

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

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PART I—FACTS

Overview

1. Amnesty International (“AI”) Canada seeks leave to intervene in this appeal on the issue of whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service (“CSIS”) in the context of security certificate proceedings under the *Immigration Refugee Protection Act* (“IRPA”) violates international norms and the constitutional principle of procedural fairness.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 *Charkaoui v. Canada (Citizenship and Immigration)*; *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. AI Canada is currently an intervener before the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almaki, Ahmad Abou-Elmaati and Muayyed Nureddin ("Jacobucci Inquiry").⁷

7. AI Canada is also an applicant in two matters concerning human rights issues currently before the Federal Court, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. The Queen* and *Amnesty International Canada and British Columbia*

³ Neve 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 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] SCC 9; *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. 19-22.

*Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada.*⁸

8. 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. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, regarding state immunity for international crimes.⁹

9. 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.¹⁰

10. 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.¹¹

Expertise regarding Human Rights

11. 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.¹²

⁸ *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. The Queen* (IMM-7818-05); *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada* (T-324-07). Neve Affidavit, para. 21.

⁹ Neve Affidavit, para. 24. *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.

¹⁰ Neve Affidavit, paras. 25-26.

¹¹ Neve Affidavit, paras 27-29.

¹² Neve Affidavit, para. 15.

12. 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*.¹³

Expertise on Security and Human Rights

13. 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 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.¹⁴

14. 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.¹⁵

15. 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.¹⁶

¹³ Neve Affidavit, para. 17; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118.

¹⁴ Neve Affidavit, paras. 32-34.

¹⁵ Neve Affidavit, para. 26, 36, 37.

¹⁶ Neve Affidavit, paras. 25, 35, 36.

Expertise on Procedural Fairness and Right to a Fair Trial

16. 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.¹⁷

17. 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. AI Canada's expertise on fair trial procedures is relevant to the issues of procedural fairness raised by the systematic destruction of interview notes and other information in the context of the *IRPA* certificate system.¹⁸

PART II—QUESTIONS IN ISSUE

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

PART III—ARGUMENT

19. 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.¹⁹

¹⁷ Neve Affidavit, paras. 39-42.

¹⁸ Neve Affidavit, paras. 40-42.

¹⁹ *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*").

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

20. 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.²⁰

21. 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.²¹

22. 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.²²

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

23. 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 and knowledge of the international norms that apply to the security certificate procedure.²³

24. If granted leave to intervene, AI Canada proposes to make the following submissions: that ss. 77 to 80 of the *IRPA*, s. 12 of the *CSIS Act* and s. 7 of the *Charter* must be interpreted in light of international norms including the *UDHR* and the *ICCPR*; that under both Canadian and international law, rigorous procedural protections are warranted in cases involving the detention of an individual and the potential return of such individual to a country where his life or freedom may be threatened; that in the context of security certificates, procedural fairness requires that the Ministers and the designated judge have access to all information underlying the summaries prepared by CSIS; that in the context of security certificates, procedural fairness requires that there be full transparency

²⁰ *Workers Compensation, supra* and *Finta, supra* at 1143-44.

²¹ Neve Affidavit, paras. 45-46.

²² Neve Affidavit, para. 47.

²³ Neve Affidavit, paras. 48-50.

regarding the source of information upon which summaries are based; and that such transparency ensures that information has been procured in a manner that is consistent with international human rights standards.

25. 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 in the context of the *IRPA* security certificate provisions.²⁴

(a) Relevant International Conventions, Treaties and Norms

26. This appeal requires careful consideration of international legal principles and their impact on the interpretation of ss. 77-80 of the *IRPA*, s. 12 of the *CSIS Act*²⁵, 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.

27. Paragraph 3(3)(f) of the *IRPA* provides that the “Act is to be construed in a manner and applied in a manner that [...] complies with international human rights instruments to which Canada is a signatory.” 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.²⁶

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* and the *CSIS Act* must be interpreted and applied.²⁷

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*.²⁸

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 Canadian legislation and the *Charter*.

²⁴ Neve Affidavit, para. 44.

²⁵ *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

²⁶ *DeGuzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436.

²⁷ *DeGuzman*, *supra* at para. 87.

²⁸ *Suresh*, *supra* at para. 59.

(b) Treatment of Information Collected by CSIS

31. If granted intervener status, AI Canada will argue that the systematic destruction of interview notes and other information by CSIS in the context of security certificate proceedings violates international norms and the constitutional principle of procedural fairness protected by s. 7 of the *Charter*. Procedural fairness requires that, at the very least, the Ministers and the designated judge have an opportunity to review the information underlying the summary prepared by CSIS in support of the security certificate. Access to this information is essential to assess its probative value and also to determine whether the information is corroborated by other means. Thus, properly interpreted, section 12 of the *CSIS Act* cannot authorize the destruction of information later relied on by CSIS in support of a security certificate.

32. Further, AI Canada will argue that full transparency requires that the relevant circumstances under which information was obtained must be disclosed to the Ministers, the designated judge and the person named in the certificate. In particular, CSIS must disclose sufficient details concerning the source of the information to allow those persons to know whether such information may have been obtained by torture or other cruel, inhuman or degrading treatment or punishment. When the provenance of such information is suspect, the Ministers must satisfy the designated judge that it was obtained free of torture or other cruel, inhuman or degrading treatment or punishment.

33. The circumstances surrounding the collection of information are relevant to the designated judge's review of the security certificate. Information obtained by torture or other cruel, inhuman or degrading treatment or punishment, in addition to being contrary to the internationally recognized principle that no one shall be subjected to such treatment, is also inherently unreliable. AI Canada submits that information obtained by torture or other cruel, inhuman or degrading treatment or punishment cannot be used in any judicial or administrative proceeding, except to establish the occurrence of the act.

(c) Right to Procedural Fairness

34. If granted leave to intervene, AI Canada will address the question of whether the treatment of evidence by CSIS is in accordance with international norms and satisfies the right to procedural fairness protected by s. 7 of the *Charter*. In particular, AI Canada will argue that the systematic destruction of information by CSIS in the context of security certificate proceedings violates

international norms and that this practice breaches the constitutional right to procedural fairness because:

- (a) exculpatory information pertaining to the named person may be destroyed;
- (b) the Ministers and the designated judge are precluded from testing the information underlying the summary; and
- (c) where sufficient details about the source of the information are not disclosed, it is more difficult to know whether such information was obtained by torture or other cruel, inhuman or degrading treatment or punishment.

35. The right to procedural fairness is a fundamental right guaranteed by several international conventions, including the *UDHR*, and the *ICCPR*.

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 systematic destruction of information by CSIS violates the imperatives of international law.

37. AI Canada will also take the position that the systematic destruction of interview notes and other information by the CSIS in the context of security certificate proceedings is unconstitutional as it violates the constitutional guarantee of procedural fairness protected by s. 7 of the *Charter*, and is 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.²⁹ As this Court confirmed in *Charkaoui v. Canada (Citizenship and Immigration)*, the designated judge's decision to affirm a security certificate has serious consequences for its subject.³⁰ 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

²⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

³⁰ *Charkaoui*, *supra* note 5 at paras. 14 and 25.

recognizes that there may be instances where security concerns necessitate restrictions on procedural fairness, CSIS' policy is more restrictive than necessary and is 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".³¹ 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 an extension of time within which to file this motion;
- (b) leave to intervene in this appeal; and
- (c) 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 23rd DAY OF AUGUST, 2007
BY:

Solicitors for Amnesty International Canada

³¹ *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)	8
2	<i>A and others v. Secretary of State for the Home Department (No. 2)</i> , [2005] UKHL 71	8
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	39
5	<i>Bouzari v. Republic of Iran</i> , Court File No. C38295, June 30, 2004	6
6	<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , 2007 SCC 9	6, 38
7	<i>DeGuzman v. Canada (Minister of Citizenship and Immigration)</i> , 2005 FCA 436	28,29
8	<i>Ertuk v. Canada (Minister of Citizenship and Immigration)</i> , 2004 FC 1118	12
9	<i>Mahjoub v. Canada (Minister of Citizenship and Immigration)</i> , 2006 FC 1503	12
10	<i>R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)</i> , [2000] 1 A.C. 147	8
11	<i>R. v. Finta</i> , [1993] 1 S.C.R. 1139	19,20
12	<i>Reference re Worker's Compensation Act</i> , [1989] 2 S.C.R. 335, at 339, 340	19,20
13	<i>Schreiber v. Canada (A.G.)</i> , [2002] 3 S.C.R. 269	6
14	<i>Shabbir v. Canada (Minister of Citizenship and Immigration)</i> , 2004 FC 480	12
15	<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	6,12,30,40

16	<i>Thang v. Canada (Minister of Citizenship and Immigration)</i> 2004 FC 457	12
17	<i>United States v. Burns</i> , [2001] 1 S.C.R. 283	6

PART VII—STATUTORY PROVISIONS

	STATUTORY PROVISION	PARA.
1	<i>Immigration and Refugee Protection Act</i> , S.C. 2001, c.27	1,27
2	<i>Canadian Security Intelligence Service Act</i> , R.S.C. 1985, c. C-23	26
3	<i>Universal Declaration of Human Rights</i> , GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948)	3
4	<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
5	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , Can. T.S., 1987 No. 36	3,40

Court file No. 31597

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