



Amnesty International

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The Honourable Anne McLellan
Deputy Prime Minister and Minister of
Public Safety and Emergency Preparedness
340 Laurier Avenue West
Ottawa, Ontario
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By fax: 990-9077

March 31, 2004

Dear Deputy Prime Minister McLellan,

We are writing this open letter to you to underscore Amnesty International's serious concerns with respect to the security certificate provisions that have been part of Canada's immigration legislation for a number of years.

Over the past several years Amnesty International has, on numerous occasions, written to the Canadian government, highlighting individual cases in which we considered that the security certificate process was resulting in violations of a number of fundamental human rights. We are aware of at least six individuals who are currently being held pursuant to security certificates. These individuals have been in detention for an extended period now, close to four years in one case.

We repeat Amnesty International's concerns below and urge that you take immediate steps to reform the security certificate process to bring it into full compliance with Canada's international human rights obligations. In doing so we remind the government that the *Immigration and Refugee Protection Act* itself, in s. 3(3)(f), requires that the law be "construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory."

Unfair Proceedings

Amnesty International is of the view that the security certificate process may very well result in arbitrary detention and thus violate the fundamental right to liberty. The process does not conform to a number of essential international legal standards, which are meant to safeguard against the very possibility of arbitrary detention. Detainees are not informed of the precise allegations against them. They see only a summary of the evidence that is being used against them. Evidence may be presented in court in the

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absence of the detainee or his or her counsel. The detainee is not afforded a right to examine any and all witnesses who have been the source of that evidence. Furthermore, the Federal Court considers only the “reasonableness” of the decision to issue a security certificate and does not substantively review it.

Amnesty International recognizes that special measures may need to be taken in cases involving security matters, but any such measures must be consistent with international law. We realize, for example, that the government may have concerns about protecting the identity of certain sources or witnesses. If so, specific and targeted measures should be taken to address those particular concerns, rather than through the widesweeping approach of the current legislation. In any case, in view of the potential for a wide interpretation by the detaining authorities of security information which may be the basis for a decision to detain, and because decisions to detain in such cases are often based on a prediction about an individual’s future actions, it is imperative that there be full and effective judicial scrutiny of such decisions, beyond the test of “reasonableness” that is the present standard.

Amnesty International has repeatedly drawn attention, worldwide, to instances where the failure to comply with international human rights standards regarding fair trials has led to wrongful detention and other human rights violations. In the present circumstances Amnesty International considers that individuals detained pursuant to a security certificate are effectively denied their right to prepare a defence and mount a meaningful challenge to the lawfulness of their detention. This is in contravention of Canada’s obligations under articles 9 and 14 of the *International Covenant on Civil and Political Rights*.

While some of the provisions in articles 9 and 14 apply specifically to individuals who have been formally charged with a criminal offence, which is not the case in the issuance of a security certificate, they are nevertheless widely recognized as reflecting general principles of law and are relevant in so far as they set out the basic essential elements of a fair hearing. Furthermore some of the provisions apply to all detainees, such as those guaranteeing the right to challenge the lawfulness of their detention. That right to challenge must be in accord with recognized international fair trial standards.

Other international standards highlight the importance of ensuring that all detainees enjoy the same level of fairness. The *UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, adopted by the UN General Assembly in 1988 establish that anyone who is detained shall be given an “effective opportunity” to be heard by a judicial or other authority, has the right to defend him or herself, and shall received “prompt and full communication” of any order of detention “together with the reasons therefore.” The *Basic Principles on the Role of Lawyers*, adopted in 1990, underscore that lawyers must be given access to “appropriate information, files and documents” so that they can provide their clients with “effective legal assistance.” Amnesty International considers that these standards require that the detainee be given detailed reasons as to why he or she is detained, access to the full evidence that is being used against them, and a substantive hearing to examine the lawfulness of the detention.

On the basis of these concerns Amnesty International has repeatedly urged the Canadian government to reform the security certificate process so as to bring it into line with Canada's international human rights obligations, including by ensuring a substantive review of the reasons for detention and by making all evidence available to the individual detained so that any potentially unfounded allegations can be effectively and meaningfully challenged.

Protection against *Refoulement*

Amnesty International is doubly concerned about the fundamentally flawed and unfair security certificate process because it is frequently applied in cases where the likely outcome is deportation to a country where the individual concerned is at serious risk of torture or other grave human rights violations. Given such potentially severe consequences, it is all the more critical that the security certificate process fully comply with international human rights standards governing arrest and detention.

International law is absolute, no one should be deported to a country "where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."¹ The United Nations Committee against Torture, in 2000, informed Canada that it is a violation of the UN Convention against Torture to deport an individual to face a substantial risk of torture, including when there are security concerns. In 2002 the Supreme Court of Canada, in the *Suresh* case, recognized that international law provides absolute protection against being returned to torture, but left open a possibility that such returns might be allowed under the Canadian Charter of Rights, in extraordinary circumstances which the Court did not define.

There is a mechanism in Canadian law which requires an assessment to be carried out by an immigration officer prior to deportation to determine whether an individual does face a substantial risk of torture. However, if a security certificate has been issued and found to be "reasonable" by a judge, that possibility is no longer available to the individual concerned. Both before and since the *Suresh* ruling Amnesty International has urged the Canadian government to amend Canadian law so as to clearly prohibit *any* individual being returned to country where there is a substantial risk of torture.

Conclusion

Amnesty International is very much aware that the government alleges that individuals detained pursuant to security certificates constitute a danger to the security of Canada. However, Amnesty International urges Canada to adopt a response to security concerns that does not result in violations of such fundamental human rights as the protections against arbitrary detention and torture. Canada's response should instead focus on bringing individuals to justice in criminal proceedings that meet international fair trial standards. That is the best means of ensuring both that both justice and security will prevail.

¹ United Nations Convention against Torture, article 3(1).

Sincerely,

A handwritten signature in black ink that reads "Alex Neve". The script is fluid and cursive, with the first name "Alex" and last name "Neve" clearly distinguishable.

Alex Neve
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(English-speaking)

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