

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)**

BETWEEN:

TIBERIU GAVRILA

Appellant

- and -

MINISTER OF JUSTICE (CANADA)

Respondent

MEMORANDUM OF ARGUMENT

(Motion to intervene pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

PART 1—FACTS

A. Overview

1. In this motion, the Canadian section of Amnesty International (“Amnesty Canada”) seeks leave to intervene in this appeal pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*. Amnesty Canada meets the test for leave to intervene. Amnesty Canada has a demonstrated interest in the subject matter of this appeal and has spent years advocating for the rights of refugees within Canada and around the world. Amnesty Canada also brings an important perspective to this appeal and will be able to provide unique and important submissions to this Court.

B. Description and Expertise of the Proposed Intervener

2. Amnesty Canada is a part of Amnesty International (“AI”), a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to

people's fundamental human rights. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.¹

3. Amnesty Canada is impartial and independent of any government, political persuasion or religious creed. Both Amnesty Canada and AI are financed by subscriptions and donations from its membership; neither body receives government funding. There are currently close to 2 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like Amnesty Canada. The organizational structure of Amnesty Canada includes a board of 12 directors elected across the country. There are specific country and issue coordinators in each region and province. Amnesty Canada has a membership of approximately 60,000 people.²
4. Amnesty Canada implements and shares AI's vision of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights standards. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural and economic. Its activities include monitoring and drafting reports on human rights abuses, participation in relevant judicial proceedings, national legislative processes and hearings, and in international committee hearings and processes. 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.³
5. Amnesty Canada has frequently been granted leave to intervene in proceedings involving the international and constitutional rights of refugees and immigrants before this Honourable Court as well as numerous other courts, tribunals, inquiries

¹ *Affidavit of Alex Neve* sworn on December 8, 2009 ("Neve Affidavit"), at paras. 2, 8

² *Neve Affidavit*, at paras. 3, 4, 6.

³ *Neve Affidavit*, at paras. 7, 9, 12

and legislative proceedings. Examples of recent interventions in this Court include the following: *Prime Minister of Canada, et al. v. Omar Ahmed Khadr*—under reserve Docket No: 33289; *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008], 2 S.C.R. 326; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *United States v. Burns*, [2001] 1 S.C.R. 283; *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.⁴

PART II—POINTS IN ISSUE

6. The issue to be determined in this motion is whether Amnesty Canada should be granted leave to intervene in this appeal.

PART III—ARGUMENT

A. Test for Leave to Intervene

7. In order to meet the test for leave to intervene, a party must have an interest in the subject matter of the appeal and must be able to provide useful and different submissions to the Court.⁵
8. Furthermore, in *Canadian Council of Churches v. Canada*, the Court indicated that:

Public interest organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.⁶
9. It is submitted that Amnesty Canada meets this test for leave to intervene and should be permitted to intervene in this appeal.

B. Amnesty Canada has an interest in the subject matter of this appeal

10. Amnesty Canada has been very engaged in work on the rights of refugees in Canada and around the world. On a global level, AI monitors and reports on the treatment of

⁴ Neve Affidavit, at paras. 15-18

⁵ *Reference Re Workers' Compensation Act, 1983 (Nfld)* (Application to Intervene), [1989] 2 S.C.R. 355 at 339; *R. v. Finta*, [1993] 1 S.C.R. 1138 at 1142

⁶ 1992 CanLII 116 (S.C.C.)

refugees and advocates for the protection of those in need of asylum. In addition, AI researches and provides credible information on human rights situations worldwide and often monitors compliance with international obligations.⁷

11. Amnesty Canada's mandate is to advance and promote international human rights at both the international and national levels. Amnesty Canada therefore has a substantial interest in Canada fulfilling its international human rights obligations, particularly those articulated under the *1951 Refugee Convention*. The potential extradition of a Convention Refugee to the place where they face a risk of persecution comes squarely within the mandate of this well respected and well established organization. It is therefore submitted that Amnesty Canada has a sufficient interest in the subject matter of this appeal to meet the required threshold articulated by this Court.

C. Amnesty Canada will provide useful and different submissions

Amnesty Canada has a unique perspective to bring to this appeal. Courts, international bodies and legislators around the world have come to recognize and trust AI's experience, objectivity and to value its unique perspective. Jean-Pierre Hocke, former United Nations High Commissioner for Refugees, noted "It's a worn cliché, but if Amnesty did not exist, it would have to be invented. It is simply unique."⁸

12. At the national level, Amnesty Canada's reports are frequently used by decision makers when making refugee status determinations. Amnesty Canada assists refugees who are at risk of return to the kind of human rights violations that AI condemns, monitors the development of the legislative and regulatory regimes which govern Canada's treatment of asylum-seekers and takes steps to increase awareness about these issues. Amnesty consequently has expertise that relates to the specific issues raised in this appeal namely: what are Canada's international obligations under the *1951 Refugee Convention*, the procedural protections necessary to prevent

⁷ Neve Affidavit, at paras. 11-13, 19

⁸ Neve Affidavit, at para 21.

improper refoulement and the interrelationship between *IRPA* and the *Extradition Act*.⁹

13. If granted leave to intervene, Amnesty Canada will assist this Court by providing a unique national and international perspective on the issues affecting the rights of refugees in this appeal. Amnesty Canada is able to present arguments on these issues beyond the ambit of the private rights of the Appellant and will review the international jurisprudence as it deals with these issues. Within the context of the procedural protections that ought to exist when dealing with the possible extradition of a refugee, Amnesty Canada will be able to provide a rights-based approach for the Court. In addition, Amnesty International will provide its unique perspective to the issues which impact on a broad spectrum of fundamental human rights.

D. Outline of Proposed Submissions

14. Consistent with the role of an intervener, Amnesty Canada will not take a position on the disposition of this appeal. Amnesty Canada will take the record as it finds it and will avoid any unnecessary duplication of submissions.

15. Amnesty Canada will make the following submissions if granted leave to intervene from this Honourable Court:

16. The protection provided by section 115(1) of the *Immigration and Refugee Act* 2001, c. 27 (“*IRPA*”) applies to all actions by the state, be it within the context of a removal order made pursuant to *IRPA*, or an extradition under the *Extradition Act*.

17. The term “removal” in section 115(1) must be read and interpreted to prohibit any form of return *in any manner whatsoever*, in accordance with Article 33(2) of the 1951 Refugee Convention. The Supreme Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 indicated that the *Refugee Convention* must be interpreted in a manner which takes into account its human rights

⁹ Neve Affidavit, at paras. 18, 22, 23

purpose, and that reference can be made to the travaux préparatoire. Amnesty Canada will rely on the UNHCR and other international interpretive guides to submit that this purposive analysis of the *Refugee Convention* requires that provisions of section 115(1) of IRPA be interpreted in a manner consistent with the prohibition against refoulement in Article 33.

18. Contrary to what was held by the Court of Appeal, Amnesty Canada will submit that the extradition and refugee determination procedures are not two separate processes. Rather, they are closely connected and a determination in one procedure is relevant to, and in some cases determinative of, what might occur in the other. The drafters of the *Refugee Convention* were acutely concerned about the possibility that fugitives from justice could attempt to abuse the *Refugee Convention*. It is for that express reason that Article 1F(b) was included in the Convention. Article 1F(b) states that the Convention does not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee. Persons excluded under Article 1F(b) are denied refugee status and would be subject to extradition.
19. In Canada, IRPA has addressed the possibility that at the time of making a claim a person might be a fugitive from justice, and not entitled to refugee protection. At the time of making a claim, a person can be found ineligible to claim refugee status pursuant to ss. 101(1)(f) and 101(2)(b) of IRPA if the person is inadmissible for having committed a serious crime outside of Canada, and the Minister certifies the person to be a danger to the public. If a person is found eligible to make a claim, then the person can be excluded from refugee protection under Article 1F(b). In addition, pursuant to section 105 of *IRPA*, once an authority to proceed is issued any refugee claim that has commenced but has not been concluded is suspended. If the Minister orders a surrender, this is equivalent to a finding of exclusion under Article 1F(b). Thus, IRPA expressly contemplates the possibility that extradition may be sought before refugee status is obtained, and accepts the determination of the extradition

judge as to whether there are reasonable grounds to believe that the person has committed an offence, which could lead to exclusion under Article 1F(b).

20. In this case, the extradition proceeding only commenced after the Appellant was granted refugee status. Amnesty Canada will argue that in such circumstances, the extradition procedure must give way to the refugee process. That is, as Canada has acceded to the *Refugee Convention* and committed itself to the principle of non refoulement, once refugee status has been afforded, the protection against non refoulement applies to prohibit all forms of return to the country of nationality, unless that return complies with the requirements of the *Refugee Convention*. Thus, if extradition is sought to a country other than the country from which the refugee has a well founded fear of persecution, the prohibition against refoulement will not come into play, and the person's refugee status will not be determinative of the decision to surrender.
21. However, when the requesting state is the country from which the person has a well founded fear of persecution, then the protection against refoulement must take precedence, if the person has been found to be a Convention Refugee. Under IRPA, there are three procedures available to the Minister in this situation. Two involve terminating the protection that had been previously obtained. The termination can be accomplished through an application to vacate the refugee status due to a misrepresentation, or through an application for a finding that the refugee status has ceased due to a change in circumstances. The third procedure is contemplated in Article 33(2) of the *Refugee Convention*, and incorporated into the legislation pursuant to section 115(2). This involves a determination that the refugee poses a danger to the public or to the national security of Canada, and falls into the categorical exception to the protection against non refoulement set out in the Convention.
22. Amnesty Canada will submit that the extradition of the Appellant to Romania is barred because it would be a violation of the principle of non refoulement. In the case at bar, the Minister made an application to the Immigration and Refugee Board

(IRB) to vacate the Appellant's refugee status after the extradition procedure commenced, but it was rejected. The Minister did not seek judicial review of the vacation decision, and did not make an application for an order that the conditions had changed and the Appellant no longer had a well founded fear of persecution. The Minister also did not seek to have the Applicant excluded according to IRPA section 115(2).

23. Amnesty Canada will also submit that both IRPA and the *Extradition Act* must be interpreted in accordance with section 7 of the *Charter of Rights and Freedoms*, and that returning the Appellant to Romania would not be in accordance with section 7 of the *Charter*.
24. The Appellant remains a convention refugee, a person who has been found to have a well founded fear of persecution if returned to Romania. The Supreme Court held in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.) that section 7 is engaged in the refugee determination process. Similarly, in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, the Court held that the risk of removal can engage section 7 when the consequences of removal are such that they place the refugee at risk.
25. Removing a Convention Refugee to the country where they face a risk of persecution can only be in accordance with the principles of fundamental justice where there is a determination that the person poses a danger to Canadian society. Moreover, as was expressed by the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, in the case of a person at risk of torture, return is prohibited in all save and except exceptional circumstances.
26. In this case, there is no allegation that the Appellant poses a danger to society or to national security. Therefore, extradition of the Appellant would only comply with the *Charter* if a determination was made in accordance with the principles of fundamental justice that the Appellant was no longer at risk of persecution or torture.

27. During the surrender procedure, the Minister of Justice is required to refuse the surrender of the Appellant if the Minister is satisfied that the prosecution is based upon certain prohibited grounds such as a person's race or religion. While there is some similarity between the questions of whether the motivation for prosecution is a person's race, this is not analogous to a finding that a person has a well founded fear of persecution. First, the motivation for the prosecution might not be persecutory, but as a Convention Refugee, the Appellant might still face a risk of extrajudicial persecution. Moreover, the Appellant might face a risk of discriminatory treatment during the legal process as a result of his race, religion, etc. As the minister is not being called upon to assess the risk upon return but rather only the motivation behind the prosecution, a determination by the Minister on this point cannot meet the requirements of the *Charter*.
28. The Minister is also required to determine whether or not the surrender would be unjust or oppressive. These criteria appear to come close to requiring that the Minister consider risk upon return. However, the criteria are not analogous to an actual assessment of risk, and therefore a determination on this point is not equivalent to a proper risk assessment.
29. Amnesty Canada will argue that the findings of the IRB are binding in a manner analogous to issue estoppel. In the immigration context, the Appellant is required to establish risk to a standard of 'more than a mere possibility'. In the extradition context, the Appellant is required to establish risk on a standard of balance of probabilities. The extradition context requires the Appellant to meet a very high standard of proof, in circumstances where a tribunal in Canada has already made a finding in his favour on the issue or risk. At international law, a refugee is to be protected against return or refoulement if he has a well founded fear of persecution. Even if the required risk assessment can be done as part of the decision on surrender, which is not admitted by the intervener, this imposes an onus on the Appellant to establish the very facts that have been determined in his favour in the refugee

proceeding, and to establish the risk on a higher standard of proof; all while the finding of risk at the refugee protection division remains intact.

30. Finally, Amnesty Canada will submit that to the extent that the Minister purported to do a risk assessment, the procedure followed was not in accordance with the principles of fundamental justice. The Appellant made submissions to the Minister of Justice who then consulted the Minister of Immigration. The Appellant was not given any opportunity to respond to the Minister of Immigration's findings that he was not at risk if returned to Romania. Given the nature of the proceedings and the importance of the issues at stake, the principles of fundamental justice at a minimum require that the Appellant have an opportunity to respond to the Minister of Immigrations's submissions on risk, and that the Minister of Justice take these into account.

31. Such further grounds as counsel may advise and this Honourable Court may permit.

PART IV—COSTS

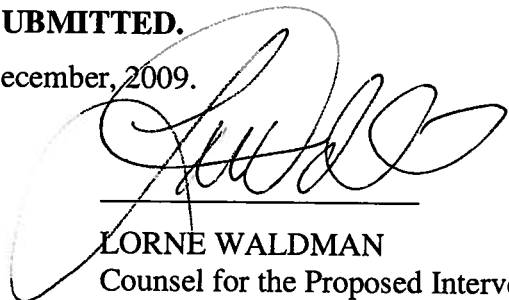
32. Amnesty Canada seeks no costs and requests that none be awarded against it in these proceedings.

PART V – ORDER REQUESTED

Amnesty Canada respectfully requests an Order: (i) granting Amnesty Canada leave to intervene in this appeal; (ii) permitting Amnesty Canada leave to file a factum not exceeding 20 pages in length in accordance with Rules 37 and 42; (iii) leave to make oral argument at the hearing of this appeal; and, such further or other Order as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario this 11th day of December, 2009.



LORNE WALDMAN
Counsel for the Proposed Intervenor,
Amnesty International

PART VI—TABLE OF AUTHORITIES

1. *Canadian Council of Churches v. Canada*, 1992 CanLII 116 (S.C.C.)
2. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9
3. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982
4. *Reference Re Workers' Compensation Act, 1983 (Nfld)* (Application to Intervene), [1989] 2 S.C.R. 355 at 339;
5. *R. v. Finta*, [1993] 1 S.C.R. 1138 at 1142
6. *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.)
7. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1