

SUPREME COURT OF CANADA
(On Application for Leave to Appeal from the Federal Court of Appeal)

B E T W E E N:

ADIL CHARKAOUI

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

Respondents

MEMORANDUM OF ARGUMENT FOR LEAVE TO INTERVENE

McCarthy Tétrault LLP
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6

Thomas G. Conway
Vanessa Gruben
Tel: (613) 238-2000
Fax: (613) 563-9386

Michael Bossin
Community Legal Services
Tel: (613) 241-7008
Fax: (613) 241-8680

Owen M. Rees
University of Oxford
Tel: +44 1865 274383
Fax: +44 1865 274313

Solicitors for the [Appellant](#)

PART I—FACTS

Overview

1. Amnesty International (“AI”) Canada seeks leave to intervene in this appeal on the issue of whether the procedural protections that apply in security certificate proceedings under Canada’s *Immigration and Refugee Protection Act* (“IRPA”) violate international norms and the constitutional principles of fundamental justice, and whether they are more restrictive of individual rights than is strictly necessary in order to safeguard national security.¹ AI Canada brings a unique expertise on how international human rights standards impact on security-related matters and has a long history as a credible, trustworthy and objective intervener before various courts, legislatures and international bodies. AI Canada has a strong interest in this appeal as it will significantly impact its ongoing work on the proper balance between security and human rights.

Amnesty International: The Organization

2. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to people’s fundamental human rights. It is impartial and independent of any government, political persuasion or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding. Currently, there are close to 2 million members of AI in over 162 countries around the world.²

3. AI’s vision is of a world in which every person enjoys all the human rights enshrined in the *Universal Declaration of Human Rights* (“UDHR”), the *International Covenant on Civil and Political Rights* (“ICCPR”), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”) and other international human rights standards. In pursuit of this vision, its mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

² Affidavit of Alex Neve, paras 7, 8 and 10 (“Neve Affidavit”).

expression, and freedom from discrimination, within the context of its work to promote all human rights.³

4. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.⁴

Amnesty International's significant experience as an intervener

5. AI has made oral and written submissions regarding international human rights to courts and legislatures around the world as well as to international bodies.

6. AI Canada has been granted intervener status in numerous judicial proceedings. This Court has granted AI Canada intervener status on several occasions, including *Suresh v. Canada (Minister of Citizenship and Immigration)*; *United States of America v. Burns*; and *Schreiber v. Canada (A.G.)*.⁵ The Ontario Court of Appeal has allowed AI Canada to intervene in *Bouzari v. Republic of Iran* and in *Ahani v. Her Majesty The Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration*.⁶ AI Canada was also granted intervener status at the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry") where it made both oral and written submissions on the subject of security and human rights.⁷

7. In 2005, the British House of Lords granted AI intervener status in *A and others v. Secretary of State for the Home Department (No. 2)*, an appeal concerning the admissibility of evidence obtained through torture. In recent years, AI's interventions in other jurisdictions have included: *A and others, Secretary of State for the Home Department*, regarding the indefinite detention of foreign nationals suspected of terrorism, under the *Anti-Terrorism, Crime and Security Act, 2001*, and *R. v.*

³Neve Affidavit paras. 11, 12; *UDHR*, GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948); *ICCPR*, 19 December 1996, 99 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368; *CAT*, Can. T.S., 1987 No. 36.

⁴ Neve Affidavit, para. 13.

⁵ *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3; *United States v. Burns*, [2001] 1 S.C.R. 283; *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269.

⁶ *Bouzari v. Republic of Iran*, Court File No. C38295, June 30, 2004 and *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration*, Court File No. C37565, February 8, 2002.

⁷ Neve Affidavit, paras. 18-21.

Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), regarding state immunity for international crimes.⁸

8. In addition, AI has participated in domestic legislative processes to advance international human rights. AI has made oral and written submissions to various legislatures and legislative committees in Canada, the United Kingdom, the United States and Australia.⁹

9. Finally, AI has made representations and submissions to numerous international bodies, including the UN Human Rights Committee, the UN Committee Against Torture, and the UN Working Group on Arbitrary Detention.¹⁰

Expertise regarding Human Rights

10. For more than four decades, AI has investigated, documented and reported on human rights abuses. AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists and scholars.¹¹

11. AI's documentation of human rights abuses has been relied upon by Canadian courts as being reliable evidence of country conditions, including, on a number of occasions, the Federal Court, and by this Court in *Suresh*.¹²

Expertise on Security and Human Rights

12. Long before events following September 11, 2001 brought the issue of human rights violations committed in the name of security to the forefront of the global debate, AI highlighted this concern in countries on every continent. Since September 11, 2001, AI has played a prominent role in promoting a rights-based framework for the response of countries to security related issues. AI has underscored the central role that human rights must play in all laws, policies and practices governments adopt to counter terrorism and enhance security. AI has actively participated in this

⁸ Neve Affidavit, para. 22. *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71; *A and others, Secretary of State for the Home Department*, [2005] 2 A.C. 68 (U.K.H.L.); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147.

⁹ Neve Affidavit, para 23-24.

¹⁰ Neve Affidavit, paras 25-27.

¹¹ Neve Affidavit, para. 15, 30.

¹² Neve Affidavit, para. 17; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118.

debate around the world and as a result, has first-hand knowledge of the various ways different countries have balanced fundamental rights in security legislation.¹³

13. In particular, AI has been active in making submissions before the legislatures and courts of the UK and Australia. AI can, therefore, bring its comparative expertise in assisting the Court on this appeal with respect to how other Western democracies balance national security and human rights in the immigration context.¹⁴

14. In Canada, AI representatives have made a significant contribution to the debate on security legislation and human rights. AI Canada has been asked to comment on Canada's counter-terrorism practices, which it has done extensively in the press, in meetings with government officials and before House of Commons and Senate committees. AI is perceived as an important and reliable source of analysis in Canada in this area.¹⁵

Expertise on Procedural Fairness and Right to a Fair Trial

15. Further, AI has unique expertise on the requirements of procedural fairness and the right to a fair trial. AI has pursued its goal of ensuring prompt and fair trials for political prisoners by sending trial observers to every region of the world. AI's work on fair trial and procedural fairness extends to every situation where an individual is confronted by the machinery of the state. As a result, AI has developed a unique expertise on the applicable international human rights standards at every phase of a trial or other judicial process.¹⁶

16. AI representatives have commented extensively on the use of secret evidence in court proceedings in numerous countries. In written briefs, AI Canada has raised fair hearing concerns with respect to the *IRPA* certificate system, provisions of the *Anti-Terrorism Act* concerning the non-disclosure of evidence on security grounds, and National Security Confidentiality determinations made in the course of the Arar Inquiry.¹⁷

¹³ Neve Affidavit, para. 31.

¹⁴ Neve Affidavit, para. 24, 31, 32.

¹⁵ Neve Affidavit, paras. 23, 33, 34.

¹⁶ Neve Affidavit, para. 37-40.

¹⁷ Neve Affidavit, paras. 39-40.

PART II—QUESTIONS IN ISSUE

17. The question on this motion is whether AI Canada should be granted leave to intervene in this appeal.

PART III—ARGUMENT

18. Leave to intervene may be granted where a party has an interest in the subject matter before the Court and will be able to make submissions that are useful to the Court and different from those of the other parties.¹⁸

(1) Amnesty International Canada has a strong and legitimate interest in this appeal

19. Any interest in an appeal is sufficient to support an application for intervener status, subject always to the discretion of the Judge hearing the motion.¹⁹

20. As demonstrated above, AI Canada has a long-standing and deep commitment to the subject of human rights and security related matters. The interaction between the right to security and other rights, such as the right to a fair trial, has been a centre-piece of AI's work for many years. AI Canada has demonstrated its interest in these issues in various fora, including governments, courts and international bodies.²⁰

21. The Court's determination in this appeal will have significant impact on AI's mission, within Canada and internationally, to ensure that governments strike the proper balance between security and other fundamental human rights.²¹

(2) Amnesty International Canada will make unique, useful submissions

22. AI Canada brings a unique perspective and approach to the issues raised in this appeal as a non-government international human rights organization with significant expertise and history regarding human rights and security. AI Canada will bring a truly comparative and international perspective to this appeal by virtue of its experience with similar legislative schemes in the US, the

¹⁸ *Rules of the Supreme Court of Canada*, Rules 55 to 57; *Reference re Worker's Compensation Act*, [1989] 2 S.C.R. 335, at 339, 340 (“*Worker's Compensation*”); and *R. v. Finta*; [1993] 1 S.C.R. 1139 (“*Finta*”).

¹⁹ *Workers Compensation*, *supra* and *Finta*, *supra* at 1143-44.

²⁰ Neve Affidavit, paras. 43-44.

²¹ Neve Affidavit, para. 45.

UK, Australia and other countries, and its knowledge of the international norms that apply to the security certificate procedure.²²

23. If granted leave to intervene, AI Canada proposes to make the following submissions:

- (a) that ss. 77 to 85 of the *IRPA* and s. 7 of the *Charter* must be interpreted in light of international norms including the *UDHR* and the *ICCPR*;
- (b) that under both Canadian and international law, more rigour is required to determine what information should be classified as national security information and, on that basis, be withheld from public scrutiny; and
- (c) that under both Canadian and international law, rigorous procedural protections including the right to full answer and defence are warranted in cases involving the potential return of an individual to a country where his life or freedom may be threatened.

24. AI Canada does not intend to take a position on the issues that are specific and personal to the Appellant. Rather, AI Canada will only make submissions on the right to a fair hearing raised by the *IRPA* security certificate provisions.²³

(a) Relevant International Conventions, Treaties and Norms

25. This appeal requires careful consideration of international legal principles and their impact on the interpretation of ss. 77-85 of the *IRPA*, and s. 7 of the *Charter*. Although the appellant has highlighted the relevant international provisions, AI Canada proposes to examine the international perspective of this appeal in greater detail.

26. Paragraph 3(3)(f) of the *IRPA* provides:

Application

(3) This Act is to be construed and applied in a manner that

(f) complies with international human rights instruments to which Canada is signatory.

²² Neve Affidavit, paras. 46-48.

²³ Neve Affidavit, para. 42.

27. Although paragraph 3(3)(f) does not directly incorporate international human rights instruments into Canadian law, it does require the provisions of the *IRPA* to be construed and applied in a manner that complies with them.²⁴

28. The *ICCPR* is a legally binding international human rights instrument that Canada has signed and ratified. It is therefore determinative of how the provisions of the *IRPA* must be interpreted and applied.²⁵

29. The scope and content of the principles of fundamental justice expressed in section 7 are also elucidated by international norms, in particular the *ICCPR*. As this Court explained in *Suresh*:

the principles of fundamental justice expressed in section 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective.²⁶

30. AI Canada has extensive knowledge of the relevant international legal principles, most notably the *ICCPR*, and the application of these principles by various international bodies and national courts. In addition, AI is well-versed in the proper application of international law to the interpretation of *IRPA* and the *Charter*.

(b) Treatment of Confidential Information where Injurious to National Security

31. If granted intervener status, AI Canada will argue that s.78 of *IRPA*, which exempts the disclosure of information to the person subject to a security certificate where it would be injurious to national security, must be narrowly construed and rigorously applied. The Minister bears the onus of establishing that the information is injurious to national security and the request must be carefully scrutinized by the designated judge.

32. AI Canada acknowledges that there are legitimate circumstances under which information should be regarded as confidential. AI Canada will argue that customary and conventional international law, including Article 19 of the *UDHR* (freedom of thought,

²⁴ *DeGuzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436.

²⁵ *DeGuzman*, *supra* at para. 87.

²⁶ *Suresh*, *supra* at para. 59.

conscience and religion), Article 19 of the *ICCPR* (freedom of opinion and expression), the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information* (“*Johannesburg Principles*”) and the International Commission of Jurists’ *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* create international legal obligations on Canada and guide the application of the national security exception to disclosure of information.

33. AI Canada will submit that the Minister must satisfy a two-prong test to establish that a document is confidential on the ground of national security and therefore may not be disclosed to the named person or his counsel.

- (a) First, the Minister must establish that non-disclosure is motivated by a legitimate national security interest. A legitimate national security interest must have as its genuine purpose and demonstrable effect the protection of Canada’s existence or territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military or terrorist threat, or an internal source, such as incitement to violent overthrow of the government.
- (b) Second, the Minister must establish that the non-disclosure sought is the least restrictive means for protecting that national security interest.

(c) Right to Procedural Fairness

34. If granted leave to intervene, AI Canada will address the question of whether ss. 77-85 are in accordance with international norms and satisfy the right to procedural fairness protected by s. 7 of the *Charter*. In particular, AI Canada will argue that these provisions violate international norms and that they breach the constitutional right to procedural fairness because the person named in the certificate and his or her counsel:

- (a) are denied access to much of the evidence on the basis that its disclosure would be injurious to national security;
- (b) are excluded from many of the court proceedings;

- (c) have no opportunity to question many of the individuals who are the source of key allegations against the named person; and
- (d) are denied the right to test the evidence before the designated judge.

35. The right to procedural fairness is a fundamental right guaranteed by several international conventions, including the *UDHR*, and the *ICCPR*. In particular, article 14(1) of the *ICCPR* states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

36. These standards and others were drafted in broad terms in order to apply to all legal systems in the world and take into account the rich diversity of legal procedures. Accordingly, they set out the minimum guarantees that all systems should provide. However, when a domestic court interprets these conventions it is incumbent on the Court to give a robust content to these rights consistent with the purpose of the protection of human rights. In AI Canada's view, the impugned provisions of the *IRPA* violate the imperatives of international law.

37. AI Canada will also take the position that ss. 77-85 of the *IRPA* are unconstitutional as they violate the constitutional guarantee of procedural fairness protected by s. 7 of the *Charter*, and are more restrictive than is strictly necessary in order to safeguard national security.

38. AI Canada will argue that rigorous procedural protections are warranted in the issuance of a security certificate. Each of the factors set out by this Court in *Baker v. Canada (Minister of Citizenship and Immigration)* lead to this conclusion, most notably the nature and consequence of the decision on the individual affected.²⁷ The designated judge's decision to affirm a security certificate has serious consequences for its subject. The issuance of a security certificate authorizes the detention and removal of the permanent resident or foreign national. These measures are as serious a deprivation of liberty as those which can arise in the criminal process. Although AI Canada recognizes that there may be instances where security concerns necessitate restrictions on procedural

²⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

fairness, the restrictions set out in ss. 77-85 are more restrictive than necessary and are therefore unconstitutional.

39. For persons named in security certificates, there is also a possibility that the person concerned will face removal to a country where there is a serious and substantial likelihood that he or she will be tortured. AI submits that the removal to torture under any circumstances violates the *Charter* and is inconsistent with Canada's obligations under the *Convention Against Torture*. In violation of international norms, Canadian law currently permits removal to torture in undefined "exceptional circumstances".²⁸ Given this possibility, rigorous procedural protections are warranted.

40. AI Canada will argue that the breach of the named person's right to procedural fairness is neither reasonable nor justified in a free and democratic society. Moreover, the breach is more restrictive than necessary in order to safeguard national security.

41. If granted leave to intervene, AI Canada will be mindful of submissions made by parties and other interveners and will seek to avoid duplication of argument and materials before the Court.

PART IV—SUBMISSIONS ON COSTS

42. AI Canada does not seek or expect to pay costs.

PART V—ORDER SOUGHT

43. AI Canada requests an order

- (a) granting leave to intervene in this appeal;
- (b) if leave to intervene is granted, leave to present oral and written arguments at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF MARCH, 2006 BY:

Solicitors for Amnesty International Canada

²⁸ *Suresh, supra* at para. 78.

PART VI—TABLE OF AUTHORITIES

	AUTHORITY	PARA
1	<i>A and others, Secretary of State for the Home Department</i> , [2005] 2 A.C. 68 (U.K.H.L)	7
2	<i>A and others v. Secretary of State for the Home Department (No. 2)</i> , [2005] UKHL 71	7
3	<i>Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration</i> , Court File No. C37565, February 8, 2002.	6
4	<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 S.C.R. 817	38
5	<i>Bouzari v. Republic of Iran</i> , Court File No. C38295, June 30, 2004	6
6	<i>DeGuzman v. Canada (Minister of Citizenship and Immigration)</i> , 2005 FCA 436	27,28
7	<i>Ertuk v. Canada (Minister of Citizenship and Immigration)</i> , 2004 FC 1118	11
8	<i>R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)</i> , [2000] 1 A.C. 147	7
9	<i>R. v. Finta</i> , [1993] 1 S.C.R. 1139	18,19
10	<i>Reference re Worker's Compensation Act</i> , [1989] 2 S.C.R. 335, at 339, 340	18,19
11	<i>Schreiber v. Canada (A.G.)</i> , [2002] 3 S.C.R. 269	6
12	<i>Shabbir v. Canada (Minister of Citizenship and Immigration)</i> , 2004 FC 480	11
13	<i>Suresh v. Canada (Minister of Citizenship & Immigration)</i> , [2002] 1 S.C.R. 3	6,11,29,39
14	<i>United States v. Burns</i> , [2001] 1 S.C.R. 283	6

PART VII—STATUTORY PROVISIONS

	STATUTORY PROVISION	PARA.
1	Immigration and Refugee Protection Act, S.C. 2001, c.27	1,26
2	<i>Universal Declaration of Human Rights</i> , GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948)	3
3	<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 99 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368	3
4	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , Can. T.S., 1987 No. 36	3,39
5	<i>Johannesburg Principles: National Security, Freedom of Expression and Access to Information</i> , U.N. Doc. E/CN.4/1996/39 (1996)	32
6	<i>Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism</i> , International Commission of Jurists, Adopted August 24th, 2004	32

Court file No. 30762

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

ADIL CHARKAOUI

APPELLANT

- and -

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

RESPONDENT

**MEMORANDUM OF ARGUMENT FOR LEAVE
TO INTERVENE**
