Court File No. 35034

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

BETWEEN:

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

APPELLANTS
(Appellants)

- and -

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

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(Respondents)

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PART 1 – STATEMENT OF FACTS

OVERVIEW

1. The Canadian Bar Association (the 'CBA') intervenes first to submit that a United Nations treaty body's comments, recommendations and views should attract deference from Canada's domestic courts, insofar as they concern questions of treaty interpretation. The treaty bodies have expertise with respect to their home treaties just as administrative tribunals have expertise with respect to their home statutes. On matters of law, treaty bodies and administrative tribunals should be treated similarly. If a treaty body's interpretation of its constitutive treaty is reasonable, the Court should defer to it. Second, the interpretation of Art. 14(1) of the *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment*[1] by the Committee against Torture ('Committee') should be accepted by the Court as establishing the legal requirements of Art. 14(1). The Committee's interpretation is fully defensible, as confirmed by recourse to supplementary means of interpretation. This Court should maintain its practice of relying on United Nations treaty body interpretations to ascertain the legal requirements of the human rights treaties to which Canada is a party. The CBA takes no position on the facts of the case.

PART II - POSITION ON MATTERS IN ISSUE

2. The CBA supports the Appellants' submissions on the question whether the jurisdictional bar created by s. 3(1) of the *State Immunity Act*, R.S.C. 1986, c. S-18 conforms to the principles of fundamental justice and says that, in answering this question, the Court should defer to and apply the Committee's interpretation of Art. 14(1) of the CAT.

PART III - ARGUMENT

The CAT intends for all victims of torture to have access to redress and to compensation.

3. The CAT confirms the absolute nature of the prohibition against torture at international law. This Court has affirmed its 'dominant status' in that regard.[2] The treaty aims to eradicate torture and other forms of cruel, inhuman or degrading treatment or punishment, by preventing them,

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[1] 10 December 1984, 1485 U.N.T.S. 85 ('CAT').

[2] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 ('*Suresh*') at para. 73.

condemning them, and holding accountable those who perpetrate them.[3] Art. 14(1) is an integral part of the scheme of the treaty. The Committee interprets Art. 14(1) of the CAT as requiring states parties to provide all victims of torture within the state, including victims of torture committed abroad, access to a remedy and redress. This has been made clear by the Committee in its concluding observations on the reports of various states parties, as particularized by the Appellants in their factum,[4] and by the Committee's *General comment No. 3*.[5]

Canadian courts should defer to the Committee's expertise on the interpretation of the CAT

4. The CBA submits that this Court should treat the Committee's interpretation of the CAT with the same deference it would afford an administrative tribunal's interpretation of its home statute, and to the same effect. The interpretation of the CAT by the Committee should be accepted by the Court if it is reasonable, meaning that the outcome falls within the range of acceptable outcomes, in respect of the facts and the law. Deference is justified by the relative expertise of the Committee on matters of the CAT's interpretation and to respect the states parties' intent to rely on the Committee as the CAT's primary interpreter[6].

5. The expertise of the Committee has two aspects. First, the Committee members have individual expertise and independence. Pursuant to Art. 17(1) of the CAT, the Committee is comprised of 'ten experts of high moral standing and recognized competence in the field of human rights'. The members serve in their personal capacities;[7] this implies independence in

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[3] See Preamble to the CAT, and Art. 4 - 15, *supra*.

[4] See Appellants' factum at paras 107 - 108.

[5] *General comment No. 3 (2012) - Implementation of article 14 by States parties*, U.N. Doc. CAT/C/GC/3 (13 December 2012).

[6] *Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] 1 SCR 190 at para 47; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160.

[7] Comparable requirements exist for other United Nations human rights treaty monitoring bodies. See, e.g., *International Covenant on Civil and Political Rights* 16 December 1966, 999 U.N.T.S. 171 ('ICCPR'), Art. 28(2) and (3); *International Convention on the Elimination of All Forms of Racial Discrimination* 21 December 1965, 660 U.N.T.S. 195, Art. 14; *Convention on the Elimination of All Forms of Discrimination Against Women* 18 December 1979, 1249 U.N.T.S. 13, Art. 17(1); *Convention on the Rights of the Child* 20 November 1989, 1577 U.N.T.S. 3, Art. 42(2); *Convention on the Rights of Persons with Disabilities* 24 January 2007, A/RES/61/106, Art. 34(3).

decision-making.[8] Moreover, the majority of Committee members are legally trained.[9] Art. 17(1) of the CAT specifically requires the states parties to give consideration 'to the usefulness of the participation of some persons having legal experience' on the Committee.

6. Second, the Committee has institutional expertise. The Committee is primarily responsible for determining whether treaty obligations are being fulfilled.[10] The states parties to the CAT have invested the Committee with the power to issue: 'general comments' on reports submitted pursuant to Art. 19; 'findings' pursuant to an inquiry constituted under Art. 20; and, where appropriate declarations are filed, 'reports' pursuant to the inter-state complaint procedure under Art. 21, and 'views' in respect of the individual complaints submitted pursuant to Art. 22.[11] Notably, when determining an inter-state complaint pursuant to Art. 21, the Committee determines whether the state that is the object of the complaint is 'fulfilling its obligations' under the CAT. Similarly, when determining an individual petition, the Committee determines whether the petitioner has suffered a 'violation by a State Party'. Accordingly, the Committee is competent to assess the lawfulness of the states parties' conduct under the treaty.

7. The Committee's interpretation of the CAT is authoritative.[12] As former Human Rights Committee member Christian Tomuschat has observed, 'No better expertise as to the scope and

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[8] C. Tomuschat, *Human Rights; Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 140, discussing Art. 40(3) of the ICCPR, which mirrors Art. 17(1) of the CAT.

[9] Six of the 10 current members of the Committee are lawyers or judges. See membership information, online: http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx.

[10] See Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009), 42 Vanderbilt J. of Transnational Law 905 at 919.

[11] Comparable provisions exist in the other core United Nations human rights treaties; see International Law Association, Committee on International Human Rights Law and Practice, *Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals*, 2002 ('ILA 2002') at 1 – 5.

[12] On the nature of the Committee's functions, see ILA 2002, *supra*, and see M. O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006), 6 H.R. Law Rev. 27.

meaning of any of the human rights treaties can be found than in the expert bodies set up to monitor their observance by states.'[13]

8. Uniformity of treaty interpretation is promoted if courts follow a treaty body's interpretation of its constitutive treaty.[14] In *Hernandez Febles v. Canada (Citizenship and Immigration)* the Federal Court of Appeal acknowledged the importance of uniform treaty interpretation and reasoned that the standard of review for domestic interpretation of international instruments should be correctness to promote uniformity.[15] The same reasoning supports deference to interpretation by the treaty body designated by the states parties to monitor treaty compliance.[16] Treaty body General Comments 'are adopted unanimously and represent the collective opinion of the respective treaty body.'[17]

The Committee's interpretation of Article 14(1) of the CAT is defensible

9. The CBA adopts the Appellants' argument concerning interpretation of Art. 14(1) of the CAT;[18] the interpretation adopted by the Committee is correct and is, in any case, reasonable. The defensibility of the Committee's interpretation is confirmed by having regard to the CAT's drafting history concerning Art. 14, as permitted by Art. 32 of the *Vienna Convention on the Law of Treaties*.[19] This history establishes the intention of the states parties to codify torture as a *jus cogens*

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[13] See Tomuschat, *supra*, at 183 and further at 185. See also M. Scheinin, 'International Mechanisms and Procedures for Implementation' in R. Hanski and M. Suksi, eds., *An Introduction to the International Protection of Human Rights: A Textbook* (Turku/Åbo: Institute for Human Rights, Åbo Akademi, 1997 at 369; and see International Law Association, Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies, 2004* ('ILA 2004') at 15.

[14] *T. v. Secretary of State for the Home Dept*, [1996] 2 All ER 865 (H.L.), at 891 per Lord Lloyd of Berwick; *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 at 4.

[15] 2012 FCA 324 at para. 24, leave to appeal granted 2013 CanLII 40344.

[16] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Rep. 2010, p. 639 at para. 66.

[17] *Mechlem, supra*, at 928.

[18] See Appellants' factum at paras. 86 - 129.

[19] 23 May 1969, 1155 U.N.T.S. 331 ('VCLT').

crime of universal jurisdiction, and to advance the fight against it by a variety of means intended to prevent and remedy the extreme harm it causes.

10. Burgers and Danelius note that Art. 14(1) 'does not give any clear indication of how the compensation shall be calculated. It states, however, that the compensation shall be fair and adequate'.[20] Further, '[t]he requirement that the compensation shall be fair and adequate excludes purely symbolic amounts of compensation.'[21] The importance of adequate compensation within the overall scheme of the treaty may be inferred from this statement. With respect to Art. 14(2) of the CAT, which provides that '[n]othing in this article shall affect any right of the victim or other person to compensation which may exist under 'national law', Burges and Danelius emphasize that 'the principal aim of the Convention is to *strengthen* the existing prohibition of such practices by a number of supportive measures'.[22] Taken together, these commentaries on the *travaux préparatoires* suggest that a state party is to give the CAT the strongest effect possible under its domestic law, including ensuring access to a remedy for harm occasioned by torture.

11. The drafting history of the CAT also supports a relationship between the intention to make torture a crime of universal jurisdiction (Art. 5(2)) and to ensure adequate compensation and full redress for all victims of torture (Art. 14(1)). The principle of universal jurisdiction was adopted precisely because the offence of torture required measures 'making it as difficult as possible for torturers to find a safe-haven in a foreign country'.[23] There is no principled reason why, under the treaty, a torturer should be denied a safe haven from prosecution but enjoy a safe haven from a civil remedy for the harm he or she has inflicted. It cannot be inferred from the terms of the Art. 14(1) or the supplementary means of interpretation that the states parties intended the CAT to allow torturers a safe harbour from civil suit. Indeed, in many civil law jurisdictions, prosecution of crime entail

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[20] J. Herman Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: M. Nijhoff, 1988) at 146 . Burges and Danelius were actively involved in the preparation of the convention and represented their governments, The Netherlands and Sweden, respectively.

[21] *Ibid*. at 147.

[22] *Ibid*.; italics in original, underlining added.

[23] *Ibid*., at 58.

access to a civil remedy for injury from the crime. As Hall notes, 'the acceptance of universal criminal jurisdiction in the Convention necessarily included universal civil claims in the large number of civil law jurisdictions around the world that require their courts to entertain an *action civile* or an *actio popularis* claim for compensation in criminal proceedings'.[24]

The Court should apply the Committee's interpretation of Article 14(1)

12. United Nations treaty bodies' interpretations of their constitutive treaties are a source of subsequent practice that may contribute to the agreement of the parties regarding their interpretation.[25] The judicial branch of government, just as much as the executive and legislative branches, can contribute to the formation of subsequent practice bearing on the CAT through adoption of the Committee's treaty interpretation.[26] In the CBA's submission, the courts should not shy away from doing so, since they are the ultimate arbiters of constitutionally protected rights in Canada, and the content of those rights is in many cases intimately linked to internationally defined human rights.

13. This Court already has an established practice of relying on the United Nations monitoring bodies' treaty interpretation.[27] Most recently, in *Divito v. Canada (Public Safety and Emergency Preparedness)*, the Court employed the Human Rights Committee's *General Comment No. 27* to determine the scope of the protection afforded by Art. 12 of the ICCPR, which the Court, in turn, applied to the interpretation of s. 6(1) of the *Canadian Charter of Rights and Freedoms*.[28]

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[24] C. K. Hall, 'The Duty of States parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007), 18 E.J.I.L. 921 at 934.

[25] See ILA 2004, *supra*, at para. 21; and see VCLT, *supra*, Art. 31(3)(b).

[26] *Ibid*. at para. 24.

[27] See: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 at para. 133; *Suresh*, *supra*, at paras. 66 – 67, per Gonthier J., dissenting; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at para. 76.

[28] 2013 SCC 47 at paras. 25 – 27.

Practice of appellate courts in other Commonwealth countries.

14. Australian appellate courts have found it 'permissible and appropriate' to consider the views of United Nations treaty bodies to interpret treaty provisions. In *Minister for Immigration and Multicultural and Indigenous Affairs v. B*, Kirby J., concurring, noted that the views of the Human Rights Committee are 'persuasive' and 'are available to municipal courts . . . as the opinions of independent experts in international law, to assist in the understanding of that law for whatever weight the municipal legal system accords to it'.[29] Similarly, the Full Court of the Federal Court of Appeal has held that while the views of the Human Rights Committee lack precedential value in Australian courts, they are legitimately regarded as 'the opinions of an expert body' established to further the objects of the treaty, and that 'it is appropriate for a court to have regard to the view of such a body concerning the construction of a treaty'.[30]

15. The Chief Justice of the New Zealand Court of Appeal has characterized the decisions of the Human Rights Committee as being 'of considerable persuasive authority. . .'[31] Similarly, *A (FC) and others v. Secretary of State for the Home Department*, Lord Bingham of Cornhill relied on the Human Rights Committee's General Comment No. 20 on Article 20 of the ICCPR to describe the legal duty of states to prevent torture.[32]

Quebec Court of Appeal and the House of Lord in *Jones*

16. Despite the authoritative nature of the Committee's interpretation of Art. 14(1), the Quebec Court of Appeal declined to rely on it, and instead followed the decisions of the Ontario Court of Appeal in *Bouzari v. Iran*,[33] and the House of Lords in *Jones v. Ministry of Interior Al-Mamlaka*

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[29] [2004] HCA 20 at para. 148.

[30] *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri*, [2003] FCAFC 70 at para. 148.

[31] *Nicholls v. Registrar of the Court of Appeal*, [1998] 2 NZLR 385 at 404 (C.A.), In *Taito v. R (New Zealand)*, [2002] UKPC 15 at para. 25, the Privy Council held that *Nicholls* had 'been overtaken by legislation and the decision of the Privacy Council in the present case', but did not in any way criticize the Court of Appeal's handling of the international law questions.

[32] [2005] UKHL 71 at para. 34.

[33] (2004), 71 O.R. (3d) 675.

Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)[34], decisions which found that Art. 14(1) of the CAT does not require states parties to permit plaintiffs to institute proceedings against foreign states to seek remedies for torture committed abroad.[35] Legal developments in the last decade have superseded the expert opinion that underpinned the Ontario courts' decisions on *Bouzari*.[36] The Quebec Court of Appeal's reasons for following *Bouzari* and *Jones* were erroneous in other respects, too.

17. The Quebec Court of Appeal's reasoning that the Committee's comments in its 2012 concluding observations to Canada's Sixth Periodic Report were aspirational statements of the *lex ferenda,* and not reflective of the *lex lata*[37] is based on the proposition that customary international law 'is far from having reached that stage of development' where immunity must be lifted for acts of torture.[38] However, the Committee's comments on the requirements of Art. 14(1) interpret and apply the CAT; they are not commentary on the state of customary international law.

18. Second, the Court of Appeal notes that *Bouzari* was mentioned twice in the reasons of the International Court of Justice in *Jurisdictional Immunity of the State (Germany v. Italy: Greece Intervening),*[39] and implies that the International Court thereby approved of *Bouzari*. Yet, the International Court explicitly held that the 'specific language' of the CAT had 'no bearing' on the matter before it.[40]

19. Third, the Lords' comments in *Jones* that the Committee's views have 'slight' legal authority, because the Committee is 'not an exclusively legal and not an adjudicative body',[41] and that the

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[34] [2006] UKHL 26.

[35] Reasons for Judgment at paras. 56 - 59.

[36] Appellants' Factum at para. 88.

[37] Reasons for Judgment, *supra*, at para. 59.

[38] *Ibid*. at para. 58.

[39] I.C.J., February 3, 2012.

[40] *Ibid*. at para. 87.

[41] *Jones*, *supra*, at para. 23, per Lord Bingham of Cornhill.

Committee's interpretation of Art. 14 should be regarded 'as having no value',[42] sit uneasily with other jurisprudence of the Lords to opposite effect. In the *A(FC) and others* case, Lord Bingham relied on a General Comment from the Human Rights Committee - the ICCPR's analogue to the Committee - to confirm the nature of the duty to prevent torture.[43] In that case, Lord Bingham readily accepted the treaty body's legal analysis. Further, in *Tangiora v. Wellington District Legal Services Committee (New Zealand)*, Lord Millet for five Lords, sitting as members of the Privy Council, was not persuaded that the functions of the Human Rights Committee were not adjudicative. Rather, Lord Millet observed, without definitively deciding, that there was 'much force' to the view that the Human Rights Committee's functions are adjudicative.[44] There is no pertinent distinction between the treaty bodies established pursuant to the CAT and the ICCPR. Similarly, in *R. v. Special Adjudicator, ex parte Ullah (FC)*, Lord Bingham considered the Human Rights Committee's approach to the deportation of aliens to situations where they may face human rights violations other than torture. Lord Bingham cited how the Committee 'ruled' in *ARJ v. Australia* (Communication No. 692/1996, 11 August 1997), thereby implicitly accepting that its work is adjudicative in nature.[45]

20. In any event, the Lords' focus in *Jones* (like the focus on the Attorney General of Canada in this appeal) on whether the Committee's views are binding as a matter of law is misplaced. Orakhelashvili observes,[46]

> If the interpretation made by the supervisory organ can be rejected just because it is not binding, then there can be more than one 'permissible' interpretation, and this undermines the interpretation regime under the 1969 Vienna Convention. *Interpretation is about the meaning of the treaty clause, not about the binding nature of institutional powers.* Moreover, in this case the Committee's interpretation of Article 14 was perfectly in accordance with its textual meaning, as well as the Convention's object and purpose. The approach of the House of Lords is to assert the power of auto-interpretation of treaties, and it undermines not only the effectiveness of human rights treaties but the stability of treaty obligations in general.

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[42] *Ibid*. at para. 57 per Lord Hoffman.

[43] See *A(FC)* and others, *supra*, at para. 34.

[44] [1999] UKPC 42 at para. 14.

[45] [2004] UKHL 26 at para. 23.

[46] Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong,' (2007) 18 E.J.I.L. 955 at 963; emphasis added.

21. Finally, the scepticism towards the validity of the Committee's treaty interpretation in *Bouzari*, *Jones* and the decision on appeal is not consistent with this Court's healthy reliance on the treaty interpretation of the United Nations treaty bodies in past decisions. The Court should not depart from that practice but continue it on a principled basis.

PART IV - SUBMISSIONS ON COSTS

22. The CBA asks that costs not be awarded for or against the CBA in respect of its intervention.

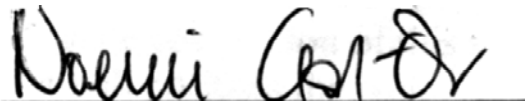
PART V – ORDER SOUGHT

23. The CBA seeks leave to make submissions, not exceeding 10 minutes in duration, at the oral hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

David Matas

Monique Pongracic-Speier



Noemi Gal-Or

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PART VI - TABLE OF AUTHORITIES

Paragraphs

A. Canadian Jurisprudence

B. Foreign jurisprudence

C. International jurisprudence

D. Treaty body comments

E. Academic writings

E. International Reports