Court File No.: 30929
Court File No.: 31178
Court File No.: 30762

SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

B E T W E E N:

HASSAN ALMREI

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AND

B E T W E E N:

MOHAMED HARKAT

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE ATTORNEY GENERAL OF CANADA

Respondents

AND

B E T W E E N:

ADIL CHARKAOUI

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

-and-

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO); UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS WATCH; CANADIAN COUNCIL OF AMERICAN-ISLAMIC RELATIONS AND CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION; CANADIAN ARAB FEDERATION; CANADIAN CIVIL LIBERTIES ASSOCIATION; CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP AND NATIONAL ANTI-RACISM COUNCIL OF CANADA; AMNESTY INTERNATIONAL CANADA; CANADIAN BAR ASSOCIATION; FEDERATION OF LAW SOCIETIES OF CANADA; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND ATTORNEY GENERAL OF ONTARIO

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER, AMNESTY INTERNATIONAL

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TABLE OF CONTENTS

> [Such] measures must be taken in transparency, they must be of short duration, and must respect the fundamental non-derogable rights embodied in our human rights norms. They must take place within the framework of the law. Without that, the terrorists will ultimately win and we will ultimately lose – as we should have allowed them to destroy the very foundation of our modern human civilization.
> *High Commissioner for Human Rights Sergio Vieira de Mello, addressing the Counter Terrorism Committee*[1]

PART I—OVERVIEW

1. Sections 33 and 77-85 of the *Immigration Refugee Protection Act* ("*IRPA*")[2] deprive the appellants of their right to life, liberty and security of the person in a manner contrary to the principle of fundamental justice that requires procedural fairness in security certificate proceedings under section 7 of the *Charter* and article 14 of the *International Covenant on Civil and Political Rights* ("*ICCPR*").[3] This violation is not justified under section 1 of the *Charter* or at international law. Further, sections 82(2) and 84 of the *IRPA* result in the arbitrary detention of the appellants contrary to section 9 of the *Charter* and article 9 of the *ICCPR*. These provisions arbitrarily discriminate between foreign nationals and permanent residents in a manner that is not justified under section 1 of the *Charter* or at international law.

PART II—QUESTION IN ISSUE

2. Do sections 33 and 77-85 of the *IRPA* violate international norms and the *Charter*?

PART III—ARGUMENT

A. Canada Is Bound by Its International Obligations

3. The security certificate scheme established under the *IRPA* must comply with Canada's international commitments. Among several others, the *ICCPR* is a legally binding international human rights instrument that Canada has signed and ratified. Parliament signaled its intention to abide by Canada's international commitments in subparagraph (f) of subsection 3(3) of the *IRPA*, which provides:

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[1] Richard Goldstone, "Combating Terrorism and Protecting Civil Liberties" in Richard Ashby Wilson, ed., *Human Rights in the "War on Terror"* (Cambridge: CUP, 2005) 157, at 166, Intervener's Book of Authorities – Vol. III, Tab 52.
[2] 2001, c. 27.
[3] 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), Intervener's Book of Authorities – Vol. III, Tab 48.

> (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.

4. Subparagraph 3(3)(f) requires that the provisions of the *IRPA* be interpreted and applied in conformity with Canada's international obligations, such as the *ICCPR*. The *ICCPR* is "a legally binding international human rights instrument to which Canada is signatory", and as such, "is determinative of how *IRPA* must be interpreted and applied, in the absence of a contrary legislative intention."[4]

5. Moreover, it is well-established that Canada's international human rights obligations are an important interpretive aid in applying the *Charter*. As the Court explained in *Suresh*, the scope and content of the principles of fundamental justice expressed in section 7 and the limits on rights that may be justified under section 1, are elucidated by international norms, in particular the *ICCPR*.[5] Indeed, "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[6]

6. The *ICCPR* gives legal effect to the *Universal Declaration of Human Rights*[7] ("*UDHR*"). The *UDHR* was drafted following the end of the Second World War, an unparalleled period of global terror, war, and human suffering. The nations that united to proclaim the *UDHR* fully understood the dangers of illiberal laws and state action in times of insecurity. They sought to enshrine rights of liberty, equality, and human dignity for future generations.[8] These rights are no less important today, during the so-called "war on terror".

7. The human rights obligations of the *ICCPR* should be construed robustly, and the corresponding limitations of those rights should be interpreted narrowly. Limitations on *ICCPR*

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[4] *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para. 87, Intervener's Book of Authorities – Vol. I, Tab 8 ("*De Guzman*"); See also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 59, Appellant's (Almrei) Book of Authorities – Vol. II, Tab 20.
[5] *Suresh, ibid.*; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056, Intervener's Book of Authorities – Vol. II, Tab 26 ("*Slaight*"); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-70, Intervener's Book of Authorities – Vol. I, Tab 3 ("*Baker*").
[6] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J. (dissenting), Intervener's Book of Authorities – Vol. II, Tab 21; approved by the majority in *Slaight, supra* at 1056.
[7] GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.
[8] Sarah Joseph *et al*, *The International Covenant on Civil and Political Rights*: *Cases, Materials, and Commentary*, 2d ed. (Oxford: OUP, 2004) at 6-7, Intervener's Book of Authorities – Vol. III, Tab 54; Philippe Sands, *Lawless World*: *America and the Making and Breaking of Global Rules* (London: Penguin Books, 2006) at 10-11, Intervener's Book of Authorities – Vol. III, Tab 56.

rights are subject to the principles of necessity and proportionality.[9] Canada has not derogated from the *ICCPR* pursuant to article 4 of the Convention. Thus, Canada's obligations under the *ICCPR* remain in full force and effect.

B. Section 7 and Section 1: Analytical Framework

8. Section 7 of the *Charter* is breached where there is a deprivation of life, liberty or security of the person contrary to a principle of fundamental justice. A violation of section 7 may be justified if it satisfies the criteria under section 1 of the *Charter*.

9. Amnesty International Canada ("Amnesty International") acknowledges that there may be instances when sufficiently serious and pressing national security concerns require restrictions on the section 7 rights of the detainee.[10] However, national security interests should not delimit the scope of the detainee's section 7 rights. Rather, these interests should be dealt with under section 1 of the *Charter* and should be interpreted consistently with Canada's binding obligations under international human rights law.

10. The Court in *R. v. Malmo-Levine; R. v. Caine* described the proper analytical approach to section 7, including the appropriate balancing that must be undertaken in delineating a principle of fundamental justice.[11] A principle of fundamental justice must fulfill the following criteria: (1) it must be a legal principle; (2) there must be sufficient consensus that the alleged principle is vital or fundamental to our societal notion of justice; and (3) the alleged principle must be capable of being identified precisely and applied in a manner that yields predictable results.[12]

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[9] Joseph *et al, supra* at 30; *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* UN Doc. E/CN.4/1985/4, Annex (1984), art. 12, Intervener's Book of Authorities – Vol. III, Tab 50 ("Siracusa"); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N.P. Engel, 1993) at XXIV, Intervener's Book of Authorities – Vol. III, Tab 55; *J.B. et al v. Canada*, Comm. No. 118/1982, UN Doc.: CCPR/C/28/D/118/1982 (1986) at para. 5 (individual opinion), Intervener's Book of Authorities – Vol. III, Tab 33 ("*Alberta Unions Case*").

[10] The appellants will be referred to as "detainees" throughout. Foreign nationals named in a security certificate are automatically detained under to s. 82(2) of the *IRPA*. Permanent residents are detained under a further warrant, pursuant to s. 82(1) of the *IRPA*. The appellants in this case are either detained in a federal facility in Kingston or are subject to restrictive conditions, including house arrest. This approach to detention is consistent with the Court's decision in *R. v. Therens*, [1995] 1 S.C.R. 613, Intervener's Book of Authorities – Vol. II, Tab 19 ("*Therens*").

[11] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, Appellant's (Harkat) Book of Authorities – Tab 7 ("*Malmo-Levine*").

[12] *Malmo-Levine, ibid.* at para. 113; *Canadian Foundation for Children, Youth and the Law v. Canada (A.G)*, [2004] 1 S.C.R. 76 at para. 8, Intervener's Book of Authorities – Vol. I, Tab 5.

11. To elucidate a principle of fundamental justice, the Court acknowledged that some balancing is required. However, justifications for limiting the section 7 right are inappropriate at this stage. The Court explained:

> The balancing of individual and societal interests within s.7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez, supra*, "in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required " (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer J. commented in *R. v. Swain,* [1991] 1 S.C.R. 933 at p. 977:
>
> > It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*…. [emphasis added].[13]

12. The Court has elaborated the different interests to be balanced under sections 7 and 1. The interests under section 7 are "to be found in the basic tenets of our legal system" whereas the interests under section 1 are "concerned with the values underlying a free and democratic society."[14] Thus, the interests in section 1 are broader. They are interests which justify the infringement of the section 7 right.

13. This distinction is significant because it determines whether the complainant or the state bears the burden of proof. A complainant should not bear the onus of balancing his or her rights against societal public policy interests. The very purpose of section 1 is to limit an individual right where the state has demonstrated that its exercise would be inimical to the realization of collective goals of fundamental importance.[15] Thus, the party seeking to uphold the limitation bears the onus of proving it.

14. National security is a societal interest that should, in a manner conforming to international human rights law, be balanced under section 1 rather than section 7. To date, the Court has considered national security interests both in elucidating the principles of fundamental justice and in

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[13] *Malmo-Levine, supra* at para. 98.
[14] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 67, Intervener's Book of Authorities – Vol. II, Tab 16 ("*Mills*"). See also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503, Intervener's Book of Authorities – Vol. II, Tab 20.
[15] *R. v. Oakes,* [1986] 1 S.C.R. 103 at 136, Intervener's Book of Authorities – Vol. II, Tab 17 ("*Oakes*").

determining whether the violation is justified in a free and democratic society.[16] This double counting unfairly favours the collective interest at the cost of the individual right. Most notably, in *Suresh* the Court weighed Canada's security interests, specifically the threat of terrorism in Canada, to determine whether deportation to torture violated the principles of fundamental justice.[17] However, in determining whether the procedural protections of a deportation proceeding were consistent with the principles of fundamental justice, the Court did not consider Canada's interest in national security. Rather, the Court balanced national security and public safety interests under section 1 to determine whether the violation of the principles of fundamental justice was justified in a free and democratic society.[18]

15. National security should not be considered under section 7 of the *Charter*. National security is not a basic tenet of Canada's *legal* system. Section 7 is concerned with the justice system and its administration. The nature of the interests to be considered at this stage of the analysis are not those falling "in the realm of general public policy" but those falling in the "inherent domain of the judiciary as guardian of the justice system"[19], such as the state's interest in investigating and prosecuting offences[20] or a complainant or witness's privacy or equality rights.[21]

16. Further, national security falls within the realm of public policy, not within the domain of the judiciary. National security matters fall squarely within the responsibility of the legislative and executive branches of government.[22] In some limited cases, national security concerns of a sufficiently serious and pressing nature may be legitimate interests that justify the limitation of rights. However, these interests should only be considered when determining whether the legislature's measure "strikes the right balance" between individual and collective rights generally under section 1.[23] To balance national security against the individual's interest under section 7 would "entirely collapse the s. 1 inquiry into s. 7."[24]

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[16] *Suresh*, *supra*; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 744-45, Appellant's (Almrei) Book of Authorities – Vol. I, Tab 11 ("*Chiarelli*"); *Ruby v. Canada,* [2002] 4 S.C.R. 3 at para. 43, Intervener's Book of Authorities – Vol. II, Tab 24.
[17] *Suresh*, *supra* at para. 45.
[18] *Suresh, supra* at para. 128.
[19] *Re B.C. Motor Vehicle Act, supra* at 503.
[20] *Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 at para. 78, Intervener's Book of Authorities – Vol. I, Tab 2 ("*Application under s. 83.28*").
[21] *Mills, supra* at para. 94.
[22] *Suresh, supra* at para. 85.
[23] *Malmo-Levine, supra* at para. 96.
[24] *Malmo-Levine, ibid*.

17. Balancing national security interests at the justification stage is also required in international law.[25] National security is an express limitation built into several provisions of the *ICCPR*. For the limitation to be permissible, the state must demonstrate that the limitation is justified. General Comment 31 explains:

> ….Any restrictions on [ICCPR] rights must be permissible under the relevant provisions of the Covenant. Where such limitations are permitted, States must in any case demonstrate their necessity and only take measures which are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. [26]

18. Accordingly, the United Nations Human Rights Committee ("HRC") has considered national security claims by the state at the justification stage of the analysis.[27] Placing the burden of justifying a limitation of a right under the *ICCPR* on the state is also required by the Siracusa Principles, which set out the general interpretive principles relating to the justification of limitations. In particular, article 12 requires that "[t]he burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state."[28]

19. The Court's decision in *Malmo-Levine* establishes a renewed and reinvigorated role for section 1 when there is an infringement of section 7. The societal interests contemplated by Lamer J. (as he then was) in obiter in *Re B.C. Motor Vehicles Act*, "natural disasters, the outbreak of war, epidemics and the like", are only a few of the interests that may justify a breach and are balanced under section 1.[29] National security is another societal interest that should be balanced under section 1.

C. The Security Certificate Provisions Violate the Right to Procedural Fairness Protected by the *Charter* and International Norms

20. Sections 33, and 77 through 85 ("security certificate provisions") violate international norms and breach the constitutional right to procedural fairness. These provisions result in a serious deprivation of the detainee's right to life, liberty and security of the person as they permit or require

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[25] International law principles are relevant in both the interpretation of *Charter* right and the justifiable limitations. *Slaight, supra* at 1056-57.
[26] Human Rights Committee, *General Comment No. 31*: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at para 5, Intervener's Book of Authorities – Vol. III, Tab 47.
[27] *Faurisson v. France*, Comm. No. 550/1993, UN Doc.: CCPR/C/58/D/550/1993 (1996) at para. 8, per Evatt, Kretzmer & Klein (concurring), Intervener's Book of Authorities – Vol. III, Tab 34; *Pietraroia v. Uruguay*, Comm. No. 44/1979, UN Doc.: CCPR/C/12/D/44/1979 (1981) at para. 16, Intervener's Book of Authorities – Vol. III, Tab 39.
[28] *Siracusa*, *supra*.
[29] *Re B.C. Motor Vehicle Act*, *supra* at 518.

the preventive detention of a person named in a security certificate and may ultimately result in the removal of the detainee from Canada to a country where his life or freedom is at risk. This deprivation is contrary to the principles of fundamental justice because the security certificate provisions do not provide sufficient procedural protection to the detainee in the face of such serious consequences. Whether the violation of the detainee's section 7 right is justifiable in a free and democratic society for reasons of national security will be addressed under section 1 of the *Charter*.

1. The Security Certificate Provisions Deprive the Appellants of Liberty and Security of the Person

21. The right to liberty is engaged once a person named in a security certificate is detained. [30] The appellants Almrei, Harkat and Charkaoui were detained in provincial remand facilities. The appellants Almrei and Harkat were recently moved to a federal facility in Kingston. Although the appellant Charkaoui has been released from a detention facility, he is subject to house arrest and subject to other severely restrictive conditions, which deprive him of his liberty.[31] Accordingly, all three appellants, having been named in security certificates and detained, are denied the right to liberty.

22. The right to security of the person, and possibly the right to life, is also engaged once the security certificate is deemed reasonable as it constitutes a removal order that may not be appealed against.[32] The *IRPA* offers hollow protection to a detainee named in a security certificate who is at risk of being tortured upon removal from Canada. Contrary to the submission of the Attorney General of Canada,[33] neither section 112 of the *IRPA* (application for protection) nor section 115 of the *IRPA* (the principle of non-refoulement) necessarily safeguard a protected person determined to be inadmissible on grounds of security or other serious grounds, or a non-protected person named in a security certificate, against removal to torture.[34] The protections offered by sections 112 and 115 are severely limited for detainees whose certificates are found to be reasonable, including protected

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[30] *IRPA,* s. 82.
[31] *Charkaoui (Re)*, [2004] F.C.J. No. 1090, Intervener's Book of Authorities – Vol. I, Tab 6 ("*Re Charkaoui*"); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 49, Intervener's Book of Authorities – Vol. I, Tab 4. The Court recently revised Harkat's conditions of detention: *Harkat v. The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness Canada,* 2006 FC 628, Intervener's Book of Authorities – Vol. I, Tab 9; Although in the context of s. 9 of the *Charter*, the Court in *Therens, supra* concluded that detention includes "psychological compulsion" (at 644).
[32] *IRPA,* s. 81.
[33] Memorandum of Argument of the Attorney General of Canada (Charkaoui) at para. 5.
[34] This is the effect of ss. 80(c), 81(a), 112(3)(a) and (b) and 115(2)(a) and (b) of the *IRPA*.

persons, where in the opinion of the Minister such persons constitute a danger to the security of Canada or because of the nature and severity of the acts they have committed.

23. Indeed, the Federal Court recently upheld a decision of the delegate of the Minister of Citizenship and Immigration denying an application for protection submitted by a detainee, despite the delegate's finding that the detainee faced a risk to his life, or of torture or of cruel and unusual treatment or punishment, if he were removed to Egypt, his country of nationality.[35] Since the security certificate provisions do not provide adequate protection for detainees who face these risks, the provisions deprive the detainees of security of the person, and in some cases, the right of the detainee to life itself.[36]

2. The Deprivations Violate the Principles of Fundamental Justice

24. The security certificate provisions offend the principles of fundamental justice, specifically the principle that the detainee must be afforded procedural fairness in the course of the security certificate proceedings. The principle of procedural fairness in administrative hearings is a "legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate."[37] The principle of procedural fairness in administrative hearings is well-accepted in both domestic and international law. In *Suresh,* the Court held that "[t]he principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker,* are the same principles underlying that duty."[38]

25. The principle of procedural fairness in administrative proceedings is also guaranteed in international law by virtue of article 10 of the *UDHR*, which provides that everyone is entitled to a "full and public hearing". It is further guaranteed in articles 13 and 14 of the *ICCPR*, which require procedural fairness.[39] The security certificate provisions do not satisfy Canada's international

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[35] *Jaballah (Re),* 2006 FC 346 at para. 12, Intervener's Book of Authorities – Vol. I, Tab 11. In the case of the appellant Charkaoui, although the PRRA indicated that there was a likelihood of torture, threats to life or a risk of cruel or unusual treatment or punishment if Mr. Charkaoui was removed to Morocco, two other assessments found that he represented a danger to Canadian security under s. 113 of the IRPA: *Re Charkaoui, supra* at para. 6. In the case of the appellant Almrei, the decision under s. 115 of the *IRPA* is still pending.

[36] *Singh et al v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 207, Intervener's Book of Authorities – Vol. II, Tab 25; *Suresh, supra* at paras. 52-54.

[37] *Malmo-Levine, supra* at para 113.

[38] *Suresh, supra* at para. 113.

[39] *Landry v. Canada*, Comm. No. R.25/112, UN Doc.: CCPR/C/27/D/R.25/112 (1986) at para. 9.1, Intervener's Book of Authorities – Vol. III, Tab 36 ("*Y.L.*"); *Morael v. France*, Comm. No. 207/1986, UN Doc.: CCPR/C/36/D/207/1986 (1989) at para. 9.3, Intervener's Book of Authorities – Vol. III, Tab 37 ("*Morael*"); *Ahani v. Canada*, Comm. No. 1051/2002, UN Doc: CCPR/C/80/d/1051/2002 (2004), Intervener's Book of Authorities – Vol. III, Tab 30 ("*Ahani*").

obligations of procedural fairness. Indeed, the United Nations Human Rights Committee in its most recent Concluding Observations on Canada expressed concern regarding the legality of the security certificate provisions under the *ICCPR*.[40]

26. Further, the content of the principle of procedural fairness in administrative hearings can be identified with predictability by virtue of the application of the principles established by the Court in *Baker* which include (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or the individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choice of procedure made by the agency itself.[41]

27. Applying these principles, the security certificate review procedure demands rigorous procedural protection. First, the security certificate procedure resembles a judicial proceeding. It is an adversarial process between the state and the detainee and it implicates the judiciary, a designated judge, who is called upon to exercise judicial powers. By virtue of the security certificate provisions, a designated judge presides over a hearing to determine the reasonableness of the security certificate based on evidence presented by both parties (albeit based in part on secret information from the Ministers). The designated judge rules on whether the detainee should be released and, if so, the conditions of his/her release. The designated judge evaluates whether information should remain secret and, if so, whether a summary of this secret information can be provided to the detainee without impairing national security. Because the security certificate proceedings are highly adversarial and the designated judge is closely involved at all stages of the proceedings, significant procedural protections are warranted. Moreover, much of the hearing is conducted in secret, with no public scrutiny.

28. The serious consequences of the security certificate scheme and the absence of an appeal requires strong procedural safeguards. The issuance of a security certificate, in practice, results in the detention of permanent residents and must result in the detention of foreign nationals. In

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[40] Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, UNHRCOR, 85th Sess., UN Doc. CCPR/C/CAN/CO/5 (2006) at para. 14, Intervener's Book of Authorities – Vol. III, Tab 45. Similar concerns were raised by the UN Working Group on Arbitrary Detention following a visit to Canada in 2005: *Report of the Working Group on Arbitrary Detention's Visit to Canada (1-15 June 2005)*, Annex to Commission on Human Rights, *Civil and Political Rights Including the Question of Torture and Detention*, UNCHROR, 62d Sess., UN Doc. E/CN.4/2006/7/Add.2 (2005), paras. 41-45, 84-86, Intervener's Book of Authorities – Vol. III, Tab 49.

[41] *Baker, supra* at paras. 23-27.

addition, the reasonableness determination of the security certificate is final – it is conclusive proof that the detainee is inadmissible, it precludes the detainee from applying for protection under section 112 of the *IRPA* and it is a removal order that may not be appealed against.[42]

29. Most importantly, stringent procedural protections are warranted because the subject of the certificate will suffer grave consequences which are as or more serious than those in the criminal process. As in *Suresh,* the Court "cannot ignore the possibility of grievous consequences such as torture and death" that may arise as a result of the security certificate provisions.[43] Once the security certificate is deemed reasonable, the detainee not only faces removal from Canada, but also the possibility of removal to a country where the detainee faces a risk to his life, or torture, or cruel and unusual treatment or punishment. Given the risk that the detainee may be subjected to torture as a result of the removal, substantial procedural protections are required.[44]

30. Further, article 3 of the *Convention Against Torture* ("CAT"), prohibits the deportation of persons to states where there are substantial grounds for believing that the person would be tortured. This also informs section 7 of the *Charter*.[45] The removal to torture under any circumstances violates Canada's obligations under the *CAT.* The real risk that the detainee will be tortured upon removal from Canada militates strongly in favour of a higher level of procedural protection.

31. Finally, the security certificate provisions leave little or no discretion to the Minister to choose or tailor the security certificate procedure to the circumstances of a particular detainee. As discussed above, the security certificate provisions create a procedure akin to a judicial proceeding, both in determining the reasonableness of the certificate and in the review of detention. In doing so, Parliament has signalled its intent that the detainee be entitled to the level of procedural protection afforded to parties in a "complete" judicial process.

32. Nevertheless, the security certificate procedure must satisfy the minimum constitutional standards for a fair hearing in all the circumstances. In Amnesty International's view, the security certificate provisions do not afford sufficient procedural protections to the detainee. The provisions unduly circumscribe the detainee's right to be informed of the case to be met by virtue of sub-

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[42] *IRPA*, s. 81.
[43] *Suresh*, *supra* at para. 52.
[44] *Suresh*, *supra* at para. 118.
[45] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Can. T.S. 1987 No. 36 (entered into force 26 June 1987), Intervener's Book of Authorities – Vol. III, Tab 43; *Suresh*, *ibid*.

paragraphs 78(b) and (h) of the *IRPA*, and his opportunity to challenge the evidence against him by virtue of sub-paragraphs 78(e) and (g) of the *IRPA*. Even where a summary is provided to the detainee, it could be unfairly prejudicial as some of the secret evidence will not be included in the summary and yet will influence the judge's decision-making. These procedural deficiencies undermine the opportunity for the detainee to meet the case against him and deprive the detainee of a real opportunity to be heard regarding either his or her inadmissibility under sub-paragraph 78(i) of the *IRPA* and to contest his or her detention under section 84 of the *IRPA*.

33. The principles of fundamental justice require that the detainee enjoy the right to full answer and defence including disclosure of the Ministers' evidence and the right to cross-examine the witnesses of the Ministers. As discussed above, the Court's approach in *Malmo-Levine* mandates that national security interests not be considered in elucidating the scope of the principles of fundamental justice, but rather in determining whether the principle may be justifiably restricted. As a result, the Court's earlier jurisprudence regarding the scope of the right to full answer and defence must be examined through the new approach endorsed in *Malmo-Levine*.

34. The nature of the security certificate procedure and the severity of the potential consequences to the detainee calls for full disclosure by the Ministers to the detainee. The Court explained in *R. v. Stinchcombe* that full disclosure is necessary to ensure that the innocent are not convicted.[46] In a security certificate proceeding, where the consequences may be as or more serious than criminal proceedings, the procedural guarantees should be akin to those in a criminal proceeding. A summary of the secret and untested information presented by the Ministers to the designated judge is insufficient for the detainee to demonstrate that the security certificate is unreasonable or that the detainee should be released.

35. In addition, the detainee should have the right to cross-examine the Ministers' witnesses who testify before the designated judge. The Court has recently affirmed that the right to cross-examination is essential "in the pursuit of justice and an indispensable ally in the search for truth. At times there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."[47] Without cross-examination, the pursuit of justice is thwarted and the truth is easily concealed. The right to rigourously and comprehensively test the evidence is especially important in security certificate

[46] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336, Intervener's Book of Authorities – Vol. II, Tab 18.
[47] *R. v. Lyttle,* [2004] 1 S.C.R. 193 at para. 1, Intervener's Book of Authorities – Vol. II, Tab 15.

proceedings because sub-paragraph 78(j) of the *IRPA* permits the designated judge to consider any information, including information that would be inadmissible as evidence in any other civil or criminal court proceeding. This information may include, for example, information extracted by torture, which is illegally obtained, as well as being demonstrably and notoriously unreliable.[48]

36. The *ICCPR* affirms the necessity of disclosure and cross-examination to ensure a fair hearing. Article 14(1) of the *ICCPR* applies to administrative proceedings, including immigration proceedings.[49] The HRC has concluded that article 14(1) requires "a number of conditions such as equality of arms [and] respect for the principle of adversary proceedings."[50] In determining whether a state has violated article 14(1), the HRC will consider whether a party "did not have the possibility of presenting evidence at his disposal" or "whether the court based its decision on evidence admitted without being open to challenge by the parties."[51] The protections of article 14(1) apply to the security certificate proceedings.

37. The procedural guarantees found in article 14(2) through (6), which represent the minimum guarantees in criminal proceedings, must also apply to the security certificate procedure. International law is meant to offer fair trial protections to individuals engaged against the full machinery of the state in proceedings that affect their fundamental rights to life, liberty and security of the person. As discussed above, the consequences of the security certificate proceedings are as, or more, serious than those in the criminal process and, accordingly, the guarantees akin to those found in articles 14(2) through (6) must apply to the security certificate procedure.

38. In particular, article 14(3)(e) of the *ICCPR* affirms the importance of cross-examination to test the evidence presented by the state.[52] Article 14(3)(e) guarantees the "right to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Further, the HRC has held that

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[48] *A and others v. Secretary of State for the Home Department (No 2),* [2005] UKHL 71, Intervener's Book of Authorities – Vol. III, Tab 29.
[49] *Y.L., supra* at para. 9.2; *Ahani, supra*.
[50] *Morael, supra* at para. 9.3.
[51] *Morael, ibid.* at para 9.4.
[52] The HRC has also recognized the importance of cross-examination under Article 14(1) in the context of a criminal trial in *Gridin v. Russian Federation*, Comm. No. 770/1997, UN Doc.: CCPR/C/69/D/770/1997 (2000) at para 8.2, Intervener's Book of Authorities – Vol. III, Tab 35.

article 14(3)(e) of the *ICCPR* requires the state to disclose evidence to the responding party as the failure to do so denies the right to a fair trial. [53]

39. Accordingly, the security certificate provisions violate international norms and section 7 of the *Charter*. As discussed, it may be justifiable to limit the extent of disclosure to the detainee or to restrict the right of cross-examination where sufficiently serious national security interests are implicated, which is examined under section 1 of the *Charter.*

3. The Security Limitations on Procedural Fairness are Not Justified

40. The security certificate provisions are neither reasonable nor demonstrably justified in a free and democratic society.

41. National security interests cannot justify the violation of the procedural rights guaranteed by article 14 of the *ICCPR*. The restriction on those rights for reasons of national security are narrow. The only restriction on procedural rights stipulated in article 14(1) for reasons of national security is the right of access to the hearing by the press or the public. Thus, national security interests cannot justify a restriction on the extent of disclosure to the detainee or the right of cross-examination. Further, as discussed above, Canada has not derogated from the *ICCPR* pursuant to article 4 and thus Canada's obligations remain in full force and effect.

42. Turning to section 1 of the *Charter*, Amnesty International concedes that the objective of ensuring Canada's security, including the protection of confidential sources and investigative methods, is a pressing and substantial objective. Amnesty International also concedes that this objective is rationally connected to the measures taken to protect disclosure of sources and methods of intelligence set out in the security certificate provisions of the *IRPA*.

43. The security certificate provisions are, however, more restrictive of individual rights than is strictly necessary in order to safeguard national security. To be reasonable and demonstrably justified, the impugned measures must impair the infringed right or freedom as little as possible.[54] The security certificate provisions do not impair the detainee's section 7 rights as little as possible

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[53] *Peart and Peart v. Jamaica*, Comm. No. 482/1991, UN Doc.: CCPR/C/54/D/482/1991 (1995) at paras. 11.4-11.5, Intervener's Book of Authorities – Vol. III, Tab 38. This guarantee is echoed in Article 6(2)(d) of the *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 4 November 1950, Eur. T.S. 5, Intervener's Book of Authorities – Vol. III, Tab 44.

[54] *Harper v. Canada (A.G.)*, [2004] 1 S.C.R. 827 at para. 110, Intervener's Book of Authorities – Vol. I, Tab 10; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 2 S.C.R. 199 at para. 160, Intervener's Book of Authorities – Vol. II, Tab 23.

because the use of an *amicus curiae* or security-cleared counsel, such as an enhanced Special Advocates model of the United Kingdom, would better protect the procedural rights of the detainee. There have been concerns raised by Amnesty International and others, including several special advocates, that the United Kingdom model is inadequate to satisfy the requirements of the ECHR. Nevertheless, Amnesty International submits, *in principle*, such a scheme would be less restrictive of fair hearing rights than under the *IRPA*. Another less impairing alternative would be to disclose the secret evidence to the detainee's counsel subject to an undertaking of confidentiality.

44. Under the United Kingdom's *Special Immigration Appeals Commission Act 1997*, the Attorney General or Solicitor General is empowered to appoint a security-cleared Special Advocate to represent the interests of a person appealing a deportation order in hearings before the Special Immigration Appeals Commission ("SIAC").[55] The *Special Immigration Appeals Commission Rules 2003* ("*SIAC Rules*") require the appointment of a Special Advocate before the Home Secretary can introduce and rely on evidence that is not disclosed to the appellant or his or her representative.[56]

45. The *SIAC* procedure was enacted in response to the European Court of Human Rights' ("ECtHR") decision in *Chahal v. United Kingdom,* which held that the state is categorically prohibited from deporting persons where they face a real risk of torture, even when they are a security threat.[57] The ECtHR reasoned that although the "use of confidential material may be unavoidable where national security is at stake", there were less restrictive means of achieving this objective than a blanket non-disclosure of secret information, such as the use of a "security cleared counsel instructed by the court."[58] Accordingly, the ECtHR concluded that the then procedures breached article 5(4) of the *ECHR*.

46. Further, the severe deleterious effects on the detainees' rights outweigh the salutary effects of the *IRPA*, the enhancement of national security. The security certificate provisions, as currently enacted, fall into the dangerous trap described by the United Nations Commission on Human Rights:

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[55] (U.K.), 1997, c. 68 ("*SIAC Act*").
[56] (U.K.), S.I. 2003/1034.
[57] *Chahal v. United Kingdom* (1996), 1 BHRC 405 (Case 70/1995/576/662) (Eur. Ct. H.R.), Intervener's Book of Authorities – Vol. III, Tab 32 ("*Chahal*").
[58] *Chahal, ibid.* at paras. 131, 144.

> Ensuring that innocent people do not become the victims of counter-terrorism measures should be an important component of the anti-terrorism strategy. This requires that States adhere strictly to their international obligations to uphold human rights and fundamental freedoms. Counter-terrorism strategies pursued before and after 11 September have sometimes undermined efforts to enhance respect for shared human rights values. Excessive measures have been taken in several parts of the world that suppress or restrict individual rights including privacy rights, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly. In order to construct the solid human rights culture required to root out terrorism, there is a need to bridge the gulf between human rights norms and their application in reality.[59]

47. Accordingly, the security certificate provisions should be declared unconstitutional.

D. Canada Detains Foreign Nationals Arbitrarily

48. Subsections 82(2) and 84(2) of the *IRPA* deprive non-citizens who are not permanent residents ("foreign nationals") of their right not to be arbitrarily detained under section 9 of the *Charter* and under international law, including article 9 of the *UDHR* and article 9 of the *ICCPR*. Subsections 82(2) and 84(2) do so in several ways. Section 9 of the *Charter* provides that "everyone has the right not to be arbitrarily detained or imprisoned."

49. First, with respect to administrative detention, the *IRPA* adversely discriminates between permanent residents and foreign nationals. Once the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness sign a security certificate, subsection 82(2) of the *IRPA* mandates that the foreign national named in the certificate be detained. By contrast, the detention of a permanent resident named in a certificate occurs only if the Ministers issue a warrant under subsection 82(1) of the *IRPA* for the permanent resident's arrest and detention.

50. Second, subsection 84(2) draws a discriminatory distinction between permanent residents and foreign nationals with respect to access to judicial review of detention. Subsection 83(1) of the *IRPA* requires a judge to commence a review of the detention of a permanent resident within 48 hours of detention, and subsection 83(2) requires that the permanent resident be returned before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize. By contrast, subsection 84(2) of the *IRPA* does not make judicial review of the detention of a foreign national available unless the foreign national has not been

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[59] Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, UN Doc. E/CN.4/2002/18 (2002) at para. 9, Intervener's Book of Authorities – Vol. III, Tab 41.

removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable. Once that period has elapsed, it is only on application by the foreign national that judicial review of the ongoing detention is triggered. In effect, this means that a foreign national who challenges his or her deportation cannot seek judicial review of his or her detention for a considerable period of time.

51. This discriminatory treatment with respect to detention and access to judicial review of detention is prohibited under section 9 of the *Charter* and under international law. There is no rational connection or reasonable justification for the legitimate national security objective of the *IRPA* to discriminate between detainees who are permanent residents and detainees who are foreign nationals.

52. "Detention" within the meaning of section 9 of the *Charter* includes not only deprivation of physical liberty or a legally enforceable demand, but also includes "psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice".[60] Here the appellants have been and, in the cases of Almrei and Harkat, continue to be incarcerated. Even though Charkaoui has subsequently been released on conditions, he is under house arrest and subject to severe restrictions on his liberty. Therefore, all three appellants are subject to "detention" in these appeals within the meaning of section 9 of the *Charter*.

53. The *automatic* detention of foreign nationals under subsection 84(2) violates section 9 of the *Charter* because it is arbitrary. These appeals differ from *R. v. Hufsky*, where the detention was at the absolute discretion of a police officer.[61] Subsection 84(2) lies at the other extreme of arbitrariness: it applies to all foreign nationals, regardless of their individual circumstances. The Court held in *Hufsky* that "discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."[62] Under subsection 84(2) it is the categorical nature—the very absence of criteria to determine an individual's security risk and consequent need for preventative detention—that renders the detention arbitrary. Drawing on the principles under article 9 of the *ICCPR*, the decision to detain must be particularized to the individual concerned: it must be

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[60] *Therens*, *supra* at 644.
[61] *R. v. Hufsky*, [1988] 1 S.C.R. 621, Intervener's Book of Authorities – Vol. II, Tab 14 ("*Hufsky*").
[62] *Hufsky, ibid.* at 633.

necessary and proportional in all the circumstances of the case, in order to conform with section 9 of the *Charter*.[63]

54. Article 9 of the *ICCPR* amplifies the general guarantee against arbitrary detention in article 9 of the *UDHR*. Article 9(1) provides:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Importantly, unlike some provisions of the *ICCPR*, there are no enumerated grounds—including national security—for limiting the right against arbitrary detention. Detention applies to all serious deprivations of liberty, including house arrest.[64] Both the arrest and subsequent detention must be specifically authorised and sufficiently circumscribed by law.[65] Although sections 82 through 84 of the *IRPA* are authorized and limited by law, they violate the further requirement that the law itself must not be arbitrary.

55. Within the meaning of article 9, "arbitrariness" imports notions of "inappropriateness, injustice and lack of predictability."[66] It is clear from the *travaux préparatoires* that detention which is "incompatible with the principles of fundamental justice or with the dignity of the human person" would be arbitrary, contrary to article 9.[67] Importantly, the decision to detain must be particularized to the individual concerned: it must be necessary and proportional in all the circumstances of the case.[68] The state is under an obligation to prove that in light of the "[detainee]'s particular circumstances, there were not less restrictive means…"[69] Not only are these principles important as free-standing obligations under international law, they inform the interpretation under the *Charter*.[70]

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[63] *A. v. Australia*, Comm. No. 560/1993, UN Doc.: CCPR/C/59/D/560/1993 (1997) at para. 9.2, Intervener's Book of Authorities – Vol. III, Tab 27.
[64] Human Rights Committee, *General Comment No. 28*: *Equality of Rights Between Men and Women*, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 14, Intervener's Book of Authorities – Vol. III, Tab 46.
[65] Joseph *et al*, *supra* at 308-309.
[66] *A. v. Australia, supra* at paras. 3.1 and 7.6. ; *van Alphen v. the Netherlands*, Comm. No. 305-1988, UN Doc.: CCPR/C/39/D/305/1988 (1990) at para. 5.8, Intervener's Book of Authorities – Vol. III, Tab 40.
[67] *A. v. Australia*, *supra* at para. 7.6.
[68] *Ibid*. at para. 9.2. See also *General Comment 31*, *supra* at para. 8.3.
[69] *C. v. Australia*, Comm. No. 900/1999, UN Doc.: CCPR/C/76/D/900/1999 at para. 8.2, Intervener's Book of Authorities – Vol. III, Tab 31 [emphasis added].
[70] *Slaight, supra* at 1056; *Baker*, *supra* at paras. 69-70; *Suresh, supra* at para. 59.

E. Arbitrary Detention of Foreign Nationals Is Not Justified

56. The arbitrary detention of foreign nationals under subsection 84(2) is not justified under section 1 of the *Charter*. Although the Court has recognised that the detention of non-citizens, who pose serious threats to national security, pending the resolution of immigration proceedings is a pressing and substantial objective in a free and democratic society,[71] the automatic detention of all foreign nationals who are subject to a security certificate—regardless of their security risk—fails the proportionality analysis under *Oakes*.

57. The distinction drawn between permanent residents and foreign nationals for the purposes of automatic detention in subsections 82(1) and (2), and access to judicial review of detention, is discriminatory and contrary to the value of equality that is entrenched in the *Charter*.[72] The detention of all foreign nationals who are subject to a security certificate—regardless of their security risk—is analogous to the detention, forcible relocation, and expulsion of Canadians of Japanese descent during World War II, which was made on the basis of race and not because of an individualized assessment of a person's security risk.[73]

58. The Court has held that distinctions between citizens and non-citizens, as well as permanent residents and other non-citizens, are appropriate in the immigration context for *some* purposes.[74] But it would be a mischaracterization to suggest that the Court has approved any distinction, for *any* purpose, drawn between citizens, permanent residents, and other non-citizens. The seminal *Charter* case of *Andrews v. Law Society of British Columbia* belies that suggestion.[75] Citizenship status constitutes an analogous ground under section 15 of the *Charter*.[76]

59. Accordingly, it is inappropriate to point to the distinction drawn between citizens and permanent residents in subsections 6(1) and (2) of the *Charter* as justification for their differential treatment outside the context of mobility rights and "the right to enter, remain in and leave

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[71] *Suresh, supra* at para. 128.
[72] See Peter W. Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 Sup. Ct. L. Rev. (2d) 113, Intervener's Book of Authorities – Vol. III, Tab 53, and the cases cited therein.
[73] *Reference Re: Persons of Japanese Race*, [1946] S.C.R. 248, aff'd [1947] 1 D.L.R. 577 (P.C.), Intervener's Book of Authorities – Vol. II, Tab 22. See the comments disapproving this decision by Binnie J. in *Application under s. 83.28, supra* at para. 114.
[74] *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84 at paras. 58-59, Intervener's Book of Authorities – Vol. I, Tab 7; *Chiarelli*, *supra*.
[75] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Intervener's Book of Authorities – Vol. I, Tab 1.
[76] *Ibid*.; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 2, Intervener's Book of Authorities – Vol. I, Tab 12.

Canada".[77] In this respect, the House of Lords held in *A and Others (No. 1)* that the then legislative scheme for the indefinite detention of non-citizens who posed a threat to national security was discriminatory contrary to article 14 of the *ECHR* because the law authorizing the detention did not apply equally to citizens who presented qualitatively the same threat to national security. Consequently, the House of Lords found that neither the derogation order from the *ECHR* nor the scheme was proportional or justified.[78] The *Charter* cannot be understood to entrench arbitrary and discriminatory distinctions.

60. International law is a guide to determining what may constitute a pressing and substantial objective under section 1 of the *Charter*.[79] Article 2(1) of the *ICCPR* specifically prohibits limitations of Covenant rights on the basis of national origin. Moreover, paragraph 4 of the *General Recommendation No. 30* of the United Nations Committee on the Elimination of Racial Discrimination against Non-Citizens explicitly provides:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4 of the Convention relating to special measures is not considered discriminatory.[80]

Further, paragraph 3 of the *General Recommendation* provides that "[a]lthough some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons." To do otherwise would violate article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

61. There is no rational connection between the objective—namely, protecting society against threats to national security—and the means chosen. The measures "must not be arbitrary, unfair or based on irrational considerations."[81] The legislation draws an improper distinction between permanent residents and foreign nationals. It would be irrational and capricious to infer, by virtue only of a person's status as a foreign national, that they necessarily constitute a greater security risk

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[77] Memorandum of Argument of the Attorney General of Canada (Almrei) at para. 62.
[78] *A and Others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 at para.73, per Lord Bingham of Cornhill, in the leading judgment (H.L.), Intervener's Book of Authorities – Vol. III, Tab 28.
[79] *Slaight, supra* at 1056-57.
[80] UN Doc. HRI/GEN/REV.7/ADD.1, (May, 2005), Intervener's Book of Authorities – Vol. III, Tab 42.
[81] *Oakes, supra* at 139.

than a permanent resident. Contrary to the submissions of the Attorney General of Canada,[82] McGillis J. in *Ahani v. Canada (T.D.)* did not consider the differential treatment between permanent residents and foreign nationals.[83] McGillis J. merely referred to affidavit evidence from a CSIS officer who explained Canada's reasons for seeking the detention of alleged terrorists. There was no constitutional challenge to the discriminatory treatment between permanent residents and non-citizens at issue in that case.

62. Moreover, even assuming that transience is a security concern, citizenship status is not the appropriate marker for a person's security status. A less restrictive and more effective means under section 1 would be an individualized risk assessment. The government cannot respond that such an assessment is not as effective as automatic detention in protecting national security: it is precisely the approach taken with respect to permanent residents. More fundamentally, "transience" or a person's security status bears no relation whatever to whether or not an individual should have access to judicial review in a timely manner in order to test the lawfulness of his or her detention.

63. Mere administrative efficiency is not an appropriate justification under section 1 of the *Charter*.[84] The government has not discharged its onus under section 1. The means chosen are disproportionate to the objective sought. The prejudicial effects of the arbitrary distinction outweigh its salutary effects.

64. The Attorney General of Canada has not offered a pressing and substantial objective that withstands scrutiny for the arbitrary detention of foreign nationals. As a result, their arbitrary detention is not justified in a free and democratic society. The impugned provisions should be declared unconstitutional.

PART IV—SUBMISSIONS ON COSTS

65. Amnesty International neither seeks costs or expects that costs will be awarded against it.

PART V—ORDER SOUGHT

66. Sections 33, 77-85 of the *IRPA* should be declared unconstitutional and of no force and effect.

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[82] Memorandum of Argument of the Attorney General of Canada (Almrei), at para. 67.
[83] *Ahani v. Canada (T.D.)*, [1995] 3 F.C. 669 at 677, Appellant's (Almrei) Book of Authorities – Vol. I, Tab 4.
[84] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 110, Intervener's Book of Authorities – Vol. I, Tab 13.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF MAY, 2006 BY:

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Solicitors for Amnesty International

PART VI—TABLE OF AUTHORITIES

		Paragraph
	Domestic Jurisprudence	
1.	*Ahani v. Canada (M.E.I.)*, [1995] 3 F.C. 669	61
2.	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143	58
3.	*Application under s. 83.28 of the Criminal Code,* [2004] 2 S.C.R. 248	15, 57
4.	*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817	5, 26, 55
5.	*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 177	21
6.	*Canadian Foundation for Children, Youth and the Law v. Canada (A.G.),* [2004] 1 S.C.R. 76	10
7.	*Charkaoui (Re),* [2004] F.C.J. No. 1090	21, 23
8.	*Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711	14, 58
9.	*Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84	58
10.	*De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436.	4
11.	*Harkat v. The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness Canada,* 2006 FC 628.	21
12.	*Harper v. Canada (A.G.),* [2004] 1 S.C.R. 827.	43
13.	*Jaballah (Re),* 2006 FC 346.	23
14.	*Lavoie v. Canada*, [2002] 1 S.C.R. 769	58
15.	*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504	63
16.	*R. v. Hufsky*, [1988] 1 S.C.R. 621	53
17.	*R. v. Lyttle,* [2004] 1 S.C.R. 193	35
18.	*R. v Malmo Levine; R. v. Caine*, [2003] 3 S.C.R. 571	10, 11, 16, 24

19.	*R. v. Mills*, [1999] 3 S.C.R. 668	12, 15
20.	*R. v. Oakes,* [1986] 1 S.C.R. 103	13, 61
21.	*R. v. Stinchcombe*, [1991] 3 S.C.R. 326.	34
22.	*R. v. Therens*, [1985] 1 S.C.R. 613	9, 21, 52
23.	*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486	12, 15, 19
24.	*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313	5
25.	*Reference Re: Persons of Japanese Race*, [1946] S.C.R. 248, aff'd [1947] 1 D.L.R. 577 (P.C.).	57
26.	*RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199.	43
27.	*Ruby v. Canada,* [2002] 4 S.C.R. 3	14
28.	*Singh et al v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177	23
29.	*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038	5, 17, 55, 60
30	*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1	4, 5, 14, 16, 23, 24, 29, 30, 55, 56
	International Jurisprudence	
31.	*A. v. Australia*, Comm. No. 560/1993, UN Doc.: CCPR/C/59/D/560/1993 (1997)	53, 55
32.	*A and Others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (H.L.)	59
33.	*A and Others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71.	35
34.	*Ahani v. Canada*, Comm. No. 1051/2002, UN Doc: CCPR/C/80/d/1051/2002 (2004)	25, 36
35.	*C. v. Australia*, Comm. No. 900/1999, UN Doc.: CCPR/C/76/D/900/1999	55
36.	*Chahal v. United Kingdom* (1996), 1 BHRC 405 (Case 70/1995/576/662) (Eur. Ct. H.R.)	45

50.	Human Rights Committee, *General Comment No. 31*: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004)	17, 55
51.	*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S., Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976)	1, 25, 38, 54
52.	*Report of the Working Group on Arbitrary Detention's Visit to Canada (1-15 June 2005)*, Annex to Commission on Human Rights, *Civil and Political Rights Including the Question of Torture and Detention*, UNCHROR, 62d Sess., UN Doc. E/CN.4/2006/7/Add.2 (2005)	25
53.	*Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* UN Doc. E/CN.4/1985/4, Annex (1984)	7, 18
54.	*Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71	6, 54
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55.	Richard Goldstone, "Combatting Terrorism and Protecting Civil Liberties" in Richard Ashby Wilson, ed., *Human Rights in the "War on Terror"* (Cambridge: CUP, 2005), 157, p.166	1
56.	Peter W. Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 Sup. Ct. L. Rev. (2d) 113	57
57.	Sarah Joseph *et al, The International Covenant on Civil and Political Rights*: *Cases, Materials, and Commentary*, 2d ed. (Oxford: OUP, 2004), pp. 6-7, 30, 308-309	6, 7, 54
58.	Manfred Nowak, *U.N. Covenant on Civil and Political rights: CCPR Commentary*, 2d ed. (Arlington: N.P. Engel, 1993), pp. XXII-XXIV	7
59.	Philippe Sands, *Lawless World*: *America and the Making and Breaking of Global Rules* (London, Penguin Books, 2006), pp. 10-11	6

PART VII—STATUTORY PROVISIONS

1.	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11, ss. 1, 6, 7, 9, and 15	1, 8, 48, 51, 58, 59
2.	*Immigration and Refugee Protection Act*, S.C. 2001, c.27, ss. 3(3)(f), 77-85, 112, and 115	1, 2, 3, 9, 21, 22, 23, 28, 35, 48, 49, 50
3.	*U.K. Special Immigration Appeals Commission Act 1997,* (U.K.), 1997, c. 68	44, 45
4.	*U.K. Special Immigration Appeals Commission Rules 2003,* (U.K.), S.I. 2003/1034	44, 45

Court File No.: 30929
Court File No.: 31178
Court File No.: 30762

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

BETWEEN:

HASSAN ALMREI

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AND

B E T W E E N:

MOHAMED HARKAT

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE ATTORNEY GENERAL OF CANADA

Respondents

AND

B E T W E E N:

ADIL CHARKAOUI

Appellant

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

-and-

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO); UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS WATCH; CANADIAN COUNCIL OF AMERICAN-ISLAMIC RELATIONS AND CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION; CANADIAN ARAB FEDERATION; CANADIAN CIVIL LIBERTIES ASSOCIATION; CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP AND NATIONAL ANTI-RACISM COUNCIL OF CANADA; AMNESTY INTERNATIONAL CANADA; CANADIAN BAR ASSOCIATION; FEDERATION OF LAW SOCIETIES OF CANADA; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND ATTORNEY GENERAL OF ONTARIO

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER, AMNESTY INTERNATIONAL

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