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### **ISRAEL**

## **DISQUALIFICATION OF PARTY LISTS FROM PARTICIPATING IN GENERAL ELECTIONS**

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DISQUALIFICATION OF PARTY LISTS FROM PARTICIPATING IN GENERAL ELECTIONS

*Executive Summary*

*Two Arab candidates' lists were disqualified by the Knesset Central Election Committee (CEC). Candidates' lists may be disqualified by the CEC in accordance with Basic Law: The Knesset. The grounds for disqualification by the CEC are extremely restricted. The CEC's decisions may be appealed to the Supreme Court. Based on an earlier decision it is highly unlikely, in the absence of a substantial amount of clear, convincing and unequivocal evidence, that the Court will validate the CEC 2009 disqualification decision.*

**I. Introduction**

On January 12, 2009, the 18<sup>th</sup> Knesset (Parliament) Central Election Committee (hereafter CEC) decided to disqualify two Arab lists from running in the upcoming February 10, 2009 parliamentary elections. The lists are the United Arab Lists- *Ta'al*, and *Balad*.<sup>1</sup> Both disqualified lists are currently represented in the outgoing Knesset.<sup>2</sup> The Chairman of the first list, Mr. Ahmed Tibi, had previously been disqualified by the CEC of the 16<sup>th</sup> Knesset in 2003. His disqualification, however, was voided by the Supreme Court.<sup>3</sup> According to media reports, members of the CEC have conceded “that the chance of the Supreme Court’s upholding the ban on both parties was slim.”<sup>4</sup>

This report will provide the legal grounds for the decision by the CEC to disqualify a candidates’ list and the timeframe for an appeal over such a decision. An analysis of the chances of the success of an appeal of the January 2009 CEC decision is also provided. This analysis is based on a study of the Supreme Court’s May 2003 leading decision involving Mr. Tibi, in addition to two other candidates, an Arab and a Jew, who had been disqualified from running in the 16<sup>th</sup> Knesset election based on similar grounds.

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<sup>1</sup> See *Press Announcement* at THE CENTRAL ELECTION COMMITTEE FOR THE 18<sup>TH</sup> KNESSET, <http://www.knesset.gov.il/elections18/heb/cec/NoticeList.aspx?NoticeId=82> (last visited January 15, 2009).

<sup>2</sup> See *Currently Functioning Parliamentary groups*, the KNESSET WEBSITE in English, [http://www.knesset.gov.il/faction/eng/FactionCurrent\\_eng.asp](http://www.knesset.gov.il/faction/eng/FactionCurrent_eng.asp) (last visited January 15, 2009).

<sup>3</sup> See AB 11280/02 The Central Election Committee for the 16<sup>th</sup> Knesset v. Ahmed Tibi at al, 57(4) PISKE DIN (Decisions of the Supreme Court, hereafter P.D.) 1 (5763/64-2003).

<sup>4</sup> SHAHAR ILAN AND RONI SINGER-HERUTI, *Knesset committee bans Arab parties from elections*, HAARETZ newspaper online edition, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=1054903> (last visited January 15, 2009).

## II. Grounds for Disqualifying Candidates' Lists

Basic Law: The Knesset, as amended, provides:

Prevention of participation of candidates' list

7A. A candidates' list shall not participate in elections to the Knesset and a person shall not be a candidate in elections to the Knesset if it's or the person's objectives or actions, expressly or by implication, include one of the following:

- (1) Negation of the existence of the State of Israel as a Jewish and democratic state;
- (2) Incitement to racism;
- (3) Support for the armed struggle of a hostile state or of a terrorist organization, against the State of Israel. ...<sup>5</sup>

## III. Timeframe for Appeal of CEC Disqualification Decision

The Knesset Elections (Consolidated Version) 5729-1969, as amended, provides:

Appeal

64.(a) Where the Central Committee refuses to approve a candidates' list, either wholly or as to the name of one of the candidates...it shall, not later than the 25<sup>th</sup> day before election day, notify its refusal to the representative of the list and his deputy, and they may, not later than the 23<sup>rd</sup> day before the election day, appeal to the Supreme Court against such refusal. ...

(b1) In an appeal over the Central Committee decision to approve or refuse to approve the participation of a candidates' list in elections to the Knesset in accordance with the provisions of section 7A of Basic Law: the Knesset, the Supreme Court shall hear the case ... at a bench of nine justices or a higher non equal number, as the President of the Supreme Court determines.

65. Publication of candidates' lists

The Central Committee shall, not later than the 9<sup>th</sup> day before Election Day, publish in *Reshumot* [Official Gazette, R.L.] the candidates' lists as approved by it or by the Supreme Court under section 64. The publication shall indicate the designation and letter of each list.<sup>6</sup>

## IV. The Supreme Court 2003 Leading Decision on Disqualification

In an extended panel of eleven justices, the Supreme Court unanimously voided the decisions by the CEC for the 16<sup>th</sup> Knesset to disqualify the candidacy of Mr. Ahmed Tibi and of Azami Bashara from participating in the 2003 elections. By a 9 to 3 majority the Court further

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<sup>5</sup> KNESSET ELECTION LAW, 5715-1955, 9 LSI 16 (5715-1954/55), as amended. Full up-to-date text of the law is available at the Nevo Legal Database at [www.nevo.co.il](http://www.nevo.co.il) (by subscription). Translation by author, R.L.

<sup>6</sup> 23 LSI 110 (5729-1968/69), as amended. Full up-to-date text of the law is available at the Nevo Legal Database, *id.*

rejected election appeals regarding the candidacy of Mr. Baruch Marzel, a former member of the Kach outlawed Jewish party.<sup>7</sup>

### **1. Rules for Disqualification:**

The Court established the following rules for implementation of disqualification under section 7A:

(1) Section 7A of Basic Law: the Knesset is based on the notion that a democracy may protect itself from non democratic forces that wish to utilize democratic ways for eliminating democracy. The provision reflects the constitutional equation determined in Israel between the liberty that democracy grants to every expression and to pluralism of views and opinions on which it is based, and the protection of its continuation as a democracy. The provision also protects the character of Israel as a Jewish and democratic state. The interpretation of this equation must preserve the delicate constitutional balance between the need to guarantee the right to elect and be elected—which is of the cornerstones of a democratic regime, without harming its existence as a Jewish state, outlawing racism and prevention of the armed struggle against the state.

(2) In consideration of the above, the Court established judicial interpretational requirements for implementation of section 7A. These requirements are based on the view that prevention of participation in an election is an extreme measure. The right to elect and be elected is a constitutional right of the highest rate. This right is not absolute and may be restricted. Any restriction of this right must be minimal and protect the most vital interests. The Court, then, listed the following restrictions for implementation of section 7A:

- a. Examination of the goals of a candidates' list should be directed at the central dominant characteristics of its objectives or activities. The authority granted in section 7A is not designed for insignificant matters the implication of which on the whole conceptual or active issue is minor and insignificant;
- b. The list's central and dominant goals (and a candidate's actions) – may be inferred from expressed direct statements as well as from cumulative and unequivocal conclusions;
- c. Goals of merely theoretical nature do not suffice. It is necessary to show that a candidate list acts in order to realize its objectives. There must be actual activity of a caliber that is designed to materialize the lists' goals from theory into reality;

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<sup>7</sup> AB 11280/02 The Central Election Committee for the 16<sup>th</sup> Knesset v. Ahmed Tibi at al, 57(4) P.D. 1 (5763/64-2003).

- d. The evidence that substantiate the goals and the actions that lead to disqualification of a candidate list or a candidate must be clear, convincing, and unequivocal.
- (3) In order to minimize conflict between the elements of “Jewish and democratic” negation of which may lead to disqualification it is necessary to focus only at the “nucleus” and minimal foundations of these elements.
- a. The “nucleus” characteristics that form the minimalistic definition of the State of Israel being a Jewish state reflect aspects of both heritage and Zionism. At their center stands the right of every Jew to immigrate to Israel, a state with a Jewish majority; a state where Hebrew is its central official language, and where most of its holidays and symbols reflect the national revival of the Jewish people; a state where Israel’s heritage forms a central component of its religious and cultural heritage.
  - b. If a candidates’ list or a candidate’s dominant goal for Israel to be “a state for all its citizens”, and this goal is directed at guaranteeing equality between all citizens of the State of Israel, this goal does not negate the existence of Israel as a Jewish state. However, if the latter stated goal wishes to harm the rational that forms the basis of establishment of the state and thus negate its character as the state of the Jewish people, this would amount to harm to the minimal and nucleus characteristics of the State of Israel as a Jewish state.
  - c. The nucleus and minimal characteristics of the expression “democratic state” are based on recognizing the sovereignty of the people, and is expressed by free and equal election; recognizing human rights including the right to dignity and equality, separation of powers, rule of law and an independent judiciary. Based on this nucleus approach, a candidate list that negates the right to elections based on a national-ethnic criterion, or which supports the use of violence to change the regime harms the nucleus of the democracy and should not be allowed to participate in the elections.
- (4) Democracy may, without losing its democratic character, protect against whoever uses an armed struggle to defeat her. It is therefore possible to prevent the participation in election of a candidates’ list or a candidate that either form an actual part or actively monetarily or politically support an organization that conducts an armed struggle against the state. Disqualification based on support, however, only applies to support directed at the armed struggle of a hostile state or a terrorist organization.

## **2. Implementation in the Circumstances of the 2003 Case**

In evaluating the CEC decision to disqualify Knesset Members Azami Bishara and Ahmed Tibi as well as the Balad party, the Court applied an extremely narrow test.

The Court agreed that the actions alleged to have been taken by MK Bishara related to negating the existence of the State of Israel as a Jewish State and supporting an armed struggle against her were central and dominant to his goals and activities as a member of Knesset. The Court, however, did not authorize his disqualification as it determined that doubt existed as to whether the evidence produced against Mr. Bishara was “convincing, clear and unequivocal.” Court President Barak held that the evidence did not mount to such a level. He specifically stated:

True, his view that Israel should be “a state for all its citizens” comes dangerously close to the possibility that negates the existence of the State of Israel as a Jewish state, but we do not have before us clear convincing and unequivocal evidence that the line was crossed. The same applies to support of the armed struggle. We were not convinced that KM (Knesset Member, R.L.) Bishara supports the armed struggle against the State of Israel. Even in this case the extensive material submitted to us should not be disregarded. Nevertheless it does not suffice to fulfill the critical evidentiary “mass” that is necessary in this case. Indeed, we cannot deny the doubt that exists in our heart. But this doubt must operate- in a democratic state aspiring for freedom and liberty- in favor of the liberty to elect and be elected.<sup>8</sup>

The Court held that if Bishara was allowed to be a candidate in the elections for the 16<sup>th</sup> Knesset, it follows that the candidates’ list in which he plays a central role should be allowed to participate in the elections.<sup>9</sup>

The Court further voided the CEC decision to disqualify KM Ahmed Tibi from participating in the elections based on his alleged support for the armed struggle of a terrorist organization against the State of Israel, under section 7A(a)(3) of Basic Law: the Knesset.

Court President Aharon Barak recognized that Mr. Tibi made harsh statements against the Prime Minister and the Israel Defense Force (IDF) Chief of Staff. Mr. Tibi also admonished the IDF’s actions in fighting terrorism. These expressions, according to Barak, do not constitute support for the armed struggle of a terrorist organization against the State of Israel. The same applies to his meetings with Yasir Arafat, the former head of the Palestine Liberation Organization. Even if terrorism activists praise Mr. Tibi for his help to their struggle, this does not prove that Mr. Tibi himself supports the armed struggle. Recognizing that some of Mr. Tibi's expressions are problematic, Barak accepted the State legal adviser’s view that there is a doubt as to Mr. Tibi's intentions and goals in this context.

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<sup>8</sup> *Id.* para 45.

<sup>9</sup> *Id.* para 50. Interestingly, on April 22, 2007, Bishara resigned from the Knesset via the Israeli Embassy in Cairo, following a police investigation into his foreign contacts, and accusations of aiding the enemy during wartime, passing information on to the enemy and contacts with a foreign agent, as well as laundering money received from foreign sources. He was accused of giving Hizbullah information on strategic locations in Israel that should be attacked with long range rockets during the 2006 Lebanon War, in exchange for huge amounts of money. Mr. Bishara denied the allegations and never returned for the continuation of his investigation. See Ron Ben Yishai, *Bishara Recommended That Hizbullah Attack South Of Haifa*, YNET NEWS, <http://www.ynetnews.com/articles/0,7340,L-3395153,00.html> (last visited January 16, 2009).

#### IV. Concluding Remarks

The 18<sup>th</sup> Knesset CEC disqualified two Arab candidates' lists, the United Arab List-*Ta'al*, and *Balad* from participating in the upcoming February 10, 2009 parliamentary elections. Based on their members' statements to the media, they intended to appeal to the Supreme Court. The law does not specify when the Court has to render its decision. According to the Knesset Elections (Consolidated Version), 5729-1969, as amended,<sup>10</sup> however, The CEC must publish the candidates' lists as approved by the Supreme Court not later than the 9<sup>th</sup> day before election day. Considering that election day is scheduled for February 10, the CEC has to publish the lists by February 1, 2009. A decision by the Supreme Court, therefore is expected any day prior to that date. According to the law, the decision will be rendered by an extended bench of at least nine justices.

Based on the 2003 decision, it is assumed that the Court will apply an extremely narrow test in evaluating the new evidence for and against inclusion of the two Arab parties in the elections. The author of this report is of the opinion that in the absence of clear convincing and unequivocal evidence of actual activity as specified in section 7A of Basic Law: the Knesset, it is highly unlikely that the Court will validate the CEC 2009 decision to disqualify the United Arab List- *Ta'al* and *Balad*.

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<sup>10</sup> Knesset Election Law, 5715-1955, 9 LSI 16 (5715-1954/55), as amended.