Court file no. 31597

SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ADIL CHARKAOUI

Appellant

-and-

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

-and-

AMNESTY INTERNATIONAL CANADA, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL, ASSOCIATION QUÉBECOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, ATTORNEY GENERAL OF ONTARIO, BARREAU DU QUÉBEC, CANADIAN BAR ASSOCIATION and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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OVERVIEW

1. The principle of procedural fairness protected by section 7 of the *Canadian Charter of Rights and Freedoms*[1](the *Charter*) and international human rights norms requires that, in the context of a security certificate proceeding, the circumstances relevant to whether information may have been obtained through torture or other cruel, inhuman or degrading treatment or punishment or through coercion ("prohibited means") must be disclosed to the Ministers, the designated judge, and the named person. Accordingly, any interpretation of the *Canadian Security Intelligence Service Act*[2] (*CSIS Act*) or the *Immigration and Refugee Protection Act* [3] (*IRPA*) that authorizes the destruction of such information, and thereby precludes the disclosure of these circumstances, violates the *Charter* and international human rights norms.

PART I—FACTS

2. This appeal arises in the context of the fourth review of Mr. Charkaoui's detention pursuant to the security certificate procedure under the *IRPA*.[4] The Federal Court of Appeal's judgment was released prior to *Charkaoui v. Canada*, where this Court found that the security certificate procedure violated the right to a fair trial and declared sections 33 and 77-85 of the *IRPA* unconstitutional.[5]

3. In assessing Mr. Charkaoui's ongoing detention, the designated judge considered existing and new information filed by the Minister of Citizenship and Immigration and the Solicitor General of Canada (the "Ministers"). Most of this information was filed confidentially with the designated judge on the basis that its

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[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
[2] *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.
[3] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[4] Subsection 83(2) of *IRPA*.
[5] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.

disclosure would be injurious to national security or the safety of any person.[6] As a result, Mr. Charkaoui received only summaries of this information.[7]

4. A few days prior to the hearing, the designated judge disclosed two additional summaries to Mr. Charkaoui. The first summary, disclosed on January 5, 2005, refers to two interviews of Mr. Charkaoui conducted by the Canadian Security Intelligence Service ("CSIS") on January 31, 2002 and February 2, 2002, respectively. CSIS conceded that the underlying documents had been destroyed pursuant to the alleged authority of s. 12 of the *CSIS Act*.[8]

5. The second summary, disclosed on January 6, 2005 refers to information obtained from Noureddine Nafia, who is being held in a Moroccan prison. The summary does not disclose the circumstances surrounding the collection of this information.[9] Specifically, it fails to address the circumstances relevant to whether the information may have been obtained by prohibited means. The appellant has adduced as evidence United Nations Human Rights Committee and Committee Against Torture reports citing allegations that torture and other prohibited treatment or punishment are used against detainees in Morocco.[10]

6. Several summaries previously disclosed to Mr. Charkaoui refer to information obtained from third parties. The summary dated 16 July 2003 refers to information obtained from Abu Zubaydah, who is detained by the US government. It too fails to disclose the circumstances relevant to whether the information may have been obtained by torture or other prohibited treatment or punishment.[11] Again, the appellant has adduced evidence indicating that Mr.

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[6] Subsection 78(b) of *IRPA*.
[7] Subsection 78(h) of *IRPA*.
[8] *Charkaoui (Re)*, 2006 FCA 206 at para. 8.
[9] Résumé des renseignements supplémentaires, 06 janvier 2005, Appellant's Record, pages 2665 to 2713; *Charkaoui (Re)*, 2005 FC 149 at para, 27.
[10] Exhibit "D" to the Affidavit of Karine Giguère, Appellant's Record, pages 666 and 672
[11] Résumé des renseignements supplémentaires, 16 juillet 2003, Appellant's Record, pages 2655 to 2659.

Zubaydah may have been mistreated.[12] In *Harkat*, Justice Dawson gave no weight to evidence provided to the Federal Court through Mr. Zubaydah, in part due to significant concerns about the methods used to interrogate him.[13]

PART II—ISSUES

7. The principle of procedural fairness protected by the *Charter* and international human rights norms:

- requires disclosure of whether information may have been obtained by prohibited means to the Ministers, the designated judge and the named person; and

- precludes any interpretation of the *CSIS Act* and the *IRPA* authorizing the destruction of information where such destruction prevents the Ministers, the designated judge and the named person from knowing whether the state's evidence may have been obtained through prohibited means.

PART III—ARGUMENT

A. Canada is bound by its international human rights obligations

8. The security certificate procedure established under the *IRPA* must comply with Canada's international commitments. To the extent that information is obtained by CSIS under the *CSIS Act* and is relied on by the Ministers or filed before the designated judge in a security certificate proceeding under *IRPA*, it must also comply with Canada's international obligations. In security certificate proceedings, the *CSIS Act* and *IRPA* are linked because CSIS obtains information itself or from other states which may be considered, either in its original form or in a summary by the Ministers, and by the designated judge where usual adversarial and evidentiary safeguards are absent.

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[12] *Charkaoui (Re)*, 2004 FC 1031 at para. 30.
[13] *Harkat (Re)* 2005 FC 393, at paras. 120, 123.

9. Parliament affirmed its intention to abide by Canada's international commitments in subparagraph 3(3)(f) of the *IRPA*, which provides:

> (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.

10. Subparagraph 3(3)(f) requires that the provisions of the *IRPA* be interpreted and applied in conformity with Canada's international obligations. Both the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* ("*CAT*")[14] and the *International Covenant on Civil and Political Rights* ("*ICCPR*")[15] are international human rights instruments legally binding on Canada as a state party and are, in the absence of contrary legislative intention, determinative of how *IRPA* must be interpreted and applied.[16]

11. Moreover, and with respect to the interpretation of the *CSIS Act*, 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.[17] 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."[18]

12. The human rights obligations pertaining to torture and other cruel, inhuman or degrading treatment or punishment are entrenched in the *Universal Declaration of*

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[14] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Can.T.S. 1987 No. 30 (entered into force 26 June 1987).
[15] *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, access by Canada 19 May 1976).
[16] *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para. 87..
[17] *Suresh, v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 59.
[18] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J.C. (dissenting).

Human Rights (*UDHR*),[19] *ICCPR*, and *CAT*. Each provides that no one should be subject to torture or to other cruel, inhuman or degrading treatment or punishment.[20] Indeed, the prohibition on the use of torture rises to the level of *jus cogens* or a peremptory norm of international law.[21] Further, the use of information obtained from torture or other prohibited treatment or punishment as evidence in judicial proceedings is also prohibited.[22] These fundamental rights must be construed broadly. They are not subject to limitation or derogation under any circumstances including situations of public emergency.[23]

13. In the context of armed conflict or war, international humanitarian law prohibits the use of torture or any other form of coercion in order to obtain information from individuals. Article 17 of the Third Geneva Convention[24] and Article 31 of the Fourth Geneva Convention prohibit the use of physical or mental torture or any other form of coercion to secure information."[25] Common Article 3 to the four Geneva Conventions also prohibits torture, cruelty and other degrading treatment.[26]

B. Section 7 of the *Charter*

14. 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. This requires

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[19] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.
[20] Article 5 of the *UDHR*; article 7 of the *ICCPR;* and articles 2 and 16 of the *CAT*
[21] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, 10 December 1998, at para. 156.
[22] Article 15 of CAT ; Article 12 of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assemble resolution 3452 (XXX) of 9 December 1975; Human Rights Committee, General Comment No. 20 re: Article 7 of the ICCPR, para. 12.
[23] Article 7 of ICCPR. General Comment 20 on Article 7 of ICCPR at para 3. CAT, Article 2. *Statement of the Committee Against Torture*: 22/11/2001. CAT/C/XXVII/Misc. 7, affirmed that the obligations contained in Articles 2 and 15 of the CAT are non-derogable and must be observed in all circumstances.
[24] *Geneva Convention (III) for the Treatment of Prisoners of War*, Geneva, 12 August 1949 ("Geneva Convention III"), Article 17.
[25] *Geneva Convention (IV) for the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949 ("Geneva Convention IV"), Article 31
[26] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949; *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, Geneva, 12 August 1949; Geneva Convention III; Geneva Convention IV, at Article 3.

first, that there has been or could be a deprivation of the right to life, liberty or security of the person, and second, that the deprivation was not be in accordance with the principles of fundamental justice. A violation of section 7 may be justified if it satisfies the criteria under s. 1 of the *Charter*.

1. The security certificate procedure deprives the named person of his liberty and security of the person

15. This Court has concluded that the security certificate procedure under *IRPA* deprives the named person, including the appellant, of his or her liberty because the named person faces detention pending the outcome of the proceedings.[27]

16. This Court has also recognized that the named person's security is implicated as a result of being named in a security certificate as it may "bring with it the accusation that one is a terrorist"; may "lead to removal from Canada, to a place where his or her life or freedom would be threatened"; and, may result in deportation to torture because the protection of s. 115(1) of *IRPA* is lost.[28]

2. The right to a fair judicial process and the principles of fundamental justice require disclosure of the circumstances relevant to whether the information may have been obtained by prohibited means

17. Where information is used in *IRPA* proceedings, a fair judicial process complying with the principles of fundamental justice requires that the circumstances relevant to whether the information may have been obtained through prohibited means be disclosed to the Ministers, the designated judge, and the named person.

18. This Court has confirmed that, in the context of a security certificate proceeding, "before the state can detain people for significant periods of time, it must accord them a fair judicial process."[29] A fair judicial process has several facets. It requires that the designated judge make a decision based on the facts and the

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[27] *Charkaoui, supra* note 5 at para. 13.
[28] *Charkaoui, supra* note 5 at para. 14. Section 115 (1) of the *IRPA* states that protected persons shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, memberhip in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.
[29] *Charkaou, supra* note 5 at para. 28.

law.[30] Further, the named person has a right know the case against him or her by being informed of that case and the right to answer that case.[31]

19. For the designated judge to make a decision based on the facts and law, the judge must be informed whether the information may have been obtained by prohibited means. For the named person to be in a position to raise legal objections and develop legal arguments, he or she must also be aware of the circumstances relevant to whether the information may have been obtained by prohibited means. These facets of the fair judicial process are intricately connected: the judge may not have a complete picture of the case where the named person is not fully informed of the case against him or her.[32]

20. In the context of security certificate proceedings, disclosure of the circumstances relevant to whether the information may have been obtained by prohibited means is especially important not only because of the serious nature of the consequences for the named person[33] but also because the rules of evidence, including (possibly) the exclusion of information obtained by prohibited means, are relaxed.[34] The judge may receive into evidence anything he or she considers appropriate, even if inadmissible in a court of law, and may base his or her decision on that evidence.[35]

21. It is particularly important that information relevant to whether the state's evidence may have been obtained by prohibited means be disclosed to the designated judge and the named person. Where the circumstances under which the state's evidence was gathered are unknown, this will affect the weight to be given to such evidence.

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[30] *Charkaoui*, *supra* note 5 at para. 29.
[31] *Charkaoui*, *supra* note 5 at para. 29.
[32] *Charkaoui*, *supra* note 5 at para. 54.
[33] *Charkaoui*, *supra* note 5 at para. 25.
[34] Section 78(h) and 78(j) of *IRPA* waive the rules of evidence as compared to s. 269.1(4) of the *Criminal* Code, R.S., c. C-34, as amended.
[35] *IRPA*, s. 78(j).

a. The use of torture and other prohibited treatment in the collection of security-related information

22. In the context of the "war on terror", there is a serious possibility that information has been obtained by torture or other cruel, inhuman or degrading treatment or punishment. Information obtained by torture or other prohibited treatment or punishment is often shared with other countries. The report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry") observed that there is significant information sharing between states, including Canada.[36] Thus, there is a strong possibility that Canadian agencies have received information obtained by torture or other prohibited treatment or punishment. Indeed, Commissioner O'Connor noted that Canadian agencies accepted or relied on "information that might be the product of torture without conducting an adequate reliability assessment to determine whether or not torture had been involved" and were "dismissive of allegations of torture (or did not take them seriously)."[37]

23. Similarly, in this case, there is a real risk that the information obtained from Nafia and Zubaydah may have been obtained by torture or other cruel, inhuman or degrading treatment or punishment. The appellant filed information in this proceeding regarding the mistreatment of Moroccan detainees.[38] and the Federal Court in *Harkat* has expressed concerns about the methods used to obtain information from Mr. Zubaydah.[39]

b. Information that may have been obtained by torture or other prohibited treatment should be excluded

24. There are two principal reasons why information obtained by torture or other prohibited treatment or punishment should be excluded from judicial

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[36] Canada. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations.* Ottawa: The Commission, 2006 ("Arar Inquiry"), p. 275. See generally recommendation No. 15.
[37] *Ibid*.
[38] Affidavit of Karine Giguère, *supra*, note 10.
[39] *Harkat (Re), supra,* note 13, at paras. 120, 123..

proceedings. The Special Rapporteur of the Commission on Human Rights in his Report on Torture and Other Cruel, Inhuman and Degrading Treatment ("Report on Torture") explained:

> Firstly, confessions or other information extracted by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding. Secondly prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.[40]

25. The UN Human Rights Committee ("HRC") has confirmed that rendering inadmissible statements obtained by torture or other prohibited treatment is an important way to discourage torture and other prohibited treatment and punishment.[41] The HRC has stated unequivocally that, "evidence provided by means of such methods or any other form of compulsion is wholly unacceptable."[42]

26. Where there is a real risk that information may have been obtained by torture or other cruel, inhuman or degrading treatment or punishment or through coercion, it should not be admissible in security certificate proceedings

27. The "real risk" test was articulated by Lord Bingham, in dissent, in *A and others*[43] and endorsed in the Special Rapporteur's Report on Torture.[44] This burden of proof best complies with the principle of a fair trial and Article 15 of the CAT.

28. A fair judicial process pursuant to the principles of fundamental justice requires that the circumstances relevant to whether the information may have been obtained by prohibited means be disclosed to the designated judge and the named

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[40] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or* punishment (14 August 2006) A/61/259.
[41] Human Rights Committee, *General Comment 20, Article 7* (Forty-fourth session, 1992), U.N. Doc. HR1/GEN/1/Rev.1 at 30 (1994) at para. 12.
[42] Human Rights Committee, *General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law* (ART. 14); 13/04/84 at para. 14.
[43] *A and others v. Secretary of State for the Home Department*, [2005] UKHL 71.
[44] Report of the Special Rapporteur, *supra* note 38 at para. 65.

person in order to ascertain whether there is a real risk that information has been obtained as a result of torture or other prohibited treatment or punishment.

29. The HRC in General Comment No. 20 described some of the contextual information that should be disclosed. This includes the place of detention. Detainees should be held in places officially recognized as places of detention and their names should be kept in available and accessible registers.[45] Further, the "time and places of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings."[46]

30. AI acknowledges that there may be exceptional circumstances when sufficiently serious and pressing national security concerns justify limited restrictions on the disclosure to the named person. In such cases, disclosure should be made to the named person's substitute.[47]

3. Destruction of information

31. AI submits that a fair trial process respecting the principles of fundamental justice precludes the destruction of information concerning whether information that the state seeks to rely on in a security certificate proceeding may have been obtained by prohibited means. The destruction of such information prevents the Ministers, the designated judge and the named person from learning whether the state's evidence may have been obtained in this manner and should therefore be excluded.

32. Any interpretation of the *CSIS Act* or the *IRPA* that authorizes the destruction of such information violates the *Charter* and international human rights norms. Where such information has been destroyed, the *Charter* and international human rights norms require the exclusion of the information from *IRPA* proceedings.

c. **<u>Conclusion</u>**

[45] General Comment No. 20, para. 11.
[46] General Comment No. 20, para. 11.
[47] Provided that a constitutionally adequate substitute is found.

33. The use of prohibited means to obtain information is used by Canada's intelligence partners in the "war on terror". The appellant has raised the possibility that the Ministers are relying on such information in his security certificate proceedings. Procedural fairness under international law and the *Charter* requires that the Ministers disclose to the appellant and the designated judge the circumstances relevant to whether the information was obtained through prohibited means. If it is established that there is a real risk of this having occurred, it must be excluded from security certificate proceedings. Our constitutional and international obligations require that Canada set itself firmly against the use of information obtained by prohibited means. We cannot escape these obligations by the expedient of being a client of states who use torture and other cruel and unusual treatment or punishment to gather information.

PART IV—SUBMISSIONS ON COSTS

34. AI neither seeks costs nor expects that costs will be awarded against it.

PART V—ORDER SOUGHT

35. AI requests that the appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF JANUARY, 2008

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Solicitors for Amnesty International Canada

PART VI—TABLE OF AUTHORITIES

		PARA
	Domestic Jurisprudence	
1	*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.	2,15,16,18,19,20
3	*Charkaoui (Re)*, 2006 FCA 206	4
4	*Charkaoui (Re)*, 2005 FC 149	5
5	*Charkaoui (Re)*, 2004 FC 1031	6
6	*Harkat (Re)* 2005 FC 393	6
7	*De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA	10
8	*Suresh, v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R.	11
9	*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313	11
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10	*Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, 10 December 1998	12
11	*A and others v. Secretary of State for the Home Department*, [2005] UKHL 71	28
	International Human Rights Law	
12	*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Can.T.S. 1987 No. 30 (entered into force 26 June 1987)	10, 12, 28

13	*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, access by Canada 19 May 1976).	10, 12
14	*Universal Declaration of Human Rights,* GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71	12
15	Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assemble resolution 3452 (XXX) of 9 December 1975	12
16	*Statement of the Committee Against Torture*: 22/11/2001. CAT/C/XXVII/Misc. 7	12
17	*Geneva Convention (III) for the Treatment of Prisoners of War,* Geneva, 12 August 1949	13
18	*Geneva Convention (IV) for the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949	13
19	*Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949	13
20	*Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, Geneva, 12 August 1949	13
21	*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (14 August 2006) A/61/259	24, 27
22	Human Rights Committee, *General Comment 20, Article 7* (Forty-fourth session, 1992), U.N. Doc. HR1/GEN/1/Rev.1 at 30 (1994)	12, 25, 29
23	Human Rights Committee, *General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law*, (ART. 14); 13/04/84	25

	Secondary Sources	
24	Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations.* Ottawa: The Commission, 2006	22

PART VII—STATUTORY PROVISIONS

		PARA
1	*Canadian Charter of Rights and Freedoms*	1,11,14,33
2	*Canadian Security Intelligence Service Act,* R.S.C. 1985, c. C-23	1,4,8,11,33
3	*Immigration and Refugee Protection Act,* S.C. 2001, c. 27	1,2,3,8,9,10,16,17,20,33
4	*Criminal* Code, R.S., c. C-34	20

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ADIL CHARKAOUI

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
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RESPONDENTS

MEMORANDUM OF ARGUMENT