

**SUPREME COURT OF CANADA**  
**(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR QUEBEC)**

B E T W E E N:

ESTATE OF THE LATE ZAHRA (ZIBA) KAZEMI and  
STEPHAN (SALMAN) HASHEMI

APPELLANTS

and

ISLAMIC REPUBLIC OF IRAN, AYATOLLAH SAYYID ALI KHAMENEI,  
SAEED MORTAZAVI, MOHAMMAD BAKHSHI and  
ATTORNEY GENERAL OF CANADA

RESPONDENTS

and

CHRISTOPHER D. BREDT

*AMICUS CURIAE*

and

CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS,  
AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE,  
REDRESS TRUST LTD., CANADIAN ASSOCIATION OF REFUGEE LAWYERS,  
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,  
CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION,  
CANADIAN CENTRE FOR INTERNATIONAL JUSTICE,  
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL HUMAN  
RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW and IRAN  
HUMAN RIGHTS DOCUMENTATION CENTER

INTERVENERS

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**FACTUM OF THE INTERVENER**  
**IRAN HUMAN RIGHTS DOCUMENTATION CENTER**

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## INTRODUCTION

1. The Iran Human Rights Documentation Center (“**IHRDC**”) is an independent non-profit NGO organization based in New Haven, Connecticut. Founded by human rights scholars and lawyers, its purpose is to promote human rights and accountability in Iran. IHRDC brings to this appeal expertise regarding the operation of the judicial system and rule of law in Iran. It conducts investigations and publishes reports on specific human rights situations, including a 2006 report<sup>1</sup> on the Kazemi case, and it regularly conducts field missions in countries with high numbers of Iranian refugees.<sup>2</sup>

## PART I – FACTS

2. IHRDC makes no comments concerning the facts set out in the record.

## PART II - QUESTIONS IN ISSUE

3. The Appellants have identified five issues, including whether the application of section 3(1) of the *State Immunity Act* (the “**SLA**”)<sup>3</sup> would infringe the Appellants’ right to a fair hearing under section 2(e) of the *Canadian Bill of Rights* (the “**Bill of Rights**”).<sup>4</sup> IHRDC will only

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<sup>1</sup> Iran Human Rights Documentation Center, *Impunity in Iran: The Death of Photojournalist Zahra Kazemi* (New Haven, Iran Human Rights Documentation Centre: 2006), Motion Record for Leave to Intervene of the Iran Human Rights Documentation Centre [Motion Record of the IHRDC], tab A, p 15.

<sup>2</sup> The overall mission of the Center is to (i) establish a comprehensive and objective historical record of the human rights situation in Iran, and on the basis of that record, establish responsibility for patterns of human rights abuses, (ii) make the record available in an archive that is accessible to the public for research and educational purposes, (iii) promote accountability, respect for human rights and the rule of law in Iran, and (iv) encourage an informed dialogue on the human rights situation in Iran among scholars and the general public in Iran and abroad.

<sup>3</sup> RSC, 1985, c S-18, **Book of Authorities, hereinafter « B.A. », Tab 14.**

<sup>4</sup> SC, 1960, c 44, **B.A., Tab 1.**

address the issue of whether a fair hearing is available to the Appellants in the Islamic Republic of Iran (“**Iran**”).

### **PART III - ARGUMENT**

#### **A. SUMMARY OF POSITION**

4. IHRDC submits that the Appellants would not benefit from the right to a fair hearing in accordance with the principles of fundamental justice in Iran.

#### **B. RIGHT TO A FAIR HEARING**

5. Subsection 2(e) of the *Bill of Rights* provides that no law of Canada shall be construed or applied so as to “deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his [or her] rights and obligations.”<sup>5</sup> The fundamental essence of the right to a fair hearing as enshrined in this provision is that it guarantees all rights necessary for an independent and impartial hearing of a litigant’s procedural and substantive rights.

6. In *Charkaoui v. Canada*,<sup>6</sup> this Court held that the right to a fair hearing contains a number of facets:

It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*.<sup>7</sup>

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<sup>5</sup> *Supra* note 3, s 2(e).

<sup>6</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, **B.A., Tab 3**.

<sup>7</sup> *Ibid*, para 29.

In *Cardinal and Oswald v. Director of Kent Institution*,<sup>8</sup> this Court stated that the right to a fair hearing “must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.”<sup>9</sup>

7. Article 14 of the *International Covenant on Civil and Political Rights* (the “**ICCPR**”), to which Canada and Iran are signatories,<sup>10</sup> includes a provision protecting the right to a fair hearing. It states that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>11</sup> The United Nations Human Rights Committee (“**UNHRC**”) has affirmed that this right is an absolute right, and one not subject to any exception.<sup>12</sup> It has stated that the requirement of independence requires guidelines setting out the procedure for the appointment of judges, as well as guarantees for their security and tenure. Thus, the right to a fair hearing demands an independent judiciary not subject to political or other influence.

8. The UNHRC has also stated that the guarantee of impartiality should ensure that judges are not influenced by any personal bias or prejudice, nor by preconceptions about the case before them, nor may they act in any way that unduly promotes the interests of one of the parties at the expense of the other.<sup>13</sup> The notion of a fair trial under article 14 ICCPR mandates the absence of

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<sup>8</sup> *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, **B.A., Tab 2**.

<sup>9</sup> *Ibid*, para 23.

<sup>10</sup> United Nations Treaty Collection, “International Covenant on Civil and Political Rights (November 11, 2013), online <[http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-4&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en)>, **B.A., Tab 16**.

<sup>11</sup> UNTS, vol 999, p 171, **B.A., Tab 16**.

<sup>12</sup> *González del Río v Peru*, Communication No 263/1987, para 5.2, **B.A., Tab 6**.

<sup>13</sup> *Karttunen v Finland*, Communication No 387/1989, para 7.2, **B.A., Tab 12**.

any direct or indirect influence, pressure, intimidation or intrusion from any source whatsoever and for whatever motive.<sup>14</sup> These requirements are to be assessed pursuant to an objective standard.

### **C. FAIR HEARING IN IRAN**

9. IHDRC submits that litigants would be unable to obtain a fair hearing where: (i) the judiciary lacks the independence and impartiality that characterize a meaningful avenue for redress; (ii) the boundaries between the roles of judges and prosecutors are blurred; and (iii) litigants deprived of a fair hearing in accordance with the principles of fundamental justice have no recourse.

#### **i) Absence of an impartial and independent judicial system**

10. IHDRC submits that where a judicial system lacks independence and impartiality, it does not afford litigants the opportunity to enforce their rights in a manner consistent with the right to a fair hearing in accordance with the principles of fundamental justice. The Iranian judiciary lacks freedom from interference in judicial decisions by other powers, and it also lacks freedom from undue bias.<sup>15</sup>

11. IHDRC submits that where prosecutors and judges in a state owe allegiance and are accountable to political actors, the judicial system in that state cannot offer litigants a fair hearing in accordance with the principles of fundamental justice. Article 39 of the Iranian Penal

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<sup>14</sup> Human Rights Committee, General Comment No 32, “Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial,” UN Doc CCPR/C/GC/32 (2007), para 25, **B.A., Tab 7**.

<sup>15</sup> *Supra* note 1 at 29, Motion Record of the IHRDC, tab A, p 46.

Procedure Code stipulates that in criminal investigations, “judges and examining magistrates shall perform the investigations with complete neutrality and observe full neutrality in finding out the circumstances which favour or harm the accused,”<sup>16</sup> and article 156 of Iran’s Constitution states that that “the judiciary is an independent power.”<sup>17</sup> The impartiality of the judiciary, however, is undermined by the fact that prosecutors share close ties with the Supreme Leader of Iran, the head of state and the highest-ranking political and religious authority in the country. That impartiality is also undermined, due to the broad powers of the Head of the Judiciary (also an appointee of the Supreme Leader<sup>18</sup>) over the appointment and dismissal of judges.

12. IHDRC submits that while judges exercise a degree of influence in Iran, their actions are influenced by others because Iranian law is defined and enforced by a select group of judges “appointed by and accountable to the [Supreme] Leader.”<sup>19</sup> Article 158 of the Constitution highlights that point. It provides the Head of the Judiciary with broad authority to appoint, dismiss, transfer, promote, and discipline judges.

13. Observers have noted that the Ministry of Intelligence and National Security of Iran (the “**Intelligence Ministry**”) has become increasingly influential over judicial matters, largely due

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<sup>16</sup> Iran Human Rights Documentation Center, “English Translation of the Islamic Republic of Iran's Criminal Code of Procedure for Public and Revolutionary Courts” (2013), online: <<http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000026-english-translation-of-the-islamic-republic-of-irans-criminal-code-of-procedure-for-public-and-revolutionary-courts.html#.UoKQWZHkGcE>>, **B.A., Tab 5**.

<sup>17</sup> Constitution of the Islamic Republic of Iran, adopted on October 24, 1979, amended on July 28, 1989, art 156, **B.A., Tab 4**.

<sup>18</sup> The Head of the Judiciary is directly appointed by the Leader to a 5-year term; *supra* note 1 at 29, Motion Record of the IHRDC, tab A, p 46.

<sup>19</sup> Human Rights Watch, “Like the Dead in their Coffins: Torture, Detention, and the Crushing of Dissent in Iran” (June 2004), online: Human Rights Watch <<http://hrw.org/reports/2004/iran0604>>, **B.A., Tab 8**.

to the use of a “special court” at Evin prison.<sup>20</sup> A fact-finding NGO reported that prison authorities confine judges and magistrates to the prison complex and deny lawyers and families access to judicial proceedings.<sup>21</sup> Lawyers complain that they are often prevented from communicating with clients who are facing trial in Evin Court, as well as accessing files. This restricted access deprives prisoners of their right to counsel and of their right to a fair hearing in accordance with the principles of fundamental justice.<sup>22</sup>

### **ii) Blurred boundaries between the roles of prosecutors and judges**

14. IHRDC submits that where the roles of judges and prosecutors in a judicial system are blurred, the right to a fair hearing in accordance with the principles of fundamental justice is denied. In Iran, there appears to be frequent overlap between the roles of judges and prosecutors. As the United Nations Working Group on Arbitrary Detentions (the “**UN Working Group**”) has noted, the “[p]rinciple of separation of authority for prosecution and judgment” has not been consistently applied in Iran’s justice system. In the early 1990s, the role of prosecutor was eliminated from the system entirely, apparently in order to accelerate the judicial process.<sup>23</sup>

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<sup>20</sup> Evin Prison is located in Evin, northwestern Tehran. It is noted for its political prisoners' wing, where prisoners have been held both before and after the 1979 Iranian Revolution. Due to the number of intellectuals that the prison housed, it has been referred to as “Evin University.” Steve Inskip, “Iran's Evin Prison Likened to Torture Chamber” (July 19, 2007), online: <<http://www.npr.org/templates/story/story.php?storyId=12091966>>, **B.A., Tab 15**.

<sup>21</sup> International Campaign for Human Rights in Iran, “Human Rights Group Demands Closure of Evin Prison Court” (April 14, 2010), online: <<http://www.iranhumanrights.org/2010/04/close-evin-court/>>.

<sup>22</sup> One lawyer stated to the International Campaign for Human Rights in Iran that the Intelligence Ministry’s interference “has in fact made providing defense for the suspect impossible.” *Ibid*.

<sup>23</sup> Soraya Ahangar, “The Tehran Public Prosecutor and the Rule of Law in Post-Election Iran” (May 27, 2010), online: Muftah <<http://muftah.org/the-tehran-public-prosecutor-and-the-rule-of-law-in-post-election-iran-by-soraya-ahangar/>>., **B.A., Tab 13**

15. In 2002, the International Commission of Jurists observed with concern that the chief judges of the jurisdictions in Iran, who were simultaneously the chief justices of the Courts of First Instance, “[functioned] both as prosecutor and judge in the same case.”<sup>24</sup> Thus, chief judges of the Courts of First Instance, who should be impartial and presume the innocence of defendants, were responsible for conducting investigatory procedures (including collection of evidence), preparing accusations against defendants, and interrogating them.<sup>25</sup> This system was also criticized by the UN Working Group:

[C]ases were tried in a manner that is incompatible with the norms guaranteeing the right to due process, including the essential norm o[f] the impartiality of the judge since ... in each case the same judge acts in succession as prosecutor, then investigating magistrate and lastly sentencing judge. The Working Group thus considers that this multiplicity of functions is such as to vitiate the right to due process and that account should be taken of this in the context of amnesty laws and pardons.<sup>26</sup>

16. By 2003, the role of prosecutor re-emerged as part of Iran’s judicial system. The office was re-opened and specialized courts were restored.<sup>27</sup> The structural damage caused by the elimination of the prosecution service, however, took time to repair. The head of the Tehran judiciary explained to a UN Working Group that the abolition of prosecutors seven years earlier had been “a disaster” for the administration of justice. At the time of the Working Group’s visit,

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<sup>24</sup> International Commission of Jurists, “Iran: Attacks on Justice” (August 27, 2002), online: ICJ <<http://www.iranrights.org/english/document-86.php>>, **B.A., Tab 9**.

<sup>25</sup> *Ibid.*

<sup>26</sup> United Nations Working Group on Arbitrary Detentions, “Civil and Political Rights, Including the Question of Torture and Detention – Report of the Working Group on Arbitrary Detentions, Visit to the Islamic Republic of Iran” (15-27 February 2003), UN Commission on Human Rights, 60th Sess., E/CN.4/2004/3/Add.2, para 62, **B.A., Tab 17**.

<sup>27</sup> *Supra* note 1 at 31, Motion Record of the IHRDC, tab A, p 48.



only months before Kazemi's detention, the office of the prosecutor had been reopened in only three jurisdictions, including Tehran.<sup>28</sup>

17. IHDRC submits that claimants are deprived of their right to a fair hearing in accordance with the principles of fundamental justice where cases are tried before judges who serve simultaneously as “prosecutor, investigator, and final decision maker.”<sup>29</sup> In Iran, the involvement of prosecutors and judges during investigations is personal and hands-on. Observers have reported, among other things, that judges in certain cases visit accused persons in interrogation rooms and detention areas.<sup>30</sup>

### **iii) Absence of recourse**

18. IHRDC submits that where principal actors of a judicial system themselves participate in actions that violate basic due process rights, that system cannot provide litigants with the right to a fair hearing in accordance with the principles of fundamental justice. In addition, IHDRC submits that where judicial actors believe themselves to be immune from legal repercussions, courts in that jurisdiction cannot be relied on to provide a fair hearing.<sup>31</sup>

19. The trial of Reza Ahmadi is illustrative.<sup>32</sup> In 2004, Ahmadi, a low-level official in the Intelligence Ministry, was put on trial for the “semi-intentional killing” of Kazemi. Questionable aspects of that trial include the court's refusal to allow witnesses to be called and the failure of

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 28, Motion Record of the IHRDC, tab A, p 45; *supra* note 19.

<sup>30</sup> *Supra* note 1 at 28, Motion Record of the IHRDC, tab A, p 45

<sup>31</sup> Prosecutor Mortazavi, for example, has been quoted as asserting outright during a session with a political prisoner's family: “I don't have any need for the law. I am the law.” *Supra* note 19.

<sup>32</sup> *Supra* note 1, appendix 3, Motion Record of the IHRDC, tab A, p 87.

the assistant prosecutor to follow up with a number of witnesses to Kazemi's arrest. The high rate of "recantation" of testimony by the individuals also raises questions.<sup>33</sup>

20. In the Ahmadi trial, the legitimacy of the proceedings was repeatedly called into question by counsel for the victim's family. Even more controversial was the choice of defendant and charge. The decision to focus prosecution efforts against Ahmadi (despite the fact that the Kazemi family had specifically filed charges against the judiciary) and to downgrade the charge from intentional to "semi-intentional" murder is also noteworthy.<sup>34</sup>

21. Finally, the inability of counsel in the Ahmadi trial to represent their client due to interference with counsel's access to the complete court file, and the absence of numerous pages in the official file, are demonstrative of the failure to benefit from a fair trial in accordance with the principles of fundamental justice.<sup>35</sup>

22. In 2012, the Quebec Court of Appeal remarked:

On the facts as alleged, Zahra Kazemi, a blameless Canadian, fell victim to a pattern of vicious misconduct by the agents of a rogue state. Such a situation causes instant revulsion in anyone who adheres to a genuine notion of the rule of law. But these acts took place in Iran and what consequences they had in Canada do not set in motion the exceptions to state immunity.<sup>36</sup>

Based on the foregoing, IHDRC submits that Iranian courts will not afford the Appellants the right to a fair hearing in accordance with the principles of fundamental justice recognized in subsection 2(e) of the *Bill of Rights* as well as a number of provisions of various international

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<sup>33</sup> *Ibid* at 28, Motion Record of the IHRDC, tab A, p 45.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Islamic Republic of Iran c Hashemi*, 2012 QCCA 1449, para 121, **B.A., Tab 11**.

treaties to which Canada is a party, such as section 14 of the *International Covenant on Civil and Political Rights* and subsection 14(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>37</sup>

#### **PART IV - COSTS**

23. IHRDC seeks no order of costs and no order of costs ought to be awarded against it.

#### **PART V - ORDER SOUGHT**

24. IHRDC's submissions are offered to assist the Court. IHRDC seeks no order from this Court.

Westmount, November 15, 2013

**(S) Babak Barin**

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**Me Babak Barin  
Barin Avocats  
Attorney for the intervener  
Iran Human Rights Documentation Center**

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<sup>37</sup> Adopted by United Nations General Assembly, resolution 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984)], entered into force on June 26, 1987 (signature of Canada on August 23, 1985 and ratification on June 24, 1987), **B.A., Tab 10**.

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