Immunity Law and added to it the provision of s. 1(a1), which provides:

'Immunity in carrying out duties

1. …

(a1) To remove doubt, an act, including a statement, which is not incidental, of a member of the Knesset that contains one of the following shall not be regarded, for the purpose of this law, as expressing an opinion or as an act that is carried out in the course of his duties or for the purpose of his duties as a member of the Knesset:

(1) Denying the existence of the State of Israel as the state of the Jewish people;

(2) Denying the democratic character of the state;

(3) Incitement to racism because of colour or belonging to a race or to a national-ethnic origin;

(4) Support for an armed struggle of a hostile state or for acts of terrorism against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad.

…'

Does the fact that the restrictions in s. 1(a1) were only added to the Immunity law in 2002 mean that before Amendment no. 29 those restrictions did not apply with regard to limiting the scope of substantive immunity? I do not think so. In my opinion, we are dealing with a 'clarifying amendment' that merely reflects the legal position prior to the amendment. It should be noted that the determination that we are dealing with a 'clarifying amendment' does not mean that the amendment should be applied retrospectively in a literal manner. All that this determination tells us is that

we should regard the amendment as important in view of the fact that it clarifies the legal position that prevailed before it, notwithstanding the position that the state presented before us in this regard (for a legislative amendment as a 'clarifying amendment,' see LCA 3527/96 *Axelbrod v. Property Tax Director, Hadera Region* [12], at p. 406; A. Barak, *Legal Interpretation* (vol. 2, *Statutory Interpretation*, 1994), at pp. 51-54). The conclusion that we are faced with a 'clarifying amendment' is based on several reasons: first, s. 1(a1) begins with the words 'to remove doubt' and this beginning constitutes a clear linguistic indication that we are dealing with a legislative amendment that was intended to clarify the legal position that prevailed before it was enacted. Second — and this is the main point — the purpose underlying the substantive immunity and the balances required for determining its scope also support the approach that we are dealing with a 'clarifying amendment' and that the 'red lines' that are provided in s. 5 of the Political Parties Law and in s. 7A of the Basic Law: the Knesset continue to accompany the candidate even after he begins to hold office as a member of Knesset. When the candidate reaches this goal, the red lines delineate the borderline of substantive immunity that is granted to him by virtue of his office. As I have already said, the institution of substantive immunity is based on the recognition that the freedom of action and expression given to the political parties and to members of the Knesset are the foundation of a functioning democracy. Nonetheless, we are not speaking of a freedom of action and a freedom of expression that are without limit. The conflict between the institution of substantive immunity and other basic values of democracy, including the rule of law and the principle of equality before the law, requires proper balances to be struck to ensure that substantive immunity does not 'cross the line' and undermine these principles to a greater extent that should be allowed. This is the purpose of the 'margin of natural risk' test that this court adopted in delineating the significance and interpretation that should be given to the expression 'in the course of carrying out his duties and for the purpose of carrying out his duties' in s. 1 of the Immunity Law. The same approach should be adopted, and is perhaps even more appropriate, where elected representatives overstep 'red lines' that concern the very existence of the state and they undermine its Jewish and democratic foundations. Indeed, the Israeli democracy is a young democracy and the rights that it grants should not be allowed to be used in order to bring about its self-destruction. The Supreme Court addressed this in *Yassin v. Parties Registrar* [10], when it said: 'Democracy does not need to allow its own destruction because of its tolerance' (*ibid.* [10], at p. 62), and in EA 2/84

Neiman v. Chairman of Elections Committee for Eleventh Knesset [13], at p. 310 {161}, where it said: 'Civil rights are not a platform for national destruction.' Therefore, there is no basis for showing tolerance towards expressions or acts of an elected representative that involve a denial of the existence of the State of Israel as a Jewish and democratic state or support for an armed struggle of a hostile state or a terrorist organization that are acting to destroy it. These principles are so basic and so essential to the existence of Israeli democracy that they should be regarded as principles that flow through the arteries of our legal system, whether they are expressly enshrined in legislation or not. The same applies to incitement to racism (see s. 5(2) of the Political Parties Law; s. 7A(2) of the Basic Law: the Knesset, and s. 1(a1)(3) of the Immunity Law). This incitement undermines the foundations of democracy and therefore it is desirable that not only should a party or a candidate be prevented from competing in elections, but also that substantive immunity should not be given to a member of the Knesset, in so far as his actions are tainted by such incitement. It should already be pointed out at this stage that the 'red lines' that are delineated by amendment no. 29 concerning the restrictions on granting substantive immunity are broader in so far as they concern support for an armed struggle against the State of Israel. Whereas s. 5 of the Political Parties Law and s. 7A of the Basic Law: the Knesset both speak of a restriction that arises because of 'support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel,' the restriction in s. 1(a1) of the Immunity Law speaks of 'support for an armed struggle of a hostile state or for acts of terrorism against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad.' Thus we see that, for the purpose of substantive immunity, the legislature expressed its opinion in amendment no. 29 that support for acts of terrorism of any kind whatsoever is antidemocratic to such an extent that substantive immunity should not be given for it, not only when we are speaking of an armed struggle of a terrorist organization against the State of Israel, but even when we are speaking of acts of terrorism directed against Jews or Arabs as such.

11. Support for the position that amendment no. 29 is merely a 'clarifying amendment,' which reflects continuity in realizing the purposes underlying s. 5 of the Political Parties Law and s. 7A of the Basic Law: the Knesset, can be found in the remarks uttered by President Shamgar in *Miari v. Knesset Speaker* [4] with regard to s. 1 of the Immunity Law before the amendment, even though in that case no decision was necessary on this issue. He said the following:

> 'This argument in essence is therefore that the legislature did not merely intend to prohibit a certain type of activity before the elections, but the aforesaid s. 7A was intended to provide a selection process *ab initio* that would determine the appearance of the Knesset and its elected representatives after the elections, and this gives rise to the connection between what is stated in s. 7A and how the elected representative carries out his duties' (*ibid*. [4], at p. 211; see also *Pinhasi v. Knesset* [5], at p. 690).

The approach that there is a link between the 'red lines' provided in s. 5 of the Political Parties Law, s. 7A of the Basic Law: the Knesset and s. 1 of the Immunity Law, which jointly express the goal of realizing the constitutional norms underlying those sections, is mentioned also in the work of Dr S. Nevot, who says:

> 'It would appear that ss. 5 and 7A, on the one hand, and s. 1 of the Immunity Law, on the other hand, were intended to prevent this phenomenon. Preventing the registration of a political party and preventing its participation in elections is a preliminary stage, which is intended to select the organizations and the persons that will be allowed to take part in the institution of the legislature. After the "selection," the institution of immunity will protect the freedom of expression of those who are chosen. The premise in this protection is that the elected representatives are only those people whose expressions and activity have been defined as legitimate. The Immunity Law is intended to complete, in this sense, the "selection" process that the legislature began in sections 5 and 7A. It is precisely the main purpose of parliamentary immunity — the one that regards the immunity as a means of protecting the legislature itself rather than the individual member of the Knesset — that requires an examination of all the arrangements that apply to the substance and character of the legislature' (see Nevot, *The Subjective (Professional) Immunity of Knesset Members*, *supra*, at p. 233).

Thus we see that expressing an opinion or doing an act that involves a denial of the existence of the State of Israel as a Jewish and democratic state, support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel, incitement to racism or support for acts of terror against the Arab minority in Israel all are 'beyond the pale' in so far as carrying out the duties of a member of Knesset is concerned. With regard to

expressing opinions or doing acts of this kind, we are therefore not required to examine the 'margin of natural risk' that was determined in *Pinhasi v. Knesset* [5], because we are concerned with expressions and acts that by their very type and nature cannot be considered as acts of a member of the Knesset 'in the course of carrying out his duties or for the purpose of carrying out his duties.'

From general principles to the specific case

12. The main dispute between the parties in the case before us concerns the application of substantive immunity to the petitioner's statements in the Um Al-Fahem speech and in the Syrian speech. According to the petitioner, the criminal proceeding that was begun against him because of these statements should be stopped because they are protected by substantive immunity under s. 1 of the Immunity Law, and therefore he has no criminal liability for them. The respondents, on the other hand, are of the opinion that we are dealing with statements that cannot be regarded as an expression of an opinion by the petitioner in the course of carrying out his duties or for the purpose of carrying out his duties as a member of Knesset.

Since we have determined that support for an armed struggle or for acts of terror against the State of Israel crosses a 'red line' that demarcates the limit of tolerance that Israeli democracy is prepared to show to public representatives, we should go on to examine whether the statements that lie at the heart of the indictment that was filed against the petitioner *prima facie* constitute support of this kind and therefore should not be subject to substantive immunity. For this purpose, we should adopt the premise that the facts of the indictment will be duly proved (see *Pinhasi v. Knesset* [5], at p. 674), since the judicial scrutiny that is exercised by the High Court of Justice cannot and should not enter into the question whether the elements of the offence under discussion will be proved. This task is the prerogative of the trial court before which the criminal proceeding is being conducted, and that court usually also makes the decision on the question of substantive immunity. In the present case, as we have explained above, we are considering the question of substantive immunity in consequence of the procedural agreement reached by the parties, even though the criminal proceeding has already begun. Based on the aforementioned premise, it can be said that the Um Al-Fahem speech and the Syrian speech contain a song of praise and approval for the Hezbollah organization. Since we know that this organization has been declared a terrorist organization under s. 8 of the Prevention of Terrorism Ordinance (see *Yalkut Pirsumim* 5749, at p. 3474),

and since we also know that the Prevention of Terrorism Ordinance defines a terrorist organization as 'an association of persons who use in its operations acts of violence that are likely to cause the death or injury of a person, or threats of such acts of violence,' it will be difficult not to regard the statements of the petitioner as support for an armed struggle of a terrorist organization. In the arguments that the petitioner made before us, he tried to distinguish between support that he expressed for the Hezbollah organization and support for acts of violence and terrorism that, according to him, he rejects utterly, by saying *inter alia* that the armed struggle that the Hezbollah organization is conducting is in his opinion a legitimate struggle of guerilla fighters against an occupying army. These distinctions that the petitioner is seeking to outline with regard to his expressions, by regarding them in their overall context, are a matter for the trial court to decide within the framework of the criminal proceeding being conducted before it. From a theoretical viewpoint, I do not rule out entirely the possibility that a thin line can be drawn between support for a terrorist organization and support for an armed struggle of a terrorist organization. But in so far as the question of the petitioner's substantive immunity is concerned, it seems to me that it is difficult not to regard the remarks of the praise and approval that he heaped on the activity of the Hezbollah organization, while referring to 'losses that [the Jewish people] suffered from the Hezbollah' and 'the steadfastness and persistence and heroism of the leadership and fighters of the Lebanese "resistance",' as support for the armed struggle that this terrorist organization is conducting against Israel. These statements cross the 'red line' to which I referred and I do not think that there is any basis for giving the petitioner substantive immunity for them.

13. Notwithstanding what we have said, it is important to remember and emphasize that there is a great distance between the finding that a certain statement does not enjoy the protection of substantive immunity and a criminal conviction for that statement. This route passes three important stations at which legal and public discretion should be exercised wisely and responsibly in order to determine whether there is a basis for bringing the elected representative to trial for those statements before he is convicted in a criminal trial for them. The first station is the attorney-general, who has discretion to decide whether certain statements, even though they do not enjoy substantive immunity, justify a criminal indictment (see HCJ 6271/96 *Be'eri v. Attorney-General* [14]; HCJ 588/94 *Schlanger v. Attorney-General* [15]; see also HCJ 935/89 *Ganor v. Attorney-General* [16], at pp. 507-511). It should be noted that the discretion exercised by the attorney-general is not

limited merely to the initial decision as to whether or not to file an indictment. There may be cases in which the attorney-general will see fit to stay criminal proceedings that have already been begun, although naturally this will happen only in exceptional and unusual circumstances that justify such a step (see HCJ 4723/96 *Atiya v. Attorney-General* [17], at pp. 723-725; R. Gavison, *Administrative Discretion in Law Enforcement: the Power to Stay and Restart Criminal Proceedings* (1991), at p. 366). The second station on the route leading to indicting an elected representative for a statement or act that is not subject to substantive immunity is the deliberations of the Knesset Committee and the decision in the plenum of the Knesset to lift procedural immunity, in which the Knesset Committee examines whether the decision of the attorney-general to file an indictment against a member of the Knesset was made lawfully or whether it was perhaps tainted by improper reasons arising from political pressure (see *Movement for Quality Government in Israel v. Knesset Committee* [7], at paras. 41-43). The last station on the route that we have outlined is the criminal trial itself, in which the court examines whether the elements of the offence attributed to the elected representative who is the accused have been proved and whether he should be convicted of that offence. In so far as this last station is concerned, and in so far as we are dealing with offences concerning the freedom of expression, care should be taken not to give too broad an interpretation to the scope of these offences, so that they do not excessively violate the political freedoms given to the elected representative and do not undermine his most essential 'tools' — speeches, articles and interviews (for difficulties raised by the broad formulation of these offences, see M. Kremnitzer, 'The Alba case: "Clarifying the Law of Incitement to Racism",' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 105 (1999), at p. 142, and see also CrimFH 8613/96 *Jabarin v. State of Israel* [18]).

The ramifications of the judgment in Central Elections Committee for the Sixteenth Knesset v. Tibi [2] *on the petition before us*

14. The last question that should be considered in this petition is the significance of the decision made by this court in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] with regard to the provisions of s. 7A of the Basic Law: the Knesset, according to which the petitioner should not be prevented from standing as a candidate for the sixteenth Knesset. It will be remembered that in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] the indictment that is the subject of this petition was before the court, since the events to which the indictment refer occurred at the time that the petitioner was a member of the fifteenth Knesset and the

indictment was filed in November 2001 after the petitioner's procedural immunity was lifted. The judgment in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], which relates to the lists and candidates for the sixteenth Knesset, was therefore given while the indictment was pending (the judgment was given on 9 January 2003, and the reasons were given separately on 15 May 2003), and it includes a lengthy discussion of the statements of the petitioner that are the subject of the indictment. The reason why the court did not see fit to prevent the petitioner from standing as a candidate in the elections for the sixteenth Knesset under s. 7A of the Basic Law: the Knesset, was that there was no convincing, clear and unambiguous evidence of the kind required in a case such as this. As the court said:

> 'Indeed, as we have seen… an essential condition — according to the interpretation of section 7A of the Basic Law: the Knesset in a host of cases — is that the evidence required in order to determine that the acts of Member of Knesset Bishara involve a denial of the existence of the State of Israel as a Jewish state and support for an armed struggle of terrorist organizations against it should be convincing, clear and unambiguous in their weight and strength. Only this strict standard of evidence can resolve the democratic paradox and deny one of the central rights of democracy, the right to vote and to stand for office. In placing this criterion before us, we are of the opinion that we have not been shown evidence of the weight and strength required to satisfy the required test… We have not been persuaded that there is before us convincing, clear and unambiguous evidence that Member of Knesset Bishara supports an armed struggle against the State of Israel (*ibid*. [2], at pp. 42-43).

Does this determination tell us that, for the purpose of granting substantive immunity to the petitioner, the limitation concerning support for an armed struggle of a terrorist organization also is not satisfied by the events that are the subject of the indictment? Section 7A(a)(3) of the Basic Law: the Knesset provides that a person shall not be a candidate in elections to the Knesset if his acts, expressly or by implication, contain 'support for an armed struggle of a hostile state or of a terrorist organization against the State of Israel.' We discussed above the correlation and the close connection between the arrangement in s. 7A of the Basic Law: the Knesset and the arrangement in s. 1 of the Immunity Law, from the viewpoint of the values that these arrangements are intended to protect and from the viewpoint of the purpose that these restrictions are intended to achieve. *Prima facie*, it would therefore

appear that once it has been determined for the purpose of s. 7A(a)(3) of the Basic Law: the Knesset that there is no basis for preventing the candidacy of the petitioner in the elections because of the statements at the heart of the indictment, it automatically follows that he also has substantive immunity under s. 1 of the Immunity Law for those statements. That is what the petitioner argued before us, while emphasizing that a different result that relies on these facts can lead to disharmony in the law. The petitioner also argued that there is no justification for restricting his actions as a representative of those members of the public who elected the National Democratic Assembly party to the Knesset, after he already satisfied the very same tests when he overcame the barrier that s. 7A of the Basic Law: the Knesset placed in his path.

15. A similar question with regard to the reciprocal relationship between the provisions of s. 5 of the Political Parties Law and the provisions of s. 7A of the Basic Law: the Knesset, arose in the past in *Yassin v. Parties Registrar* [10]. In that case, President Barak discussed the great similarity between the two provisions, but also emphasized the difference between them, when he said:

> 'The considerations that lie at the heart of preventing the commencement of the starting phase (the registration) are not identical to the considerations that lie at the heart of preventing the completion of the final phase (the elections). The violation of values that democracy seeks to protect is far greater in the first stage than in the second stage… Within the scope of s. 7A of the Basic Law: the Knesset, it has been held that only in extreme and special cases can a list be prevented from participating in the elections; that the disqualification is the last resort; that s. 7A of the Basic Law: the Knesset should be given a strict, narrow and restrictive interpretation. This interpretive approach is desirable. It allows a very narrow scope for preventing the participation of a list in the elections. The additional power to disqualify a list that is found in s. 5 of the Political Parties Law should therefore have a very narrow field of operation. If the power to disqualify a list under s. 7A of the Basic Law: the Knesset is narrow, then the power to disqualify a list under s. 5 of the Political Parties Law is very narrow indeed, and the difference between them is narrower still' (*ibid*. [10], at pp. 69-70).

According to this tiered approach towards the tests that should be applied with regard to the disqualification of a political party or a candidate from participating in the democratic process, President Barak was of the opinion that it is indeed possible that it will be decided to allow the registration of a party under the tests set out in s. 5 of the Political Parties Law, but that the same party will not be allowed to compete in the elections under s. 7A of the Basic Law: the Knesset. In his words: 'It is possible to conceive of a party whose registration will not be disqualified, but whose participation in the elections will not be allowed' (see *Yassin v. Parties Registrar* [10], at p. 68, and for a similar approach, which distinguishes between the right of a party to participate in the elections and recognizing its power to realize certain aspects of its manifesto, see HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [19], at p. 800).

Whether or not we accept this tiered approach in so far as it concerns the correlation between s. 5 of the Political Parties Law and s. 7A of the Basic Law: the Knesset (for a dissenting opinion, see *Isaacson v. Parties Registrar* [11], at pp. 539-540, and see and cf. EA 2600/99 *Erlich v. Chairman of Central Elections Committee* [20], at p. 47), it would appear at any rate that we should recognize the manifest difference between these provisions and the restrictions that apply to the scope of the substantive immunity provided in s. 1 of the Immunity Law. As I have said, the restrictions concerning substantive immunity originate in the arrangements in s. 5 of the Political Parties Law and s. 7A of the Basic Law: the Knesset, since all of these legislative arrangements have a common purpose and similar basic values that they are seeking to protect. Notwithstanding, there is a significant difference between the arrangement concerning substantive immunity and the two other arrangements. Not allowing the registration of a political party and preventing a party or any of its candidates from participating in elections irreversibly violate the basic rights of the individual. A refusal to register a political party under s. 5 of the Political Parties Law violates the freedom of political association, which expresses the right given to the individual in a democracy to decide and influence his fate in the country in which he lives. Placing a barrier before a party or its candidates that prevents them from competing in elections deals a mortal blow to the right to vote and to stand for office, which is also one of the basic rights in a democracy (see Y. Mersel, *The Constitutional Status of Political Parties* (2005), at pp. 49-54). These two arrangements therefore violate the freedom of political expression that is realized by the possibility given to the individual in a democracy to form an association in order to further his political views and the possibility

of trying to persuade others to vote for him as a representative in parliament in order to act to realize the opinions and ideas in which he believes. The importance of political parties and the importance of the right to vote in this context were discussed by Prof. Y. Galnor when he said that 'there is no democracy without parties and there is no true democracy when the citizen is not given a possibility of choosing between two or more parties, as well as additional opportunities for political participation' (Y. Galnor, 'The Political Parties Law — Its Contribution to the Political System,' *A Legal Framework for the Activity of Political Parties In Israel* (The Israeli Association for Parliamentary Problems, the Knesset, 1988), at pp. 29, 30; Mersel, *The Constitutional Status of Political Parties*, *supra*, at pp. 45-48). Thus we see that a refusal to register a political party inflicts a multi-faceted violation of a spectrum of the rights that reflect political association. Less serious a violation is caused by preventing a list of a party's candidates or one of its candidates from participating in elections, but even on this level we are concerned with a mortal blow to the political freedoms of the individual. At the lowest level of this scale, and at a considerable distance from the barriers that were established in s. 5 of the Political Parties Law and in s. 7A of the Basic Law: the Knesset, we can place the denial of substantive immunity. We are concerned with a candidate who has already been elected to the Knesset and is holding office in it as one of its members. Within the framework of this position, he has the possibility of addressing the Knesset, of tabling questions, putting forward matters for the agenda and draft laws, being a member of the Knesset committees and voting on laws. Thus the Knesset member realizes *de facto* his political freedoms and those of the persons who voted for him. Moreover, not granting substantive immunity is a decision that by its very nature is limited to the circumstances of a specific case that gives rise to a question of immunity, and it does not result in a sweeping denial of the rights of the Knesset member and the ways in which he may act and express himself that come with his position. An additional material difference between the arrangements in s. 5 of the Political Parties Law and s. 7A of the Basic Law: the Knesset derives from the fact that the violation to the freedom of expression because substantive immunity is not given to a member of the Knesset is a violation after the event for remarks that have already been made. The smaller degree of violation caused by imposing sanctions after the event in matters concerning the freedom of expression was discussed by Justice A. Barak in HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [21], where he emphasized that in such matters a

criminal indictment after the event is preferable to prevention before it, except in cases where the illegality is 'clear and manifest.' As he said:

> 'A prohibition *ab initio* prevents the actual publication and causes harm to the freedom of expression, damage that sometimes cannot be repaired in the future. By contrast, holding a criminal proceeding cannot "stop" the expression, and it allows the holding of a fair trial that will ultimately determine the liability for the publication, and thereby "slow down" the desire to make a new publication' (*ibid*. [21], at p. 297; for the same approach in civil cases, see also CA 214/89 *Avneri v. Shapira* [22], at pp. 864-870).

With regard to the scale that we are discussing, it can be said that the restrictions in s. 5 of the Political Parties Law and in s. 7A of the Basic Law: the Knesset *ab initio* prevent the freedom of political expression of the individual, whereas the restrictions that limit the scope of substantive immunity apply entirely after the event, i.e., in the stage after the member of the Knesset has realized his freedom of expression and the question under consideration is whether there is a basis for allowing him to be brought to trial for it. The scale of violations in each of the arrangements that we have described — s. 5 of the Political Parties Law, s. 7A of the Basic Law: the Knesset and finally s. 1 of the Immunity Law — justifies a difference in applying the 'red lines' that are common to all of these arrangements. This leads to the conclusion that there can indeed be cases in which it will be decided not to prevent a party or a specific candidate from standing for election to the Knesset under s. 7A of the Basic Law: the Knesset, but the same facts may lead to the conclusion that for the purpose of substantive immunity a 'red line' has been crossed in such a way that there is a justification for exposing the member of the Knesset to a criminal proceeding for the opinions that he expressed or the acts that he committed.

16. Such is the case before us. In *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] the court addressed the strength of the violation of the political freedoms of the individual where a party or a candidate is prevented from competing in the elections to the Knesset. In emphasizing the major effect of this violation and the strict and restrictive approach that should be adopted when erecting a barrier to competing in the election under s. 7A of the Basic Law: the Knesset, the court determined a series of interpretive criteria and tests that reflect this restrictive approach, which are as follows:

'*First*, considering the purposes of a list of candidates means considering "*dominant* characteristics that are placed in a *central* position among the aspirations or the activities of the list" (EA 1/88 *Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [23], at p. 187).

> "The power granted in s. 7A is not designed for matters that are marginal and whose effect on ideology or policies as a whole is not significant and serious. This means phenomena… that can be described as *dominant* characteristics that are placed in a *central* position among the aspirations or activities of the list" (*ibid*. [23]).

We are therefore concerned with purposes that are a "dominant" goal (in the language of Justice M. Cheshin in the hearing before the Elections Committee for the Sixteenth Knesset, minutes of the meeting of the Elections Committee of 31 December 2002, at p. 612); *second*, the dominant and central purposes of the list — and to the same extent, the acts of a candidate for the elections within the framework of a list of candidates — are derived both from express declarations that are directly stated and also from reasonable conclusions that are clearly implied (*Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [23], at p. 188); *third*, purposes that are of a theoretical nature are insufficient. It must be shown that the list of candidates "is acting in order to realize its purposes and to convert them from theory into practice" (*ibid*. [23], at p. 196; see also EA 2/88 *Ben-Shalom v. Central Elections Committee for the Twelfth Knesset* [24], at p. 284). There must be "activity in the field" that is intended to put the theory of the list's purposes into practice. This activity needs to be repeated. Sporadic activity is insufficient. The activity needs to adopt a serious and extreme form of expression from the viewpoint of its intensity (see *Yassin v. Parties Registrar* [10], at p. 66)… *Finally*, the evidence proving the purposes and the acts that result in a list of candidates or a candidate not being allowed to participate in the elections to the Knesset needs to be "convincing, clear and unambiguous" (*Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [23], at p. 196; *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [13], at p. 250

{101})' (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], at p. 18).

In view of these general requirements, the court in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] turned to examine whether there were grounds for disqualifying the candidacy of the petitioner from participating in the elections to the Sixteenth Knesset. This examination also included, as aforesaid, a consideration of the statements that were the basis for the indictment and that are the focus of the petition before us. Ultimately, as we have already said, the court held in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] that the evidence presented before it left room for doubt as to whether that evidence really was capable of indicating in a convincing, clear and unambiguous manner that the petitioner did indeed support an armed struggle against the State of Israel. The court further held that the doubt in this regard should operate in the petitioner's favour. For this reason, and for other reasons concerning the other restrictions in s. 7A of the Basic Law: the Knesset, the court came to the conclusion that the petitioner should not be prevented from competing in the elections for the Sixteenth Knesset (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], at pp. 40-43).

17. The premise for considering the scope of substantive immunity pursuant to s. 1 of the Immunity Law is completely different from the criteria that the court adopts when it considers whether to disqualify a candidate for the elections under s. 7A of the Basic Law: the Knesset. First, the question concerning giving substantive immunity naturally arises with regard to a specific case and there is no need to show that we are speaking of dominant characteristics that are placed in a *central* position among the activities or the statements of the member of the Knesset in general. Notwithstanding, it is not superfluous to point out that in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] the court held that the actions and expressions attributed to the petitioner, and especially his statements as a member of the Fifteenth Knesset in the two incidents that are the subject of the indictment, are characterized *inter alia* by support for an armed struggle against the State of Israel, and it also held that this purpose is placed in the centre of the petitioner's actions, as a dominant purpose that is put into practice in recurrent activity and with great intensity. Second, for the purpose of preventing participation in the elections under s. 7A of the Basic Law: the Knesset, 'convincing, clear and unambiguous evidence' must be presented with regard to the purposes and acts of the candidate or the list. By contrast, the premise for the purpose of determining the scope of substantive immunity

is, as aforesaid, that the facts of the indictment will indeed be proved (see *Pinhasi v. Knesset* [5], at p. 674). On the basis of this premise, the court should examine whether there are grounds for granting the member of the Knesset substantive immunity, or whether perhaps we are dealing *prima facie* with the crossing of the 'red lines' that underlie the legal system, for which substantive immunity should not be given.

18. I admit and do not deny that the conclusion that a member of the Knesset should not be given substantive immunity for a political speech, which is normally the natural work tool at his disposal when carrying out his duties, is not at all a simple one. But in my opinion there is no alternative in view of the fact that we are dealing with the expression of an opinion, on two occasions, that was formulated and considered in advance, and that falls in the centre of the prohibited area — support for an armed struggle of a terror organization — and a very long way beyond the 'red line' established by Israeli democracy to protect its very existence. Indeed, terror and democracy can be compared to fire and water; they cannot exist side by side. The fire of terror has no place in a democracy. As President Barak said in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]:

> 'Democracy is based on dialogue, not on force; on persuasion, not on violence. Someone who is not prepared to abide by the "rules" of democracy himself cannot be allowed to make the argument that others should follow these rules in dealing with him' (*ibid*. [2], at p. 24).
>
> President Barak further said that:
>
> 'Democracy is allowed… to defend itself against anyone fighting it in an armed struggle. It is one thing to aspire to change social arrangements by means of the legitimate tools that democracy makes available to a list of candidates; it is another thing to aspire to change arrangements by means of support for an armed struggle against the state' (*ibid*. [2], at pp. 26-27).

19. The other reasons raised by the petitioner in the alternative, which concern the proceeding of lifting his procedural immunity, do not reveal any real ground for our intervention, and a study of the minutes of the deliberations that were held by the Knesset Committee and by the plenum show that, contrary to the arguments raised by the petition, comprehensive, objective and exhaustive deliberations were held, and no defect can be found in these.

Conclusion

20. For all of the reasons set out above, I propose to my colleagues that we deny the petition without any order for costs.

President A. Barak

I regret that I am unable to agree with the opinion of my colleague Justice E. Hayut. If my opinion is accepted, we will decide that the petitioner has substantive immunity against the indictment that was filed against him in the Nazareth Magistrates Court. My colleague laid down 'red lines' beyond which the laws of immunity do not apply. According to her approach, the petitioner's case crosses these lines, and therefore the question of substantive immunity does not arise at all in his case. My opinion is different. In my opinion, the petitioner does not cross these lines and also succeeds in falling within the scope of substantive immunity. I will discuss each of these two aspects separately.

Amendment 29 of the Immunity Law

1. I am in agreement with my colleague to a large extent. I accept three of her main findings in her opinion. *First*, I accept that the Immunity, Rights and Duties of Knesset Members Law (Amendment no. 29), 5762-2002 (hereafter — 'Amendment no. 29), which provides, *inter alia*, that a statement of a member of the Knesset that contains support for an armed struggle of a terror organization should not be regarded as an expression of an opinion that is made by a member of the Knesset in the course of carrying out his duties or for the purpose of carrying out his duties, is a 'clarifying amendment,' i.e., that it is declarative. It reflects the legal position that also prevailed before the amendment. This amendment enshrines in the Immunity, Rights and Duties of Knesset Members Law (hereafter — 'the Immunity Law') similar restrictions to the restrictions imposed upon the registration of political parties (s. 5 of the Political Parties Law, 5752-1992) and the participation of candidates and lists in elections to the Knesset (s. 7A of the Basic Law: the Knesset). These restrictions determine the 'red lines,' in the language of my colleague, which a member of the Knesset should not cross. A member of the Knesset who crosses these lines should not be regarded to have acted in the course of carrying out his duties or for the purpose of carrying out his duties. *Second*, I accept my colleague's position, which I also expressed in *Pinhasi v. Knesset* [5], that for the purpose of analyzing a claim of immunity we start with the premise that the facts of the indictment will be duly proved (see *Pinhasi v. Knesset* [5], at p. 674). *Third*, I accept the position of my colleague that there is a difference between the burden of

proof required for disqualification of a list from competing in the elections and the burden of proof required in order to hold that a certain expression does not fall within the scope of substantive immunity. This distinction derives from the fact that preventing someone *ab initio* from competing in the elections involves a much more severe violation of political freedoms than the violation caused to these freedoms as a result of depriving a member of the Knesset of substantive immunity. But accepting these three premises does not lead to my colleague's conclusion.

2. The petitioner before us is charged with an offence of support for a terrorist organization (in the form of uttering statements of praise and approval). Amendment no. 29 provides that support for *an armed struggle* of a terrorist organization is what falls outside the limits of substantive immunity. The two are not entirely identical. Amendment no. 29 does not provide that all support or every utterance of statements of praise and approval for a terrorist organization falls outside the scope of substantive immunity. Therefore, even though I accept that Amendment no. 29 is a clarifying amendment, and even if I assume, as we should assume at this stage, that the indictment against the petitioner will be proved, this is still insufficient for deciding the question whether or not the petitioner has substantive immunity against this indictment. In order to decide this question, we must ascertain whether the petitioner's statements amount to support for an armed struggle of a terrorist organization. *Prima facie*, the proper stage for ascertaining this is the stage of the preliminary arguments within the framework of the criminal proceeding before the trial court. Within the framework of this proceeding, the parties may raise arguments and present evidence on the question whether the statements of the petitioner amount to support for an armed struggle of a terrorist argument or not, and the court can give its determination on the question of substantive immunity on the basis of the arguments and evidence so presented. My opinion therefore is that this question should be determined at the stage of the preliminary arguments in the Nazareth Magistrates Court. But since the Nazareth Magistrates Court decided not to determine this question, and since the parties before us agreed that we should consider and decide the question on its merits, we will therefore consider it and decide it on the basis of the arguments and the evidence brought before us.

3. Is it possible to regard the statements of the petitioner as containing support for an armed struggle of a terrorist organization? If the answer to this question is yes, our deliberations will end with the conclusion that the remarks of the petitioner fall within the scope of the prohibition provided in

Amendment no. 29, and therefore the petitioner does not have substantive immunity. If the answer to this question is no, our conclusion will be that Amendment no. 29 does not apply to the case before us, and we shall be required to examine whether the statements of the petitioner are protected by substantive immunity in accordance with the tests that we usually apply in this regard. Do the remarks of the petitioner amount to support for an armed struggle of a terrorist organization? This is not the first time that this question has arisen before us. This question was considered in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]. That case considered, *inter alia*, the decision of the Central Elections Committee for the Sixteenth Knesset to prevent the petitioner and the list led by him from participating in the elections. That decision was based on two grounds. *First*, the Elections Committee was of the opinion that the petitioner satisfied the ground provided in s. 7A(a)(1) of the Basic Law: the Knesset, which concerns the disqualification of the candidacy of a person in the elections, if his acts involve a denial of the existence of the State of Israel as a Jewish state. *Second*, and this is the main issue in our case, it decided that the petitioner satisfied the ground provided in s. 7A(a)(3) of the Basic Law, which concerns the disqualification of the candidacy of a person in the elections, if his acts involve support for an armed struggle of a terrorist organization against the State of Israel. The main evidence on which the conclusion of the Elections Committee was based with regard to the second ground was the statements of the petitioner in the Um Al-Fahem speech and the Syrian speech, which are the statements that lie at the heart of the indictment that is the focus of this petition.

4. These decisions of the Elections Committee were submitted for our approval pursuant to s. 7(a) of the Basic Law. We decided, by a majority, that the decision of the Elections Committee should not be approved. We held that we were not persuaded, to the degree of certainty required in cases of election disqualification, that the statements of the petitioner amounted to support for an armed struggle of a terrorist organization. I discussed in that case the distinction between general support and support for an armed struggle of a terrorist organization:

> 'Does Knesset Member Bishara support an armed struggle of a hostile state or of a terrorist organization against the State of Israel? It should be noted that the question before us is not whether Knesset Member Bishara supports a terrorist organization. This question is the focus of the criminal proceeding that is being conducted against him, and we will

> express no opinion on this matter. The question before us is whether Knesset Member Bishara supports an armed struggle of a terrorist organization. As we have seen, the argument of Knesset Member Bishara is that his liberal-democratic outlook implies opposition to violence and an armed struggle. According to his approach, it is possible to oppose what he calls "occupation" without adopting an armed struggle. Therefore he opposes any harm to civilians' (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], at p. 42).

It should be noted that the chairman of the Elections Committee for the Sixteenth Knesset, Justice M. Cheshin, correctly distinguished between the two, and held that support for a terrorist organization does not amount to support for an armed struggle of a terrorist organization. His position was that the remarks of the petitioner did not amount to support for an armed struggle of a terrorist organization. The following is how we presented the position of Justice M. Cheshin in *Central Elections Committee for the Sixteenth Knesset v. Tibi*:

> 'Justice M. Cheshin also explained that support for a terrorist organization does not constitute a ground for disqualification, and that it is necessary to prove support for an armed struggle of a terrorist organization against Israel (at p. 602 of the minutes). Support should naturally be a daily phenomenon for a specific terrorist organization (at p. 603 of the minutes). Justice M. Cheshin presented his position according to which, in order to disqualify a person or a list of candidates from participating in the elections, it must be shown that the ground for disqualification is 'a dominant phenomenon… absolute denial of the state, absolute racism, absolute support for a terror organization as if I were a member of Hamas… or Hezbollah (at p. 661 of the minutes). Finally, Justice M. Cheshin presented his position that, after a study of all of the material, it did not appear that absolute support for an armed struggle… was proven in this matter (*ibid*.). Justice M. Cheshin pointed out that "I think that Israeli democracy is a strong democracy… we can also tolerate exceptions, even if they are extreme" (at p. 661 of the minutes). Against this background, Justice M. Cheshin reached the conclusion that there was no basis for preventing the participation of Knesset Member Bishara in the elections to the Knesset' (*ibid*. [2], at p. 39).

This was also our conclusion in *Central Elections Committee for the Sixteenth Knesset v. Tibi*:

> 'We are of the opinion that we have not been shown evidence of the weight and strength required to satisfy the required test… We have not been persuaded that there is before us convincing, clear and unambiguous evidence that Member of Knesset Bishara supports an armed struggle against the State of Israel' (*ibid*. [2], at p. 43).

5. The distinction between general support for a terrorist organization, by way of uttering statements of praise, and support for an armed struggle of a terrorist organization is not merely a semantic distinction. It is implied by the express language of the law. It is also implied by its purpose. This distinction reflects the attempt of the legislature to balance the desire to protect the foundations of the state against the desire to protect basic political freedoms such as the right to vote and to stand for office (in so far as s. 7A of the Basic Law is concerned) and the freedom of parliamentary expression (in so far as Amendment no. 29 is concerned). Admittedly, I accept that there is a difference between the burden of proof required for the purpose of disqualifying a list from participating in the elections and the burden of proof required for determining that a certain expression is not protected by substantive immunity. This difference derives from the fact that preventing someone from standing for office in the elections is a more serious and prospective violation of political freedoms than the violation of those freedoms that is brought about as a result of a determination that a certain expression is not protected by substantive immunity, which is a more limited violation in its scope and is applied retrospectively. Notwithstanding, the extent of this difference should not be exaggerated. The distance between convincing, clear and unambiguous evidence (which is required for the red line of which my colleague speaks) and the evidence required in order to deny substantive immunity (within the framework of a criminal proceeding) is not great at all.

6. My opinion is that the respondents have not proved before us, within the framework of considering the issue of substantive immunity as a preliminary argument in the criminal trial — just as they did not prove in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] — that the remarks of the petitioner contain support for an armed struggle of a terrorist organization (as distinct from support for a terror organization by way of uttering statements of praise and approval). Admittedly, had the hearing of

this question taken place before the trial court, the respondents could have presented additional evidence that supports their position. The petitioner could also have added to the evidence and arguments that were heard by the Central Elections Committee and by this court in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]. But this was not done. The evidence before us is merely certain extracts from the speeches made by the petitioner. This evidence was fully presented before us in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2], and nothing has been added to it. There is also nothing new in the arguments of the parties. In the case before us I have not been persuaded that the statements of the petitioner can be regarded as containing support for an armed struggle of a terror organization, to the degree of proof required for determining that they cross those 'red lines' beyond which there is no substantive immunity. In *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] we held:

> 'We have not been persuaded that there is before us convincing, clear and unambiguous evidence that Member of Knesset Bishara supports an armed struggle against the State of Israel. In this matter also, we should not ignore the extensive material that was submitted to us. Notwithstanding, it is insufficient to satisfy the critical "mass" of evidence that is required in this regard. Indeed, we do not deny that we have some doubt in our minds. But this doubt should work — in a democracy that seeks freedom and liberty — in favour of the freedom to vote and stand for office' (*ibid*. [2], at p. 43).

In the petition before us — which is being considered within the framework of the criminal proceeding — I have also not been persuaded that the petitioner supports an armed struggle against Israel. The petitioner was not examined on this matter in the trial court. No evidence was brought in this regard beyond what was before this court in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]. In these circumstances — notwithstanding the difference in the level of proof — I am of the opinion that there are grounds for reaching a similar conclusion.

7. Thus we see that even though I accept my colleague's position that Amendment no. 29 of the Immunity Law is a declarative amendment, and even if we assume, as we should in a petition of the kind before us, that the indictment against the petitioner will be proved, this will not be sufficient to lead to the conclusion that the remarks of the petitioner amount to support for an armed struggle of a terrorist organization. Therefore, this will be

insufficient for reaching the conclusion that Amendment no. 29 applies in our case. Admittedly, this will lead us to the conclusion that the petitioner committed an offence of uttering statements of praise and approval for a terrorist organization. But this offence does not fall within the express limitations that are imposed on substantive immunity in Amendment no. 29. We are dealing in this context with an 'ordinary' offence that is subject to the tests developed in the case law of this court concerning the scope of substantive immunity. I will now turn to examine these tests.

Section 1(a) of the Immunity Law

8. Does the petitioner have substantive immunity with regard to his statements? Were the petitioner's statements that are before us made 'in the course of carrying out his duties or for the purpose of carrying out his duties as a member of the Knesset'? The expression 'in the course of carrying out his duties or for the purpose of carrying out his duties as a member of the Knesset' in s. 1(a) of the Immunity Law should be given the meaning that realizes its purpose. My colleague discussed extensively the normative framework of substantive immunity and the purposes underlying it. I agree with those remarks. As my colleague says, substantive immunity is intended, first and foremost, 'to ensure that a member of the Knesset can properly discharge his duties and represent the public that elected him by giving free and full expression to his opinions and outlooks, without concern or fear' (para. 6 of my colleague's opinion). This immunity was not given to members of the Knesset for their own benefit. It is not a sovereign privilege that the member of the Knesset enjoys by virtue of his exalted position. Substantive immunity is given to members of the Knesset in order to guarantee essential public interests. *First*, this immunity is essential in order to guarantee the right of all citizens to full and effective political representation. Substantive immunity protects the right of all citizens to have their opinions and outlooks heard, through their elected representatives, in the various frameworks of public debate in general, and in parliament in particular. This protection is essential mainly for citizens who are members of minority groups in society. In this sense, substantive immunity also furthers civil equality, in that it protects even the right of members of minority groups in society to full and effective political representation, and it protects them by protecting the member of the Knesset, who represents their interests and their opinions, against the power of the majority. *Second*, substantive immunity is essential in order to guarantee a free marketplace of ideas and opinions. Here too this immunity is especially important when we are speaking of opinions and ideas that are offensive or outrageous, and it is

especially required for elected representatives who express opinions that are regarded by most of the public as such. Indeed, 'freedom of expression is also the freedom to express dangerous, offensive and perverse opinions, from which the public recoils and which the public hates' (*Kahane v. Broadcasting Authority Management Board* [21], at p. 279). *Third*, following from the aforesaid, substantive immunity is essential in order to guarantee the democratic character of the government. Thus we see, as my colleague says, the purposes underlying substantive immunity are of different kinds. They are intended to protect basic political freedoms. They are intended to allow the proper functioning of the legislature. They express a desire to ensure the independence and the freedom of action of members of the Knesset. They are intended to strengthen democracy. On the other hand, we should not ignore the other (general) purposes of the Immunity Law. Like every other law, it is intended to realize the rule of law — including the rule of law among the members of the legislature — and equality before the law. How should these conflicts be resolved? The proper balancing point between these purposes is the balancing point that is reflected in the 'margin of natural risk' test that my colleague discussed. A member of the Knesset will have substantive immunity only in those cases in which the unlawful act falls within the scope of the margin of risk that the lawful activity as a member of the Knesset naturally creates (see *Pinhasi v. Knesset* [5], at pp. 686-687).

9. My opinion is that the 'margin of natural risk' test is satisfied in the circumstances before us. I did not reach this conclusion lightly, and it is not an obvious one. Admittedly, in my opinion we are dealing with a 'difficult case' for applying the margin of natural risk test. Admittedly, the statements of the petitioner and the circumstances in which they were made are, in my opinion, close to the line beyond which it would not be possible to say that they fall within the scope of the natural risk involved in carrying out the duties of a member of the Knesset. Notwithstanding, my opinion is that in the circumstances of the case, and in view of the other relevant circumstances of this case, the proper conclusion is that the natural risk test is satisfied by the petitioner before us. This position of mine is based on three reasons. *First*, the statements attributed to Knesset Member Bishara were made in political speeches that he made. The speeches dealt with broad political subjects. These speeches were long ones and many things were said in them. *Inter alia*, they included the remarks that are attributed to the petitioner in the indictment. It cannot be said that these remarks were the main part of the speeches. It cannot be said, and the respondents did not even argue this before us, that the main purpose of these speeches was to express support for

a terrorist organization. The statements made in this context constitute merely a part of all the remarks made by the petitioner. *Second*, the offence with which the petitioner is charged is an offence that relates to the freedom of expression. This fact is also important when determining the limits of the 'margin of natural risk,' in view of the centrality of speeches in carrying out the duties of a member of the Knesset. *Third*, in view of the broad language in which offences concerned with the freedom of speech — such as defamation, incitement, rebellion and making statements of praise for a terrorist organization — are usually couched, there is a concern that if members of the Knesset will be exposed to these criminal indictments, this will reduce their ability to express themselves without fear, even in cases where their remarks do not constitute a criminal offence. This result will seriously harm the freedom of parliamentary expression and the basic political freedoms associated therewith.

10. In my opinion in *Pinhasi v. Knesset* [5], I expressly addressed the question of political speeches and the offences associated with them, such as defamation, incitement and rebellion. I discussed how the purpose of substantive immunity is to guarantee that a member of the Knesset will not be prevented from expressing his opinion on public issues merely because of the concern that he may overstep the boundary in certain cases between what is permitted and what is forbidden. In this regard, I made the following remarks:

> 'Membership of the Knesset gives the members of the Knesset immunity for prohibited actions that fall within the scope of "professional risks." Someone who is in the business of making speeches has a high probability of being caught violating prohibitions concerning defamation or incitement. Substantive immunity was intended to give him immunity within the limits of this risk… the purpose of this substantive immunity is to allow the member of the Knesset to express his opinion freely, without him being prevented from making lawful remarks that his position requires him to make, merely because of the fear that he may make an unfortunate statement, and he may be carried away in making permitted and lawful remarks into prohibited and unlawful ones' (*ibid*. [5]).

Indeed, offences that concern the freedom of expression are by their very nature an integral part of the role of a member of the Knesset. Political expression — speeches, articles and interviews — are the main tools of the

member of Knesset. It is through political expression that a member of the Knesset is able to express his outlook and the outlook of the people who voted for him on public matters. This is the main role of the member of Knesset. A member of Knesset who speaks on political issues is carrying out his main parliamentary activity. Protecting a member of the Knesset in this activity is the main purpose of substantive immunity. Whoever engages in political expression as a main part of his job is inevitably in great danger of falling foul of the prohibitions concerning the freedom of speech, such as incitement, rebellion and uttering statements of praise for a terror organization. There are two combined reasons for this. *First*, because of the broad and comprehensive language of these criminal prohibitions (concerning the broad and comprehensive language of the prohibition against incitement, see, for example, CrimA 2831/95 *Alba v. State of Israel* [25]). The offence with which the petitioner is charged is a very broad one. Section 4 of the Prevention of Terrorism Ordinance, with which the petitioner is charged, provides that:

'Supporting a terrorist organization

> 4. A person —
>
> …
>
> (b) who publishes, in writing or orally, words of praise or approval for, or a call to help or support, a terrorist organization; or'
>
> …
>
> (g) who commits an act that contains an expression of identification with a terrorist organization or approval for it, by raising a flag, displaying a symbol or slogan or by uttering an anthem or slogan, or any act of similar expression that clearly displays such identification or approval, all of which in a public place or in such a manner that persons who are present in a public place can see or hear such an expression of identification or approval;

shall be charged with an offence…'.

According to Professor Kremnitzer:

> 'The difficulty is that the expressions "praise," "encouragement" and "approval" are very broad… Does a statement that "Had it not been for the 'Intifadeh,' the Oslo agreement would not have been made' not constitute approval for acts of violence? Is a description of discrimination against the Arab minority and the difficulty or impossibility of making a significant change in this area not amount to an encouragement of violence? Does a description of the means of oppression adopted in the occupied territories, together with harsh and frank criticism of them, not amount to such encouragement? Is historical research that indicates that in certain situations it is not possible to direct the attention of the majority to the distress of the minority other than by resorting to violence not encouragement to violence? Does speaking of a connection between the acts of the government and acts of terrorism not encourage terror? We are speaking of statements that lie at the centre of the area protected by freedom of speech' ('The *Alba* Case: "Clarifying the Laws of Incitement to Racism",' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 105 (1999), at p. 142).

Second, members of the Knesset frequently speak on confrontational matters, in a manner that may be seen as provocative and outrageous by some members of society. This is particularly true in Israeli society (see. E. Benvenisti, 'Regulating the Freedom of Expression in a Polarized Society,' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 29 (1999)). It is true with regard to the offence of incitement. It is also true with regard to the offence of uttering statements of praise and approval for a terrorist organization. It is natural to say that in view of the petitioner's views, the manifesto of his party, and the outlooks of the people who elected him, the petitioner will find himself expressing opinions on the question of the Arab-Israel dispute, with its various aspects. These positions are likely to be regarded as provocative and outrageous by a large part of society. Here too there is a great danger that his remarks will be interpreted as statements of praise and approval for a terrorist organization. There is also a risk that in certain cases his remarks will overstep the mark and will in fact actually constitute statements of praise and approval for a terrorist organization. But we should not, because of these risks, prevent the petitioner from carrying out his duties and from realizing

his public mission. Substantive immunity is intended to give him the defence that is required for this purpose. My opinion, therefore, is that the fact that political statements are a main tool of a member of the Knesset, the controversial context in which the petitioner often speaks in the course of carrying out his duties, and the general and all-inclusive language of the criminal prohibition concerning statements of praise and approval for a terrorist organization all lead to the conclusion that taking a risk by making remarks that amount to statements of praise and approval for a terrorist organization is also a 'professional risk' of a member of the Knesset, and that statements of this kind are therefore in the 'margin of risk' that parliamentary activity naturally creates. Therefore, statements of this kind will, as a rule, be protected by substantive immunity, provided they were not made by abusing substantive immunity.

11. My conclusion is therefore that the offence of support for a terrorist organization was committed by the petitioner — if it was indeed committed, which we are assuming for the purpose of this petition — as an integral part of the legitimate activity of expressing an opinion on political issues, and as an ancillary or secondary issue thereto. It follows that in my opinion the petitioner has substantive immunity with regard to the statements for which the indictment was filed.

Summary

12. In view of my conclusion that the petitioner has substantive immunity against being indicted for the statements that he made, there is no further need to discuss the arguments concerning the proceedings that led to the lifting of procedural immunity.

13. Finally, I would point out that I have not held in my opinion that the statements of the petitioner are desirable ones. Quite the contrary, the assumption that I have made was that in his statements the petitioner committed a criminal offence of support for a terrorist organization. Indeed, the petitioner's remarks are problematic, and they are very offensive to the ear. But I have found that they were uttered by the petitioner in the course of carrying out his duties, and for the purpose of carrying out his duties, as a member of the Knesset. We should protect and defend the ability of members of the Knesset to carry out their duties without fear and trepidation. Substantive immunity is intended to provide this protection, which is a public interest of the first degree. This protection is essential for the existence of basic political freedoms. It is essential for the existence of Israeli democracy.

If my opinion is heard, we will grant the petition, hold that the petitioner has substantive immunity that cannot be lifted, and therefore we will make the order *nisi* absolute, in the sense that the criminal proceedings that are taking place against the petitioner will be cancelled.

Justice E. Rivlin

1. I have studied the opinions of my colleagues, President A. Bark and Justice E. Hayut. My colleague the president is of the opinion that the petitioner has substantive immunity for the statements that are the subject of the indictment against him. My colleague Justice Hayut is of the opinion that the petitioner's case does not fall within the scope of substantive immunity. I agree with the conclusion of my colleague the president. In my opinion too the statements of the petitioner fall within the scope of substantive immunity. But I would like to add the following remarks in this regard.

My colleagues disagree with regard to a fundamental issue: does the case of the petitioner go beyond the 'red lines' of substantive immunity, so that there is no longer any need or basis to adopt the balancing tests laid down in case law, including the 'natural risk test,' which is the opinion of my colleague Justice E. Hayut, or, despite the difficulty raised by this case, should it too ultimately be decided by the balancing tests that have been laid down in the case law of this court over the years with regard to the question of immunity, which is the opinion of my colleague the president? A decision on this issue, in one direction or the other, requires an examination of the significance of Amendment no. 29 of the Immunity Law (the Immunity, Rights and Duties of Knesset Members Law (Amendment no. 29), 5762-2002 (hereafter — 'Amendment no. 29)). But this decision derives, so it would seem, also from an ethical outlook on the proper way in which a democracy, and Israeli democracy in particular, should contend with statements of the kind uttered by the petitioner. Both with regard to the statutory question — the effect of Amendment no. 29 — and with regard to the ethical question I find myself in agreement with my colleague the president, for his reasons and for reasons of my own.

2. The indictment that was filed against the petitioner attributes to him offences arising from statements that he made. It concerns, as my colleagues explained in their opinions, two speeches that the petitioner made, for which he was indicted on two offences of support for a terrorist organization, pursuant to ss. 4(a), 4(b) and 4(g) of the Prevention of Terrorism Ordinance, 5708-1948. The question whether the petitioner's statements are protected

by substantive immunity follows from the question whether they were made 'in the course of carrying out his duties, or for the purpose of carrying out his duties, as a member of the Knesset' (s. 1 of the Immunity, Rights and Duties of Knesset Members Law, 5711-1951). This is not a simple question. The petitioner, a member of the Knesset in Israel, uttered in his speeches remarks that are outrageous to most of the public in Israel. Because of his shocking remarks, an indictment was filed against him, and this attributes to him offences of support for a terror organization, and the remarks are far more serious since they were made by a member of the house of representatives of the State of Israel. But one important matter confronts us from the outset: the petitioner before us was allowed by us to compete for a seat in the Knesset, and he was indeed elected to hold office in it; the statements for which we are being asked to deny him immunity are the very same statements that were before us when we allowed him to compete in the elections. In my opinion, one case is dependent on the other. This is the position at the outset, and we will return to it later.

3. Every society, and especially a democracy, is required to determine its credo with regard to the question of how to realize the values underlying it, without endangering those selfsame values and its very existence. This determination is a difficult one. It requires a delicate balance, which sometimes involves a considerable amount of uncertainty in its application. Section 5 of the Political Parties Law, 5752-1992, and s. 7A of the Basic Law: the Knesset, as they have been interpreted in the case law of this court, seek to determine such a balance. These sections determine that someone who takes part in the democratic process must commit himself to the rules of democracy. Indeed, democracy — so we have been taught — is entitled to protect itself against those who seek to destroy it. 'In order to prove its viability, democracy does not need to commit suicide' (*per* President A. Barak in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2]). These sections also enshrine another fundamental principle, which is unique to the State of Israel, namely that it is the state of the Jewish people. 'There are many democratic states. Only one of them is Jewish. Indeed, the reason for the existence of the State of Israel is that it is a Jewish state' (*ibid*. [2], *per* President Barak). In addition to these principles there are the prohibitions against incitement and support for an armed struggle against Israel, and all of these combine in order to limit the right to register a political party and the right to take a part in the elections to the Knesset.

But case law with regard to the implementation of these sections — and we are referring mainly to case law concerning s. 7A of the Basic Law: the

Knesset — reflects the great complexity of life and the fact that the statutory provision concerning the boundaries of democracy do not resolve all of the complexities. Time and again this court has considered the cases of persons, political parties and list of candidates who challenged these boundaries, stepped on the borderline and sometimes crossed over it. The court, and with good reason, consistently maintained the delicate balance between all of the considerations. In following this path, the court sought to uphold, in so far as possible, the right to vote and to stand for office, which is a 'constitutional right of the first degree' (*Welner v. Chairman of Israeli Labour Party* [19], at p. 800). Because of this approach, the court adopted a restrictive interpretation of s. 7A of the Basic Law: the Knesset, and it held that the section should only be applied in extreme circumstances. To this end, various interpretive criteria were laid down, and these were summarized in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] in the following terms:

> '*First*, considering the purposes of a list of candidates means considering "*dominant* characteristics that are placed in a *central* position among the aspirations or the activities of the list"…
>
> > "The power granted in s. 7A is not designed for matters that are marginal and whose effect on ideology or policies as a whole is not significant and serious. This means phenomena… that can be described as *dominant* characteristics that are placed in a *central* position among the aspirations or activities of the list"…
>
> We are therefore concerned with purposes that are a "dominant" goal… *second*, the dominant and central purposes of the list — and to the same extent, the acts of a candidate for the elections within the framework of a list of candidates — are derived both from express declarations that are directly stated and also from reasonable conclusions that are clearly implied… *third*, purposes that are of a theoretical nature are insufficient. It must be shown that the list of candidates "is acting in order to realize its purposes and to convert them from theory into practice"… There must be "activity in the field" that is intended to put the theory of the list's purposes into practice. This activity needs to be repeated. Sporadic activity is insufficient. The activity needs to adopt a serious and extreme form of expression from the

> viewpoint of its intensity… Indeed, democracy does not take action against someone who does not take action against it. This is a defensive democracy, which does not prevent participation in the elections of a list of candidates merely because of the purposes of the list, but it defends itself against acts that are directed against it. *Finally*, the evidence proving the purposes and the acts that result in a list of candidates or a candidate not being allowed to participate in the elections to the Knesset needs to be "convincing, clear and unambiguous"…' (references omitted).

4. The broad approach, which seeks to uphold basic freedoms in so far as possible, does not necessarily conflict with the outlook of defensive democracy. On the contrary, it arises from precisely the same ideological outlook. The free marketplace of ideas in general, and its expression in the house of elected representatives in particular, is essential for preserving democracy. Limiting the possibility of voting and standing for office in the Knesset, and thereby expressing opinions and outlooks, was not intended to suppress — and certainly not to veto — opinions and outlooks. On the contrary, participation in the democratic process often prevents anti-democratic activity; and the freedom of expression, which is the main tool that is given to members of the Knesset when carrying out their duties, is frequently the antithesis of violence, outbreaks of hostility or the feeling of persecution and discrimination. This was discussed by Justice Barak in *Kahane v. Broadcasting Authority Management Board* [21]:

> 'Another aspect of the case for democracy concerns the important contribution of the freedom of expression to social stability, and consequently also to democracy… By virtue of freedom of expression social pressure finds its expression in negotiation, and not in action. The release of social pressure finds expression on the peaceful path of expression rather than on the violent path of action. Society, which often sits idly by and does not foresee hidden troubles, prepares itself for future troubles, when it becomes aware of the dangers that the freedom of expression brings out into the open.'

If a person is prevented from speaking out, this may lead to undermining the barrier that holds him back from resorting to violence. Again, broad freedom must not become a recipe for destruction. Limits must be set, but it is not for no reason that we have over the years set the limits with care and

sensitivity, in the belief that usually a problematic statement is better than a problematic action, and defensive democracy often defends itself well if it allows the strident voices in it to be heard, so that they become known and, where necessary, will be required to give an accounting in the marketplace of statements and opinions. Indeed, the remedy for speech is to reply with speech, and the remedy for support of an opinion is to give support to a contrary opinion. This position reflects the basic commitment of the Israeli public to the values of democracy (see also E. Benvenisti, 'Regulating the Freedom of Expression in a Polarized Society,' 30 *Hebrew Univ. L. Rev. (Mishpatim)* 29 (1999), at p. 38).

5. Even the petitioner, despite the problematic remarks in his two speeches under discussion, and additional remarks that he has made over the years, clears the barrier of s. 7A of the Basic Law: the Knesset, even if it is by a narrow margin. The Supreme Court, by a majority, allowed him to participate in the elections, even though the statements in this case, for which the indictment that is before us today had already been filed, were before it. This court held then, *inter alia*, that in view of the interpretive criteria that apply to the implementation of the aforesaid s. 7A, it could not be said that there was a sufficient factual basis for holding that the petitioner in his statements expressed support for an armed struggle of a terrorist organization. Therefore, it was found that the petitioner did not satisfy this ground of disqualification (or any other grounds of disqualification). Now the same statements and what is *de facto* the same ground of disqualification are before us. But the framework is different; now we are concerned with substantive immunity.

6. The question of the connection between preventing participation in the elections under s. 7A of the Basic Law: the Knesset (and s. 5 of the Political Parties Law) on the one hand and substantive immunity on the other has engaged the court in the past, but no firm determination was made. In *Miari v. Knesset Speaker* [4], Justice Ben-Porat held that substantive immunity should not be interpreted as giving 'a green light to acts that inherently conflict with loyalty to the existence of the state' (*ibid*. [4], at pp. 225-229). Justice Shamgar left this question undecided, when he said that:

> 'The essence of the argument may be that when s. 7A was enacted, the acts described therein became inconsistent with the actions of a member of Knesset and in any case they cannot be regarded as actions that are done in the course of carrying out his duties or for the purpose of carrying out his duties. What is

stated in s. 7A is intended to create a distinction between legitimate parliamentary activity and acts of the kind described in the aforesaid provision of statute, as if it said that it does not permit circumstances in which such purposes or such acts are a part of the parliamentary activities in which a member of the Knesset participates. *Prima facie* the provisions of s. 7A address the stage before the elections, i.e., the provisions address an earlier constitutional stage. But it can be assumed that it will be argued that the restrictions provided in s. 7A (and they are without doubt restrictions in comparison to full freedom of speech) have, by their very nature and in view of the logical ramifications of the aforesaid provision of state, transcendent consequences in that they directly imply what can be considered, according to our constitutional outlook, as a permitted or a prohibited act in the parliamentary sphere. Moreover, it can also be argued that s. 7A addresses a list of candidates rather than an individual member of Knesset as such; but the answer to this is that from what is required of a list of candidates we can derive by means of an analogy the implications for the individual member of the Knesset' (*ibid*. [4], at p. 211).

In *Pinhasi v. Knesset* [5], President Barak also left undecided the question 'whether substantive immunity applies to offences that directly concern actions or purposes that prevent a list of candidates from participating in the elections to the Knesset' (*ibid*. [5], at p. 690). All of this was before Amendment no. 29. Now the connection is enshrined in statute, in s. 1(a1) of the Immunity Law, which provides the following:

'Immunity in carrying out duties

1. …

(a1) To remove doubt, an act, including a statement, which is not incidental, of a member of the Knesset that contains one of the following shall not be regarded, for the purpose of this law, as expressing an opinion or as an act that is carried out in the course of his duties or for the purpose of his duties as a member of the Knesset:

(1) Denying the existence of the State of Israel as the state of the Jewish people;

(2) Denying the democratic character of the state;

(3) Incitement to racism because of colour or belonging to a race or to a national-ethnic origin;

(4) Support for an armed struggle of a hostile state or for acts of terrorism against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad.

…'

This strengthened the connection between the grounds for disqualification concerning actually competing in the elections and the grounds for denying substantive immunity. But this is not the end of the matter, since, as we have already seen, in so far as s. 7A of the Basic Law: the Knesset is concerned, the grounds for disqualification do not stand on their own; they are accompanied by all the interpretive criteria that derive from the necessary balance between the relevant considerations. Is the Immunity Law free of all or some of those interpretive criteria? Should we ignore these balancing criteria and the balancing tests laid down in case law with regard to substantive immunity (and especially the margin of natural risk test) when we apply the provisions of s. 1(a1) of the Immunity Law? Moreover, are incidents that occurred *before* Amendment no. 29 — even if we assume that it is a clarifying amendment — also exempt from the balancing applied by judicial discretion where an indictment of the kind filed against the petitioner is filed against a member of Knesset? I am of the opinion that if we answer yes to all of these questions, an excessive disparity will be created between the criteria that have been laid down with regard to preventing participation in the elections and the criteria required for denying substantive immunity.

7. My colleague Justice E. Hayut cites the remarks of S. Nevot in her book *The Subjective (Professional) Immunity of Knesset Members* (Doctoral Thesis — Hebrew University, 1997), and these should be cited once more:

> 'It would appear that ss. 5 and 7A, on the one hand, and s. 1 of the Immunity Law, on the other hand, were intended to prevent this phenomenon. Preventing the registration of a political party and preventing its participation in elections is a preliminary stage, which is intended to select the organizations and the persons that will be allowed to take part in the institution of the legislature. *After the "selection," the institution of immunity will protect the freedom of expression of those who are chosen. The premise in this protection is that the elected representatives are only those people whose expressions and activity have been defined as legitimate*' (emphasis supplied).

Thus we see that after the selection process the institution of substantive immunity will protect the freedom of expression of those persons who were elected, on the assumption that if they are elected, this was after their statements were found not to have crossed the line beyond which the statement should have been prevented *ab initio* rather than dealing with it by means of denouncing it from the podium of the Knesset. This is, of course, pertinent in our case too, since denying the petitioner immunity is being sought for the very same statements that were already examined and that were not found to be sufficient to prevent him from being elected to the Knesset. In the same vein, see the remarks of President A. Barak in *Kahane v. Broadcasting Authority Management Board* [21]:

> 'This approach of mine, which applies freedom of expression also to the "exceptional" statement that is racist, applies especially to freedom of expression of a political party that participates in parliamentary life. The petitioners were permitted to participate in the elections. More than twenty thousand persons voted for them. How is it possible, in a democracy, to allow an organization to participate in the elections but to prevent it from expressing its opinions after the elections?'

My conclusion is therefore that the correlation between the grounds for disqualification and the grounds for denying immunity, and the continuous purpose that this correlation seeks to serve, are the two sides of the coin; on the one hand, if an act or a statement constitute a ground for disqualifying a list or a candidate from standing for office for the Knesset, pursuant to s. 7A, then this has, in the words of President Shamgar in *Miari v. Knesset Speaker* [4], 'transcendent consequences,' i.e., a direct ramification 'on what can be considered, according to our constitutional outlook, as a permitted or a

prohibited act in the parliamentary sphere,' and therefore the act or expression will not be protected by substantive immunity. But on the other hand, if it is found that there is no sufficient ground for preventing the possibility of being elected to the Knesset, it will be difficult for us to ignore this conclusion when we examine the question of immunity for the same statements and on the same grounds. Allowing someone to compete in the elections implies *de facto* a predetermination of the margin of parliamentary activity that is not prohibited in our democracy. Activity within this margin while holding office in the Knesset will be considered in most cases as activity of a member of Knesset that is carried out in the course of carrying out his duties and for the purpose of carrying out his duties. It is not easy to eject from the back door someone who was allowed in through the front door. Obviously, if the member of the Knesset departs from the scope of that margin, and severs the connection between the declarations and purposes that were approved and his *de facto* actions, then the connection between the approval to compete in the elections and the protection provided by immunity is also severed. In such a case, removing the immunity will also not deter the colleagues of that member of the Knesset, and his replacement where necessary, from acting within the framework of that permitted margin. Indeed, when the whole margin lies on the borders of what is permitted, any deviation, even if small, is likely to remove the protection of immunity. But such an additional step was not taken in our case. The statements in the original case are the very same statements that are the basis for the indictment today.

8. It should be emphasized that I am not of the opinion that there is a real disparity — a 'considerable' distance' in the words of my colleague Justice Hayut — between refusing the right *ab initio* to participate in the elections and denying substantive immunity. My colleague is of the opinion that even though all of the arrangements — those in s. 5 of the Political Parties Law, s. 7A of the Basic Law: the Knesset and s. 1(a1) of the Immunity Law — were intended to realize a common purpose and to protect common basic values, there is a material difference between the first two and the third. My colleague discusses the great importance of the right to register a political party and to compete in the elections, a right that, when denied, irreversibly violates basic rights of the individual, namely the right to vote and to stand for election and the freedom of expression. By contrast, according to her, denying substantive immunity does not involve such a serious violation. As she says:

> 'We are concerned with a candidate who has already been elected to the Knesset and is holding office in it as one of its members. Within the framework of this position, he has the possibility of addressing the Knesset, of tabling questions, putting forward matters for the agenda and draft laws, being a member of the Knesset committees and voting on laws… not granting substantive immunity is a decision that by its very nature is limited to the circumstances of a specific case that gives rise to a question of immunity, and it does not result in a sweeping denial of the rights of the Knesset member and the ways in which he may act and express himself that come with his position… the violation to the freedom of expression because substantive immunity is not given to a member of the Knesset is a violation after the event for remarks that have already been made' (at para. 15).

My colleague goes on to say:

> 'With regard to the scale that we are discussing, it can be said that the restrictions in s. 5 of the Political Parties Law and in s. 7A of the Basic Law: the Knesset ab initio prevent the freedom of political expression of the individual, whereas the restrictions that limit the scope of substantive immunity apply entirely after the event, i.e., in the stage after the member of the Knesset has realized his freedom of expression…' (*ibid*.)

My approach is different. I am of the opinion that if we were indeed speaking here merely of a violation after the event that is limited to the circumstances of a specific case, there would be no need for the institution of substantive immunity, which violates, as my colleague Justice Hayut clearly explained, the rule of law and equality before the law. The whole essence and logic of the institution of immunity derives from the assumption that indicting a member of the Knesset in a criminal trial for an act or expression in the course of carrying out his duties may cause much *more extensive harm in the future.* Substantive immunity is intended to guarantee that a member of the Knesset can carry out his duties without fear and express his opinions and outlooks, which are the opinions and outlooks of the people who voted for him:

> 'Immunity is intended to ensure that a member of the Knesset can properly discharge his duties and represent the public that elected him by giving free and full expression to his opinions

> and outlooks, without concern or fear that this may result in a criminal conviction or a personal pecuniary liability in a civil proceeding' (the remarks of my colleague Justice Hayut in her opinion, at para. 6).

Similarly:

> 'A member of the Knesset who cannot express himself without fear of the legal consequences of his remarks cannot discharge his duty to the voter… the freedom of political debate demands that no restriction is placed on the ability of elected representatives to express themselves freely' (*per* President Shamgar in *Miari v. Knesset Speaker* [4], at p. 207).

We are therefore speaking here of a *barrier* that prevents free speech; of the *fear* of the cooling effect, which often causes as much harm as the *ab initio* freezing effect and which will undermine the ability of members of the Knesset to take part in the political debate. Only this understanding, of the future wide-ranging effects that may result from indicting a member of the Knesset can explain the 'constitutional importance of the first degree' that is attributed to substantive immunity, and the outlook that 'the whole nation has a clear essential interest in the realization of this right, so that it does not suffer a major or minor violation by anyone' (*per* President Agranat in *State of Israel v. Ben-Moshe* [3], at p. 439). Indeed, if a member of the Knesset is concerned that he might be indicted if he expresses the opinions of his party and the people who voted for him, of what value is the possibility of addressing the Knesset, of tabling questions and draft laws and taking part in voting?

9. My colleagues cite the case law rule that was laid down in *Pinhasi v. Knesset* [5], according to which 'for the purpose of analyzing a claim of immunity, we adopt the premise that the facts of the indictment will be duly proved.' This is indeed the case law rule, but ultimately, as we have said, we should ensure that the disparity between the criteria for examining the right to compete in the elections — a right that can only be denied under strict conditions, including the need for 'convincing, clear and unambiguous evidence' — and the criteria for examining the question of immunity is not greater that what is required by the nature of the matter. This is the case today, and it is certainly the case with regard to an incident that occurred prior to Amendment no. 29, which my colleague Justice Hayut agrees does not apply 'retrospectively in a literal manner,' even if it is a clarifying amendment. In the absence of appropriate balancing tests, a situation may be

created in which the combination of the rule in *Pinhasi v. Knesset* [5] and Amendment no. 29 will lead to the result that administrative discretion in filing an indictment for certain offences — such as the offence attributed to the petitioner — will also determine the question of immunity, without the matter being subject to any real judicial scrutiny. It is undesirable that this should happen (cf. Benvenisti, 'Regulating the Freedom of Expression in a Polarized Society,' *supra*, at p. 65). Amendment no. 29 was not intended to rule out the possibility of exercising judicial scrutiny, just as the aforesaid s. 7A did not deprive the court of the possibility of exercising judicial scrutiny that takes into account the basic principles of the legal system.

10. Indeed, the legislature had its say when it enacted the provisions included in s. 1(a1) of the Immunity Law within the framework of Amendment no. 29. But even this amendment does not raise an impenetrable barrier against judicial scrutiny, which should be stronger precisely when a question arises with regard to human rights. A similar need has also been recognized in other legal systems. The United States Supreme Court long ago restricted the scope of judicial review over economic legislation, but it emphasized from the outset, albeit cautiously, that there might be a greater tendency to intervene — or, in other words, it would determine a narrower scope for operation for the presumption of constitutionality — when legislation appears on its face to be within the scope of the specific prohibitions stated in the amendments to the constitution, and especially those concerning the prohibition against violating basic human rights (see footnote 4 of Justice Stone's opinion in *United States v. Carolene Products Co.* [29]). The court in that case specifically mentioned, from the viewpoint of how 'exacting' the judicial scrutiny should be, the cases in which the legislation restricts those political processes that in themselves are supposed to serve as a barrier against undesirable legislation or where the legislation is directed against a particular religion or against identifiable and insular minorities. This footnote spread its wings and took up a position at the front of the stage, where it has served as an anchor for later case law concerning human rights. The protection of the freedom of expression has become greater there when it is invoked by minorities seeking equality, since naturally the majority has greater power to express its opinions. The logic that guided the Supreme Court in the United States is clear. In Israel, the margin of deference that we will show to the actions of the other branches will take into account out basic constitutional principles, which, for example, include property rights, and our outlook with regard to balancing all the considerations that are relevant when exercising judicial scrutiny (see also

HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [26]). In any case, we should recognize the special importance of judicial scrutiny in those cases where basic human rights are under discussion. Here it is important for judicial scrutiny to be exercised fully. This can be done if it succeeds in not wasting its legal and social resources, which derive from public confidence, where the margin of deference is greater (see *Movement for Quality Government in Israel v. Prime Minister* [26]). This is the case in general, and it is particularly so when we are speaking of immunity that concerns the freedom of expression, and in our case this is not any expression, but political expression; and not any political expression, but political expression of a member of Knesset; and not any member of Knesset, but a representative of a minority group. Substantive immunity is intended, first and foremost, to ensure the effective representation in the Knesset of the various sectors of the population, so that their voices are heard and are not precluded from public debate in the State of Israel, in so far as this is possible within the limitations of a democracy; an additional purpose of immunity is to protect the Knesset and its members against interference and harassment on the part of the executive branch (see *Pinhasi v. Knesset* [5], at pp. 678-679). In view of these purposes, we should maintain the distinction between the decision to file an indictment — a decision that is within the authority of the attorney-general — and the decision concerning substantive immunity. One should not automatically deduce that there is no substantive immunity from the mere filing of the indictment for the offence that is attributed to the petitioner, not even in view of the ruling in *Pinhasi v. Knesset* [5]. The mere filing of the indictment against the petitioner does not erect a barrier that prevents judicial scrutiny with regard to the limits of the immunity.

11. My colleague the president follows this path, and presents in his opinion a balancing test for the purpose of applying Amendment no. 29. He does this before he comes to the margin of natural risk criterion, which applies, according to him, to cases that do not fall within the scope of that amendment. Thus, the president holds that —

> 'The distance between convincing, clear and unambiguous evidence (which is required for the red line of which my colleague speaks) and the evidence required in order to deny substantive immunity (within the framework of a criminal proceeding) is not great at all' (at para. 5 of his opinion).

This balancing criterion is sufficient, in our case, to lead to the conclusion that even when we take Amendment no. 29 into account, there is no statutory basis for holding that the petitioner does not have substantive immunity.

Indeed, the distinction outlined by the president between uttering statements of praise and approval for a terrorist organization and actual support for an armed struggle against the State of Israel, appeared already in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] and was supported by a majority of the justices. This distinction allowed the petitioner to compete in the elections to the Knesset (for a similar distinction, see HCJ 1398/04 *Ben-Horin v. Registrar of Amutot* [27]). We do not deny that the distinction is not an easy one, and already in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] there was doubt in this regard. But in so far as there is a doubt, it is better to 'err' on the side of freedom of speech, as Justice Stone said in *Jones v. Opelika* [30]:

> 'If this court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being over protective of these precious rights.'

Ultimately it was found in *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2] that the evidence could not support the ground of disqualification that refers specifically and expressly to support for an armed struggle. The same conclusion, on the basis of the same evidence, has been reached by my colleague President A. Barak in our case as well, and I agree with this conclusion.

12. The question remains whether, in view of the balancing tests laid down in the case law of this court, the remarks made by the petitioner fall outside the scope of substantive immunity. In this regard, I see very great importance in the fact that we are dealing with offences that revolve entirely around statements. Indeed, the interests that immunity is intended to realize — mainly the right to effective political representation and to participation in public debate, the principle concerning the existence of a free marketplace of ideas and opinions and the purpose of maintaining a democratic process — are realized first and foremost by means of the political statements of a member of the Knesset. Free expression of opinions is the heart and soul of substantive immunity. 'Someone who is in the business of making speeches has a high probability of being caught violating prohibitions concerning defamation or incitement. Substantive immunity was intended to give him immunity within the limits of this risk' (*per* President

A. Barak in *Pinhasi v. Knesset* [5]). The combination between the broad scope of application of the offences concerning the freedom of expression and the nature of the duties of a member of Knesset, to express his opinion in public and sometime differ from the opinion of the majority in harsh terms, places the member of Knesset — and especially one who belongs to minority sectors of the population — in an inherent risk of falling into the scope of the offences. All of this shows that immunity against indictment, where we are concerned with offences of speech, should be very broad.

13. In *Pinhasi v. Knesset* [5], the president held that the margin of natural risk applies to those actions that '… are so related and integral to his duties that there exists a concern that if the member of the Knesset will be required to account for these illegal actions, this will directly affect his ability to discharge his duties according to law and will restrict them' (*ibid*. [5], at p. 690). Offences that only concern speech fall, as a rule, within the margin of natural risk. If a member of the Knesset is required to account for them, this may create a dangerous cooling effect.

With regard to activity of a different kind, such, for example, as a false entry in corporate documents, it has been held that it does not fall within the natural risk of the activity of a member of the Knesset, since 'there is no concern that if criminal liability is imposed on a member of Knesset who signs these accounts in the knowledge that his declaration is false, and with a fraudulent intention, he will refrain from preparing these accounts lawfully' (*ibid*. [5], at p. 692). This is not the case with offences involving speech, such as offences of incitement and even uttering statements of praise and approval for a terrorist organization. Thus, for example, a member of Knesset, and not necessarily a member of Knesset who comes from the Arab minority, may express an opinion that a violent act that was directed against the State of Israel led to political consequences for which the perpetrators of the act hoped. Such a statements does not need to be motivated by identifying with the action or support for it, but it may arise from the speaker's subjective perception of reality. No one disputes that the remarks of the petitioner depart *prima facie* from the scope of such a statement. But the fear is that if the petitioner is not permitted to say what he said, notwithstanding the seriousness of his statement and notwithstanding the fact that it lies on the borderline of immunity, this will lead to excessive restraint, which will result in an excessive restriction on the limits of debate. I am therefore of the opinion that the petitioner's remarks lie within the margin of natural risk.

The result is that I agree with the conclusion of my colleague President A. Barak that the petitioner has substantive immunity against being brought to trial for the offences which are the subject of the indictment that was filed against him.

Petition granted by majority opinion (President Barak and Justice Rivlin), Justice Hayut dissenting.

3 Shevat 5766.

1 February 2006.