SCC File No. 33313

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

BETWEEN:

TIBERIU GAVRILA,

Appellants

- and -

MINISTER OF JUSTICE (CANADA)

Respondent

AFFIDAVIT OF ALEX NEVE

I, **ALEX NEVE,** of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

1. I am the Secretary General of Amnesty International (Canadian Section, English Branch) ("Amnesty Canada") and as such have knowledge of the matters hereinafter deposed to.

I Interest of Amnesty in this Appeal

(i) Amnesty International and Amnesty Canada: The Organizations

2. Amnesty International ("AI") is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to people's fundamental human rights.

3. AI is impartial and independent of any government, political persuasion or religious creed. AI and Amnesty Canada are financed by subscriptions and donations from its membership; neither body receives government funding.

4. 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.

5. In essence, Amnesty Canada is the manifestation of the global AI movement in this country.

6. 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.

(ii) The Vision and Work of Amnesty Canada

7. Amnesty Canada implements and shares the vision of AI. AI's vision is of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights ("UDHR")* 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.

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

9. Amnesty Canada seeks to advance and promote international human rights at both the international and national level. As part of its work to achieve this end, Amnesty Canada:

(a) monitors and reports on human rights abuses;

(b) participates in relevant judicial proceedings;

(c) participates in national legislative processes and hearings; and

(d) participates in international committee hearings and processes.

10. In particular, Amnesty Canada has taken action to promote the protection of Canadian refugees. As outlined below, Amnesty Canada has been active in a variety of cases and many other forms of advocacy concerning the rights of refugees in Canada.

(iii) Monitoring and Reporting on Human Rights Abuses and Involvement in Refugee Proceedings in Canada

11. AI's investigative work is carried out by human rights researchers who receive cross-check and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, web-sites and other media outlets. As well, AI sends about 130 fact-finding missions to some 70 countries each year to directly assess what is happening on the ground.

12. 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.

13. AI's research has been used by Canadian courts and is recognized as credible. These official reports by AI are often relied on as evidence by immigration review boards and in Canadian courts. For example:

(a) in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, Justice Tremblay-Lamer found "the [Minister's] delegate's blanket rejection of information from agencies with worldwide reputations for credibility, such as AI and [Human Rights Watch] ... puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources." Indeed, as Justice Tremblay-Lamer pointed out, "the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility".

(b) Similarly, in *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, the Federal Court allowed a judicial review of a Pre-Removal Risk Assessment ("PRRA") on the basis that the PRRA officer failed to consider a detailed analysis of the applicant's personal circumstances prepared by AI, whom the Court referred to as a "credible source".

(c) The Federal Court has also emphasized the important evidentiary role of AI reports in *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, and *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118. Finally, in *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, [2002] 1 S.C.R. 3, the Supreme Court of Canada relied on an AI report concerning Sri Lanka's torture of members of the Liberation Tigers of Tamil Eelam.

14. In addition to being used by Canadian courts, AI uses its research to prepare other reports, briefing papers, newsletters and campaigning materials. Amongst its publications is the annual *Amnesty International Report* on human rights conditions in countries around the world.

15. Amnesty Canada has participated in the preparation of these reports and has assisted in the distribution of these reports in Canada.

(iv) Participation in Judicial Proceedings

Amnesty Canada has intervened in several cases involving international human rights, refugee and extradition issues before the Supreme Court of Canada, including:

(a) *Prime Minister of Canada, et al. v. Omar Ahmed Khadr*–under reserve Docket No: 33289--(granted leave to intervene with respect to whether the actions of the Government of Canada with regards to Omar Khadr violated the *Charter* and administrative law principles and whether the Government of Canada was consequently under an obligation to ask for the repatriation of Omar Khadr from Guantanamo Bay)

(b) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008], 2 S.C.R. 326 (granted leave to intervene with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international norms and the constitutional principles of procedural fairness);

(c) *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350 (presented submissions on the constitutionality of the procedural protections in the *Immigration and Refugee Protection Act* security certificate regime and on the arbitrary detention of foreign nationals under that regime);

(d) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (argued that the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);

(e) *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 (presented submissions to the Court regarding the nature and scope of the

international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, which the Court referred to);

(f) *United States v. Burns*, [2001] 1 S.C.R. 283 (provided information to the Court on the significant international movement towards the abolition of capital punishment);

(g) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (provided information regarding the international movement towards the abolition of capital punishment); and

(h) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (provided information regarding the international movement towards the abolition of capital punishment).

16. In addition to advocacy before the Supreme Court of Canada, Amnesty Canada has appeared before lower Canadian Courts or public inquiries as either an intervener or as a party. Examples include the following:

(a) Amnesty Canada has intervened before the Ontario Court of Appeal in:

(i) *Bouzari v. Islamic Republic of Iran* (Court File C38295, June 30, 2004), a case involving the right of a torture victim to sue for compensation from the offending government, and

(ii) *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration* (Court file C37565, February 8, 2002), where submissions were made on Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee;

(b) Amnesty Canada is an applicant in two matters before the Federal Court concerning refugee and fundamental human rights issues:

(i) in *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada,* 2008 FCA 229, the applicants asserted that Canada's "safe third country" agreement with the United States was invalid and unlawful because the United States fails to comply with its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, and

(ii) in *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,* 2008 FCA 401, the applicants asserted that Canada is in breach of its obligations under the *Convention Against Torture* by transferring Afghan detainees into the custody of Afghan officials where they are at serious risk of torture or cruel, inhuman or degrading treatment.

(c) Amnesty Canada has been granted intervener status in the following inquiries:

(i) The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry"), where it made submissions on the subject of security and human rights.

(ii) The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin ("Iacobucci Inquiry") where it made submissions on the substantive issues before the Commissioner on the source of applicable standards under international law; the prohibition against torture; providing or exchanging information and travel plans with foreign

officials; the inadequacy of diplomatic assurances with respect to the use of torture; the prohibition against the use of information obtained through torture; communication, the provision of information, and assistance in questioning detained Canadians; requirement of consular officials to ensure that basic human rights are protected; and the presumption of innocence of Canadians detained abroad, among other things.

17. AI or its local national organizations have made submissions in other countries on various matters, including matters arising from the "War on Terror," such as:

(a) AI was recently *amicus curiae* before the Supreme Court of the United States in *Boumediene v. Bush*; *Al Odah v. United States*, 128 S. Ct. 2229 where AI argued that the Military Commission Act of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;

(b) In 2006, the British House of Lords granted AI intervener status in *Al-Skeini and others v. the Secretary of State*,[2007] UKHL 26, an appeal concerning the applicability of the European Convention on Human Rights and the UK's *Human Rights Act 1998* to the actions of British armed forces in Iraq;

(c) Other proceedings in England include:

(i) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, (regarding the admissibility of evidence obtained through torture);

(ii) *A and others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (regarding indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001);*

(iii) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (U.K.H.L.) (regarding state immunity for international crimes); and

(iv) *Chahal v. United Kingdom*, (1997) 23 E.H.R.R. 413 (E.Ct.H.R.) (regarding the absolute prohibition against returning an individual to face a risk of torture).

(v) Participation in Legislative Proceedings

18. Amnesty Canada has also sought to advance international human rights directly through the legislative process. Amnesty Canada has submitted written and oral arguments to government officials, legislators and House and Senate committees on numerous human rights issues including issues surrounding the rights of refugees,. Amnesty Canada's submissions include:

(a) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development regarding the repatriation of Omar Khadr, May 2008;

(b) *Amnesty International: Brief on Bill C-31* (Immigration and Refugee Protection Act), March 2001;

(c) Security through Human Rights: Amnesty International Canada's Submission to the Special Senate Committee on the Anti-Terrorism Act and House of Commons Sub-Committee on Public Safety and National Security as part of the Review of Canada's Anti-Terrorism Act, May 16, 2005;

(d) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees (May and September 2005);

(e) Oral submissions before the House Committee on Citizenship and Immigration regarding security certificates (November 2006);

(f) Oral submissions before the House Defence Committee regarding the transfer by Canadian troops of Afghan detainees in Afghanistan (December 2006); and

(g) Oral submissions before the House Committee on Human Rights regarding Bill C-3, the proposed amendment to the security certificate regime (December 2007).

(vi) Participation with International Organizations

19. AI has formal relations with the United Nations Economic and Social Council (ECOSOC), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe, the Organization of American States, the Organization of African Unity, and the Inter-Parliamentary Union.

20. Amnesty Canada recently made the following submissions to various international organizations regarding security and human rights:

(a) *Human Rights for All: No Exceptions* (Amnesty International's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada), February 2007;

(b) Amnesty International's Updated Briefing to United Nations Human Rights Committee with respect to the United States, July 2006;

(c) Amnesty International's Supplementary Briefing to United Nations Committee Against Torture with respect to the United States, May 2006;

(d) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (Amnesty Canada's Submissions to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada), 2005;

(e) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, October 8, 2004; and

(f) *It's Time* (Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada), November 2000.

21. These international bodies recognize and trust AI's experience, objectivity and value AI's unique perspective. As 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."

(vii) Amnesty Canada's Work on the Rights of Refugees

22. Amnesty Canada has an active and long-standing interest in issues involving the protection of the rights of refugees. . As demonstrated above, we have been involved in numerous proceedings at all levels of court and in a variety of jurisdictions on the rights of refugees.

23. Amnesty Canada's involvement in refugee issues is extensive. Examples of our involvement include:

(a) calling on all governments to observe certain basic principles in their asylum procedures which are essential in helping to prevent the forcible return of asylum-seekers at risk of serious human rights violations. The principles were based on international standards, such as are set out in the

International Covenant on Civil and Political Rights and relevant conclusions adopted by the intergovernmental Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR);

(b) engaging in letter writing campaigns to Jason Kenney, Minister for Citizenship, Immigration and Peter Van Loan, Minister of Public Safety with regards to the treatment of the 76 individuals who recently arrived by boat on the West Coast from Sri Lanka. Amnesty Canada asked, among other things, that the Minister take vigorous measures to ensure that all relevant government agencies have in place policies prohibiting inappropriate communications with foreign governments about refugee claimants, and that these policies are respected;.

(c) actively pursuing legislative changes such as attempting to streamline the immigration process by supporting the implementation of Bill C-291; .

(d) increasing awareness about the issues faced by refugees in Canada with awareness campaigns through blogs, our website and other forms of media; and,

(e) engaging in public advocacy and increasing community support for the rights of refugees by supporting programming throughout Canada on World Refugee Day.

24. These are some of the examples of Amnesty Canada's involvement in refugee-related issues such as the ones in this case. Our efforts are continuing with on-line action and related initiatives, lobbying and other public advocacy.

II. The Proposed Submissions of Amnesty Canada

25. Amnesty Canada seeks leave from this Honourable Court to make the following submission:

(a) The protection provided by section 115(1) of the *Immigration and Refuge Act* ("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*.

(b) 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 purpose, and that reference can be made to the travaux preparatoire. 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(1) and that consequently, section 115(1) of IRPA must be interpreted to apply to all forms of return, including return through extradition.

(c) Amnesty Canada will submit that contrary to what was held by the Court of Appeal, 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. Indeed, 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. Persons excluded under Article 1F(b) are denied refugee status and hence would be subject to extradition.

(d) 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. Thus, at the time of making a claim, a person can be found to be ineligible if the person has been found to be inadmissible for having committed a serious crime outside of Canada and the Minister certifies the person to be a danger to the public. Moreover, if the claimant is found eligible to make a claim, then the person can be excluded 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 and if the Minister orders a surrender, this is considered to be equivalent to a finding under Article 1F(b). Thus, IRPA expressly contemplates the possibility that extradition may be sought before refugee status is obtained and accepts the determination by the extradition judge as to whether or not there are reasonable grounds to believe that the person has committed an offence which could lead to exclusion under Article 1F(b).

(e) In this case however, the extradition proceeding only commenced after the person had been 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.

(f) 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—two involve terminating the protection that had been previously obtained. The termination can be accomplished either through an application to vacate the status due to a misrepresentation or through an application for a finding that the status has ceased due to changes in circumstances. The third procedure is that 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 in Canada so that the exception to the protection against no refoulement set out in the Convention would apply.

(g) 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, an application to vacate the claim was made by the Minister after the extradition procedure commenced but was rejected. The IRB made this finding despite the fact that the claimant had not withheld information No judicial review of the decision was sought and no application was made for an order that the conditions had changed and that the Appellant no longer had a well founded fear of persecution. No consideration under section 115 was undertaken.

(h) Amnesty Canada will also submit that both IRPA and the *Extradition Act* must be interpreted in accordance with section 7 of the *Charter or Rights and Freedoms* and that returning the Appellant to Romania would not be in accordance with section 7 of the *Charter*.

(i) 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.

(j) Within the context of a removal of a Convention Refugee to a country where the person faces a risk of persecution, the principles of fundamental justice require that the removal can only take place if there is a determination that despite the risk of persecution, 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.

(k) In this case there is no allegation that the person poses a danger to society or to national security, so the only possible way in which the extradition could be sanctioned under the *Charter* would be if there was a determination made in accordance with the principles of fundamental justice that the person was no longer at risk of persecution or torture. It is true that during the surrender procedure the Minister of Justice is required to refuse to surrender the Appellant if the Minister is satisfied that the prosecution is based a person's race, religion etc. While there is some similarity between the questions of whether or not the motivation for persecution is a person's race, this is not an analogous finding to a finding that a person has a well founded fear of persecution. First, the motivation for the prosecution might not be persecutory, but the Appellant might as a Convention Refugee 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 of this point cannot meet the requirements of the Charter of Rights and Freedoms .

(l) It is true that the Minister is 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 but the criteria are not analogous to an actual assessment of risk and therefore a determination on this point cannot be considered to be equivalent to a proper risk assessment.

(m) Amnesty Canada will argue will argue that the findings of the IRB are binding in a manner analogous to a claim to issue estoppel. In both the immigration context the Appellant is required to establish risk to a standard of more than a mere possibility. In the extradition context, the procedure requires the Appellant to satisfy the Minister on a balance of probabilities that they are at risk. This 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 same 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 we assume that the required risk assessment can be done within the context of the decision on surrender, a matter 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 to a higher threshold; all this while the finding of risk at the refugee protection division remains intact.

(n) Finally, Amnesty Canada will submit that from a procedural point of view, to the extent that the Minister purported to do a risk assessment, it was not conducted by the Minister in compliance with the principles of fundamental justice. The Appellant made submissions to the Minister who then consulted the Minister of Immigration. The Appellant was not given any opportunity to

respond to the findings of lack of risk made by the Minister. Given the nature of the proceedings and the issues at stake, the principles of fundamental justice must at a minimum require that the Appellant have an opportunity to respond to the Minister's submissions and that the Minister of Justice take these into account.

26. I believe that Amnesty Canada brings a unique perspective and approach to the issues raised in this appeal.

27. Amnesty Canada is uniquely positioned as an international non-governmental organization to bring a truly international perspective to this appeal. Amnesty Canada has extensive knowledge of the international norms and treaties that are relevant in this appeal, most notably those articulated in the 1951 *Refugee Convention*.

28. If granted leave to intervene, Amnesty Canada will be mindful of submissions made by parties and other interveners in this appeal and will seek to avoid duplication of argument and materials before the Court.

29. I make this affidavit in support of Amnesty Canada's application to intervene and for no other or improper purpose.

SWORN BEFORE ME at the City of)
Ottawa in the Province of)
Ontario this 8th day of)
December, 2009)

A Commissioner for Taking Affidavits

ALEX NEVE