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# KAZEMI ESTATE V. ISLAMIC REPUBLIC OF IRAN AND THE DOCTRINE OF STATE IMMUNITY UNDER CANADIAN LAW

Christopher Cornell\*

THIS article looks at the Supreme Court of Canada's recent decision in *Kazemi Estate v. Islamic Republic of Iran (Kazemi)* outlining to what extent Canadian law grants sovereign nations immunity from suit in Canadian courts. Part I provides background information on the case itself and the relevant law, while Part II discusses the Supreme Court's ruling and the dissent by Justice Abella. Part III discusses the potential for legislative changes in light of the *Kazemi* ruling, and Part IV concludes.

## I. KAZEMI ESTATE V. ISLAMIC REPUBLIC OF IRAN: BACKGROUND LAW AND LOWER COURT RULINGS

### A. THE MURDER OF ZAHRA KAZEMI

Zahra Kazemi, a photojournalist with dual Canadian and Iranian citizenship, was arrested at 5:40 PM on June 23, 2003, outside of Evin Prison in Tehran while photographing a vigil held by family members of demonstrators imprisoned there after being arrested earlier that June.<sup>1</sup> Kazemi was arrested for allegedly taking photos of the prison wall, an act that would have been illegal as indicated by signs posted on the wall, and was taken into the prison for questioning.<sup>2</sup> Upon her arrest, Kazemi was asked by prison officials to hand over her camera and film for examination, and was told that if she did so, then she would be allowed to retrieve them the next day.<sup>3</sup> Instead of complying with the request, Kazemi

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1. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *IMPUNITY IN IRAN: THE DEATH OF PHOTOJOURNALIST ZAHRA KAZEMI* 6 (2d ed. 2006).

2. *Id.*

3. *BBC News: Iran-A Murder Mystery (Worldwide Version)* (BBC News television broadcast Feb. 15, 2004) at 22:14, available at <http://news.bbc.co.uk/2/shared/spl/hi/programmes/correspondent/transcripts/iran150204.txt>.

opened her camera and exposed the film to light, making it impossible for the prison officials to determine what she had been photographing and leading to her confinement in the prison.<sup>4</sup>

### 1. *Kazemi's Detention*

Although the exact timeline of events is disputed, it is certain that, over the next three days, Kazemi was interrogated at the prison by agents and officials from at least three governmental bodies: the Public Prosecutor's Office, the intelligence unit of the Law Enforcement Forces, and the Ministry of Intelligence and Security.<sup>5</sup> On the night of June 26, 2003, three days after her captivity and interrogations had begun, Kazemi, who had been in good physical health before being arrested, complained that she was feeling unwell and began to vomit, with blood visible in the vomit.<sup>6</sup> After an examination in the Evin Prison medical clinic, prison officials decided at 12:20AM on June 27th to transfer Kazemi to Baghiatollah Al-Azam Military Hospital.<sup>7</sup> Upon arrival at the hospital, Kazemi, then in a coma, was examined by Dr. Shahram Azam and one of his female nurses.<sup>8</sup> Kazemi never regained consciousness and was taken off life support on July 10, 2013, by Iranian authorities—without the consent of Kazemi's mother or son—and subsequently died.<sup>9</sup>

### 2. *Iranian Government Investigations*

After Kazemi's death, the Ministry of Culture and Islamic Guidance issued a report indicating that Kazemi had suffered a stroke and died in detention.<sup>10</sup> The next day, however, then Iranian President Mohammad Khatami ordered a special presidential commission to look into the circumstances of Kazemi's death, clarify ambiguities that were arising, and present a report on the matter to both himself and the Iranian public.<sup>11</sup> The presidential commission's report concluded that Kazemi, at some point within twenty-four hours of her death, had been struck in the head, causing a skull fracture and associated injuries that ultimately lead to her death.<sup>12</sup>

4. *Id.*

5. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 1, at 7.

6. *Id.*

7. *Id.*

8. Richard Cleroux, *Iranian Secret Police Tortured Woman To Death, Says Doctor*, *TIMES* (London), Apr. 1, 2005, at 43, available at <http://www.thetimes.co.uk/tto/news/world/article1974102.ece>.

9. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 1, at 8.

10. *Id.* at 9.

11. *Id.*

12. MATN-E KAAMEL-E GOZAARESH-E HEY'AT-E VEEZHEYEH RA'EES JOMHOORI BARAAEYEH RESEDEGI BEH MASA'ALEH-YE FOT-EKHANOOM-E ZAHRA KAZEMI [COMPLETE REPORT OF THE SPECIAL PRESIDENTIAL COMMITTEE TO INVESTIGATE THE DEATH OF MRS. ZAHRA KAZEMI], 04/28/1382 [07/19/2003] 6 (Iran), translated in IRAN HUMAN RIGHTS DOCUMENTATION CTR., *IMPUNITY IN IRAN: THE DEATH OF PHOTOJOURNALIST ZAHRA KAZEMI* (2d ed. 2006).

Not long after the presidential commission issued its report, another investigation was initiated under Article 90 of the Iranian Constitution, which mandates that the Iranian Majlis (parliament) investigate complaints filed against any of branch of the Iranian Government.<sup>13</sup> The complaint here was filed by Kazemi's mother, Ezzat Ebrahimi.<sup>14</sup> The parliamentary commission offered no explanation for Kazemi's death; rather, it concluded that she had possessed the proper credentials to engage in photojournalism, that she had not broken any Iranian laws when photographing the vigil outside Evin Prison, that her arrest itself violated the Iranian Constitution, and that she had been denied protections and rights guaranteed under the Iranian Constitution.<sup>15</sup> But most of the report was dedicated to lambasting the actions of the Chief Prosecutor of Tehran, Saeed Mortazavi, who the parliamentary commission showed had (1) been behind the continued illegal detention of Kazemi after the intelligence services had ruled that she should be released; and (2) tried to cover up the circumstances of her confinement and death.<sup>16</sup> The report further stated that Mortazavi refused to comply with constitutionally and legally authorized requests presented to him and his office, often by trying to argue that he was not legally required to comply.<sup>17</sup> After two investigations by the Iranian Government, it was clear that Zahra Kazemi had been killed by a strike to the head while in detention, the detention itself had been unconstitutional, and the Tehran Prosecutors Office had—at the very least—attempted to cover up the circumstances around Kazemi's confinement and death because of the legal problems with her detention.

### 3. *The Trial of Reza Ahmadi*

Despite several individuals being charged by Iranian authorities with Kazemi's murder at various times, the only person in Iran to stand trial was Reza Ahmadi, a low ranking Intelligence Ministry official who had been assigned to watch Kazemi during her detention, and who was charged with Kazemi's "semi-intentional killing."<sup>18</sup> Ahmadi's June 2004 trial was criticized from the start on many fronts, including by the Intelligence Ministry, which insisted that he was a scapegoat, and by Kazemi's mother, Ezzat Ebrahimi, who complained that she had filed her criminal

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13. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 1, at 13.

14. GOZAARESH-E KOMESESEYON-E AASL-E NAVAD-E GHAANOON-E ASAASI-E MAJLES-E SHORAAYE ISLAMI MARBOOT BEH ELAL VA AVAAMEL-E KOSHTEH SHODAN-E KHANOOM-E ZAHRA KAZEMI AKKAAS VA KHABARNEGAAR-E IRANI [REPORT OF THE PARLIAMENTARY ARTICLE 90 COMMISSION REGARDING THE CAUSES AND PERPETRATORS OF THE KILLING OF THE IRANIAN PHOTOJOURNALIST, MS. ZAHRA KAZEMI], 08/07/1382 [10/29/2003] 1 (Iran), *translated in* IRAN HUMAN RIGHTS DOCUMENTATION CTR., *IMPUNITY IN IRAN: THE DEATH OF PHOTOJOURNALIST ZAHRA KAZEMI* (2d ed. 2006) [*hereinafter* REPORT OF THE PARLIAMENTARY ARTICLE 90 COMMISSION].

15. *See id.* at 6–7.

16. *See id.* at 4–8.

17. *See id.* at 4–5.

18. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 1, at 21–22.

complaint against the Public Prosecutor's Office.<sup>19</sup> Over the course of the trial, the judge refused to consider evidence from the Intelligence Ministry and the Kazemi family's lawyers that evidence in the case had been tampered with and that initial witness reports stating that Kazemi had been injured by prison officials when she was arrested had been recanted under duress.<sup>20</sup> Further, the Kazemi family lawyers were barred from introducing valuable evidence, such as the parliamentary commission's report and the case file in its entirety.<sup>21</sup> Due to a lack of evidence, the court acquitted Ahmadi.<sup>22</sup>

As no other suspects were charged, the court had to rule that the death was an accident likely caused by Kazemi falling and striking her head because of decreased blood sugar following a hunger strike.<sup>23</sup> Since the trial court ruling, Ahmadi's acquittal was upheld at the intermediate appeals level, and the Supreme Court of Iran has ordered a new investigation into the case because of procedural flaws and jurisdictional issues with the original case.<sup>24</sup> But, to date, no public report as to the results of the Supreme Court of Iran's investigation, or even any evidence that the investigation took place, has emerged.

#### 4. *Doctor Azam's Report*

In April 2005, the Iranian Government's claim that Kazemi's only injury was the blow to her head was directly contradicted by her treating physician, Dr. Shahram Azam.<sup>25</sup> Dr. Azam offered a distinct and more horrific report on Kazemi's physical condition upon arrival at his hospital.<sup>26</sup> According to Azam and his medical notes, Kazemi arrived with injuries that included a fractured skull, broken nose, burst ear drum, crushed left toe, two broken fingers, three missing fingernails, deep scratches into her flesh, and missing skin indicative of her having been flogged; injuries that, to Dr. Azam, "indicated it was organi[z]ed torture and not an injury that caused her death."<sup>27</sup> While Dr. Azam, as a male doctor, was not permitted to conduct an investigation of Kazemi's genital area, an investigation by one of his female nurses concluded that Kazemi had been the victim of a "savage" and "very brutal rape."<sup>28</sup> The extreme nature of Kazemi's injuries, which were to some extent apparent to

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19. *Id.* at 22.

20. *Id.* at 23.

21. *Id.* at 23-24.

22. *Id.* at 24.

23. *Id.*

24. *Iranian Court Reopens Kazemi Case*, BBC NEWS, (Nov. 27, 2007, 7:09 PM), [http://news.bbc.co.uk/2/hi/middle\\_east/7115024.stm](http://news.bbc.co.uk/2/hi/middle_east/7115024.stm).

25. Cleroux, *supra* note 8.

26. *Id.* Dr. Azam had fled Iran in August 2004 with his family by feigning a need to seek medical treatment in Finland before continuing on to Sweden, and later being granted asylum in Canada with the assistance of Kazemi's son, Stephan Hachemi.

*Id.*

27. *Id.*

28. *Id.*; SHAHRAM AZAM, MEDICAL REPORT OF DR. SHAHRAM AZAM DESCRIBING HIS EXAMINATION OF KAZEMI AT BAGHIATOLLAH AL-AZAM HOSPITAL, June 27,

her mother upon collecting her body, shed light on why Iranian Government officials forced Mrs. Ebrahimi to consent to the immediate burial of her daughter's body before any further investigation could be carried out.<sup>29</sup> With the information provided by Dr. Azam and Mrs. Ebrahimi in mind, it is reasonable to conclude that, after her arrest, Zahra Kazemi was tortured, raped, and murdered by Iranian government officials who then literally buried the evidence of those crimes by forcing Kazemi's mother to consent to an immediate entombment.

## B. CANADIAN LAW ON STATE IMMUNITY

The Canadian law addressing the immunities of foreign states in Canadian courts is the State Immunity Act, a piece of legislation that went into effect in 1982.<sup>30</sup> The State Immunity Act was enacted by the Canadian Parliament to establish that under Canadian law foreign states were not absolutely immune from suit in Canadian courts (as had been the case under previous common law precedent); rather, they were offered the restrictive immunities from suit provided by the Act itself.<sup>31</sup> Under the State Immunity Act, a foreign state is immune from suit in Canadian courts except (1) if the state voluntarily waves its immunity; (2) if the suit relates to the commercial activities of the foreign state; (3) if the actions of the state have led to any death, personal or bodily injury, or damage to or loss of property on Canadian soil; or (4) in court proceedings against a state for support of terrorism after January 1, 1985, if the state is on the list of state supporters of terrorism issued by the Governor General in Council.<sup>32</sup> The terrorism exception to the immunity of a foreign state is a recent addition to the State Immunity Act that was added in 2012 via the Justice for Victims of Terrorism Act.<sup>33</sup> To date, the only foreign states listed by the Governor General in Council as sponsors of terrorism are Iran and Syria, both of which were listed on September 7, 2012.<sup>34</sup> So under the State Immunity Act, a foreign state effectively is immune from suit except when a potential suit relates to the state's commercial activities, when it has caused an injury on Canadian soil, or for any state supported acts of terrorism committed after January 1, 1985, if the state in question is listed as a state supporter of terrorism by the Canadian Government.

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2003, *translated in* IRAN HUMAN RIGHTS DOCUMENTATION CTR., *IMPUNITY IN IRAN: THE DEATH OF PHOTOJOURNALIST ZAHRA KAZEMI* (2d ed. 2006).

29. *See* REPORT OF THE PARLIAMENTARY ARTICLE 90 COMMISSION, *supra* note 14, at 3.

30. H.L. Molot & M.L. Jewett, *The State Immunity Act of Canada*, 20 CAN. Y.B. INT'L L. 79, 79 (1982).

31. *See id.* at 79, 121.

32. State Immunity Act, R.S.C. 1985, c. S-18, §§ 4-6 (Can.).

33. Justice For Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, § 4 (Can.).

34. Order Establishing a List of Foreign State Supporters of Terrorism, SOR/2012-170 (Can.).

## C. LOWER COURT RULINGS

1. *The Quebec Superior Court Ruling*

Following his mother's death and Dr. Azam's revelations, Kazemi's son, Stephan Hashemi, filed a civil suit on July 29, 2006, in the Quebec Superior Court—in both his personal capacity and as executor of his mother's estate—against the Iranian Government, Ayatollah Ali Khamenei, the Iranian Supreme Leader, Saeed Mortazavi, and Mohammad Bakhshi, the Deputy Chief of Intelligence of Evin Prison at that time.<sup>35</sup> Citing the abuse suffered by Kazemi and its direct link to her death, the Kazemi estate sued for \$5,000,000 for Kazemi's pain and suffering and another \$5,000,000 in punitive damages; Hashemi sued for \$5,000,000 for the loss of his mother and the pain and suffering caused by it, \$2,000,000 in punitive damages, an amount to be determined at trial sufficient to repatriate Kazemi's remains to Canada and provide for a proper autopsy and reburial, and legal expenses.<sup>36</sup> The Iranian defendants contested the validity of the action, citing the State Immunity Act, but the plaintiffs responded by arguing that several provisions of the State Immunity Act were unconstitutional, or alternatively, that the case was allowed to proceed under the terms of the State Immunity Act.<sup>37</sup>

Hashemi's claim centered on the fact that Canadian law allowed for a suit to be filed if, among other things, the damage caused to the plaintiff as a result of the defendants' actions was suffered by the plaintiff in Canada—in this case, Quebec.<sup>38</sup> The Kazemi estate argued that it would be impossible for the claim to be fairly adjudicated in Iran, so it should also be heard in Quebec.<sup>39</sup> Alternatively, the Kazemi estate contested, if the State Immunity Act validly and constitutionally barred the estate's suit, then it should still be allowed to proceed because either (1) common law and international law establish that torture is so heinous an act that it should constitute an exception to the immunity afforded by the State Immunity Act;<sup>40</sup> or (2) the immunities offered to the Iranians under the State Immunity Act constituted unconstitutional violations of the Canadian Bill of Rights and Charter of Rights and Freedoms.<sup>41</sup>

The superior court ruled on January 25, 2011 that, as Hashemi alleged, he suffered injurious psychological trauma and pain and suffering while in Canada as a result of the defendants' actions, and that his claim could proceed to trial under the provisions of Section Six of the State Immunity Act.<sup>42</sup> The court also held that Kazemi's estate's claim against all of the defendants was barred by the State Immunity Act because her injuries

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35. *Estate of Kazemi v. Islamic Republic of Iran*, 2011 QCCS 196, para. 2 (Can. Que. Sup. Ct.).

36. *Id.* para. 4.

37. *Id.* paras. 6–7.

38. *See id.* para. 26.

39. *Id.* para. 28.

40. *See id.* para. 37.

41. *Id.* para. 155.

42. *Id.* paras. 83, 92, 94.

occurred in Iran, not Canada.<sup>43</sup> The Superior Court further ruled against the defendant's other arguments by holding that (1) the State Immunity Act was itself the sole source of Canadian law on state immunity, and that neither common law nor international law principles were applicable<sup>44</sup>; and (2) the State Immunity Act was fully constitutional and thus must be applied.<sup>45</sup> In sum, the Quebec Superior Court determined that the State Immunity Act was both constitutional and the sole source of Canadian Law on state immunity, and that Stephan Hashemi's claim could proceed under the provisions of the Act but those of his mother's estate could not.

## 2. *The Quebec Court of Appeal's Ruling*

Both the Iranian defendants and the Kazemi estate appealed the rulings against them, and the Quebec Court of Appeal issued its ruling on August 15, 2012.<sup>46</sup> In its ruling, the Court of Appeal first upheld the Superior Court when it ruled that the State Immunity Act is the complete codification of Canadian state immunity law, and that no common law or international law is applicable in the field of state immunity as far as Canada is concerned.<sup>47</sup> The Court of Appeal then reversed the Superior Court by ruling that, under Section Six of the State Immunity Act, if an injury suffered in Canada is to be grounds for allowing a suit against a foreign state, it must be a physical injury.<sup>48</sup> Hashemi's claims of psychological pain and suffering were therefore insufficient to allow his suit to proceed.<sup>49</sup> Turning to whether all of the named defendants were protected by state immunity, the Court of Appeal agreed with the Superior Court that the State Immunity Act shielded each defendant from Canadian judicial review.<sup>50</sup> The Court of Appeal also agreed with the Superior Court's ruling that the State Immunity Act was fully legal and did not infringe upon any rights provided by the Canadian Bill of Rights or Charter of Rights and Freedoms.<sup>51</sup> In effect, the Court of Appeal ruled that the claims of both the Kazemi estate and Hashemi were barred by the immunities provided to foreign states by the State Immunity Act.<sup>52</sup>

## II. KAZEMI ESTATE V. ISLAMIC REPUBLIC OF IRAN: THE SUPREME COURT OF CANADA'S RULING

Following the ruling of the Quebec Court of Appeal, both the Kazemi estate and Hashemi appealed their cases to the Supreme Court of Ca-

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43. *Id.* paras. 93, 154.

44. *Id.* para. 213.

45. *Id.* para. 215.

46. Estate of Kazemi v. Islamic Republic of Iran, 2012 QCCA 1449, paras. 13–14 (Can. Que. C.A.).

47. *Id.* para. 42.

48. *Id.* paras. 82–83.

49. *Id.*

50. *See id.* para. 97.

51. *Id.* paras. 109, 120.

52. *See id.* para. 122.



nada,<sup>53</sup> which subsequently heard their appeals and issued its opinion on October 10, 2014.<sup>54</sup>

#### A. THE MAJORITY OPINION

The majority opinion in the case was authored by Justice Louis LeBel, who wrote for the entire Court, except for Justice Rosalie Abella.<sup>55</sup> Justice LeBel did not hide the Court's feelings on the facts. The opinion's first sentence reads: "The death of Ms. Zahra Kazemi in Iran was nothing short of a tragedy."<sup>56</sup> But the next paragraph clarifies that, despite Zahra Kazemi's tragic death, Canadian law on the matter is straightforward: Iran and its officials are entitled to immunity, and neither Kazemi's estate nor her son can sue in Canadian courts because of that immunity.<sup>57</sup>

The first issue addressed by LeBel was whether the State Immunity Act was a complete codification of Canadian state immunity law, or if common law or international law principles played a role.<sup>58</sup> LeBel held that, while immunity is itself a product of international law, the State Immunity Act is the complete codified source of authority regarding the law of foreign state immunity in Canada, and that principles from common law or international law outside of the text of the Act are not applicable.<sup>59</sup> The opinion notes that the decision as to any changes to the scope of state immunity law was the prerogative of the Canadian Parliament.<sup>60</sup> To drive this point home, LeBel pointed out that when the Justice For Victims of Terrorism Act—the legislation establishing that terrorist acts can be barred from immunity protections—was before Parliament, other proposed legislation that was ultimately not sanctioned by Parliament would have similarly removed immunities afforded for acts of genocide, torture, or other grave crimes.<sup>61</sup> LeBel effectively demonstrated that, for the purposes of Canadian law, there is a very narrow range of exceptions to the principle of foreign state immunity, and that all of those exceptions had been codified by Parliament in the State Immunity Act. Yet he simultaneously explained that Parliament could add additional exceptions to the law at any time.

The next issue LeBel addressed was whether agents of a foreign state can be sued for acts of torture committed abroad.<sup>62</sup> LeBel began by making clear that, while torture is undoubtedly abhorrent and illegal under Canadian law, the question before the court was "whether one can

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53. *Estate of Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, para. 1 (Can.).

54. Mike Blanchfield, *SCC Says Hashemi Can't Sue Iran Over Mother's Torture Death*, CTV NEWS (Oct. 10, 2014, 2:08 PM), <http://www.ctvnews.ca/canada/scc-says-hashemi-can-t-sue-iran-over-mother-s-torture-death-1.2048146>.

55. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (Can.).

56. *Id.* para. 1.

57. *Id.* para. 2.

58. *Id.* para. 31.

59. *Id.* paras. 44–45, 54, 56.

60. *Id.*

61. *Id.* para. 44.

62. *Id.* para. 53.

sue a foreign state in Canadian courts for torture committed abroad.”<sup>63</sup> In the case of the pain and suffering alleged by Hashemi, LeBel stated that Hashemi had no valid claim because (1) the underlying torts causing his mother’s death did not occur in Canada;<sup>64</sup> and (2) the injuries he allegedly suffered were mental, and only physical injuries or mental injuries arising from physical injuries were covered by the scope of the State Immunity Act.<sup>65</sup> Next, LeBel concluded that, for the purposes of the State Immunity Act, Mortazavi and Bakhshi were covered by the immunity afforded to foreign governments.<sup>66</sup> Therefore, neither the Kazemi estate nor Hashemi could “avail themselves of a Canadian court in order to sue Iran or its functionaries for Ms. Kazemi’s torture and death.”<sup>67</sup> LeBel then analyzed the relevant statutory protections afforded by the Bill of Rights and the constitutional protections afforded by the Charter of Rights and Freedoms, and concluded that the State Immunity Act violated neither.<sup>68</sup> And so all challenges to the State Immunity Act’s constitutionality failed.<sup>69</sup>

LeBel concluded the entire discussion explaining that Canadian foreign state immunity law is a product of Parliament, and that considerations by it and the Government of the day require knowledge of “diplomacy and international politics and a careful weighing of national interests.”<sup>70</sup> Though some actions taken by Parliament or the Government with regard to immunity can be subject to Charter scrutiny, the actual decisions still vest in the political branches of the Canadian government.<sup>71</sup> Further elaborating on the political considerations, LeBel stated:

Parliament has the ability to change the . . . law on exceptions to state immunity, just as it did in the case of terrorism, and allow those in situations like Mr. Hashemi and his mother’s estate to seek redress in Canadian courts. Parliament has simply chosen not to do it yet.<sup>72</sup>

Because the State Immunity Act itself was constitutionally valid, and under its provisions the Iranian defendants were all entitled to immunity from suit, the Supreme Court of Canada rejected the appeals of the Kazemi estate and Stephan Hashemi, and upheld the ruling of the Quebec Court of Appeal.<sup>73</sup>

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63. *Id.*

64. *Id.* para. 73.

65. *Id.* para. 74–75.

66. *See id.* para. 98. The plain text of the statute already afforded immunity to the Iranian Government and Ayatollah Khamenei as its Supreme Leader. *Id.* para. 184.

67. *Id.* para 110.

68. *Id.* paras. 120, 167.

69. *Id.*

70. *Id.* paras. 169.

71. *See id.* para. 170.

72. *Id.* para. 170.

73. *See id.* para. 171.

## B. JUSTICE ABELLA'S DISSENT

The dissent by Justice Rosalie Abella revolved around an argument grounded in international law, asserting that, because Mortazavi and Bakhshi allegedly committed torture, they were not protected by the provisions of the State Immunity Act, and thus could be forced to go to trial.<sup>74</sup> Justice Abella began by acknowledging that the Iranian government and the Supreme Leader are undoubtedly covered by the immunities of the State Immunity Act based on a plain reading of text.<sup>75</sup> Justice Abella argued that, under customary international law, states may grant immunity to foreign officials, but that customary international law does not necessarily stop a state from denying immunity to foreign officials who carried out or enabled acts of torture.<sup>76</sup> She went on to argue that, because there is universal acceptance that torture should be prohibited, denying immunity to individual foreign state officials does not undermine the basic principle of non-interference with the sovereignty of individual states that forms the basis of international law's motivations for immunity protections.<sup>77</sup> Therefore, because Justice Abella reads the State Immunity Act's immunities as inapplicable to officials of a foreign state who engage in torture, she would have forced Mortazavi and Bakhshi to stand trial.<sup>78</sup>

It is worth noting that, in the majority opinion, Justice LeBel rejected Justice Abella's argument by stating that it defeats itself by conceding that customary international law is *developing towards* holding that foreign officials are not immune from charges related to torture, as opposed to such a holding already being a settled part of customary international law.<sup>79</sup> Justice LeBel then concluded that, because the idea that foreign officials are not immune from charges related to torture is not settled customary international law, it cannot be used to interpret the State Immunity Act; therefore, officials who committed torture would be shielded by foreign state immunity under the Act.<sup>80</sup>

All in all, Justice Abella agreed with the majority that the Iranian government and Ayatollah Khamenei were granted immunity from suit by the State Immunity Act. She dissented, however, based on her belief that a developing customary international law norm would allow an exception to the Act for foreign officials who engaged in torture, and, as a result, force them to stand trial.

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74. *See id.* paras. 229, 231 (Abella, J., dissenting).

75. *Id.* para. 184.

76. *See id.* para. 211.

77. *Id.* para. 229.

78. *Id.* para. 231.

79. *See id.* para. 102 (majority opinion).

80. *Id.*

### III. THE PARLIAMENTARY RESPONSE TO *KAZEMI ESTATE V. ISLAMIC REPUBLIC OF IRAN*

After the Supreme Court of Canada ruled in *Kazemi* that Parliament could remove the immunity for foreign states and officials who engage in torture from the State Immunity Act, several groups and individuals called upon Parliament, and by implication the then in power Government of Prime Minister Stephen Harper, to introduce and approve legislation removing immunity under the Act for torture conducted by foreign states.<sup>81</sup> Among those calling for changes to the State Immunity Act were Hashemi's lawyers and the then main opposition New Democratic Party.<sup>82</sup>

Despite these calls, there has been just one legislative proposal: a private members bill<sup>83</sup> by Liberal MP Irwin Cotler, a former Justice Minister and Attorney General of Canada.<sup>84</sup> On October 20, 2014, Cotler re-introduced into the House of Commons a bill he had initially proposed with multi-party support in the prior Parliament to amend the State Immunity Act to allow foreign states to be sued for any acts of genocide, crimes against humanity, war crimes, or torture—it was never voted on.<sup>85</sup> Upon introducing the bill, Cotler invited the Harper Government to take the bill on as its own legislation, which would all but guarantee its approval.<sup>86</sup> Otherwise, Cotler's low ranking on the list for consideration of private members' bills would, once again, likely cause the bill to die without being voted on.<sup>87</sup> Cotler's fears were well-founded because no legislative progress was made on the bill after it was introduced and had its first reading in the House of Commons, causing it to expire with the dissolution of the 41st Parliament in August 2015.<sup>88</sup> If enacted, Cotler's bill—or similar legislation—would accomplish the simple legislative change the Supreme Court contemplated when it said in *Kazemi* that Parliament could modify the State Immunity Act to remove the immunities afforded to states who engage in torture.<sup>89</sup>

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81. See *Zahra Kazemi's Son Blocked By Supreme Court From Suing Iran*, CBC NEWS (Oct. 10, 2014, 2:55 PM), <http://www.cbc.ca/news/politics/zahra-kazemi-s-son-blocked-by-supreme-court-from-suing-iran-1.2794468>.

82. *Id.*

83. Bill C-632: A Bill to Amend the State Immunity Act, 2013-14, H.C. Bill C-632 (Can.), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6729743&File=4>.

84. *The Honourable Irwin Cotler: Roles*, PARLIAMENT OF CAN., <http://www.parl.gc.ca/Parliamentarians/en/members/Irwin-Cotler%281785%29/Roles> (last visited Mar. 15, 2015).

85. House of Commons Debates, 41st Parl. 2nd Sess., Vol. 147 No. 128 (Oct. 20, 2014) at 8587 (Hon. Irwin Cotler) (Can.), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=2&DocId=6730963>.

86. *Id.*

87. *Id.*

88. *Private Member's Bill C-632*, LEGISINFO, <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&billId=6252036&Mode=12> (last visited Jan. 29, 2015).

89. See H.C. Bill C-632.

## IV. CONCLUSION

In *Kazemi*, the Supreme Court of Canada (like the Québécois courts before it), was placed in an unenviable situation. Though various organs of the Iranian Government admitted that Zahra Kazemi was murdered while in their custody and the evidentiary record indicated a significantly darker series of abuses before her death, Canada's State Immunity Law clearly held that Iran and its officials were entitled to immunity from suit in Canadian courts for those abuses. The justices, while cognizant of the horrific circumstances surrounding Kazemi's death, based their opinions on their reading of the relevant law, even though the outcome was one that they themselves probably felt was undesirable. With that undesirability in mind, Justice LeBel set out exactly what the Canadian Parliament would need to do to allow suits against states that torture Canadians to progress in Canadian courts, pointedly citing the recent example of the amendment to the law banning immunity for acts of terrorism. Hopefully the Canadian Parliament will act on the Cotler bill, or one like it, and grant Canadian victims like Stephan Hashemi the right to sue the persons and governments responsible for their suffering in Canadian courts.

# **Arbitration Conference**

