Court File No.

**FEDERAL COURT**

B E T W E E N:

**KAGUSTHAN ARIARATNAM**

Applicant

-and-

**CANADIAN SECURITY INTELLIGENCE SERVICE**

Respondent

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**NOTICE OF APPLICATION**
**(Pursuant to section 18.1 of the *Federal Courts Act*)**

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 13, 2022

Issued by:

Jonathan Macena
_____
(Registry Officer)

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I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie confirme À l'original déposé au dossier de la Cour fédérale.

Filing Date
Date de dépôt : June 13, 2022

Dated
Fait le : June 14, 2022

## APPLICATION

This is an application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act,* R.S.C., 1985, c. F-7 to set aside the decision ("**Decision**") of the Canadian Human Rights Commission ("**Commission**" or "**CHRC**") dismissing the Applicant's complaint against the Canadian Security Intelligence Service ("**CSIS**") under s. 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 ("***CHRA***") on the basis that the National Security and Intelligence Review Agency "has addressed or could have addressed the allegations of discrimination overall."

The Decision is dated June 1, 2022, and it was first communicated to the Applicant on June 2, 2022.

## THE APPLICANT MAKES APPLICATION FOR:

a) An order pursuant to section 18.1 of the *Federal Courts Act*, quashing the Decision;
b) The costs of this application; and
c) Such further and other relief as counsel may request and this Honourable Court may permit.

## THE GROUNDS FOR THE APPLICATION ARE:

### I. Background

#### A. Forced Recruitment as Child Soldier

1. The Applicant was born in Sri Lanka. In 1990, at the age of 17, the Applicant was forcibly recruited to the Students Organization of Liberation Tigers. One year later, he was forcibly recruited to the Liberation Tigers of Tamil Eelam ("**LTTE**"). He was forced to work as an Intelligence Officer.

2. In 1995, the Applicant surrendered to Sri Lankan security forces and provided them with intelligence to successfully recapture the Jaffna peninsula from the LTTE.

3. In September 1997, the Sri Lankan military released the Applicant, and he moved to Canada. The Applicant was granted refugee status in April 1998, and he cut all ties with the Sri Lankan military.

**B. Work as CSIS Informant & Forced Misdiagnosis**

4. In the summer of 2000, a CSIS official, who identified herself as Lezli Kirsch, visited the Applicant at his apartment in Montreal. The Applicant told Ms. Kirsch about his past, including that he was forced to fight for the LTTE, and the Applicant provided Ms. Kirsch with intelligence information about Sri Lanka. For the next three years, the Applicant met with Ms. Kirsch weekly and provided her with intelligence information.

5. In August 2003, some LTTE supporters made death threats against the Applicant and his family. The next day, the Applicant went for an x-ray for a sinusitis condition. After undergoing the x-ray, it occurred to the Applicant that it might be a bad idea for someone to have a record of his facial structure because of the death threats and his intelligence work. He asked the technician to delete the x-ray, but she refused.

6. The Applicant called the police to ask for assistance. He explained his history to them, including his involvement with CSIS, but they did not believe him. The Applicant showed the police Ms. Kirsch's card, but when they called Ms. Kirsch, she lied and denied the Applicant's involvement with CSIS. She instructed the police to take the Applicant to a psychiatric hospital. They kept the Applicant there for two weeks, falsely diagnosing him with bipolar disorder. He was only released on the condition that he take anti-psychotic medications and attend follow up appointments at the hospital.

7. The Applicant continued working as an informant for CSIS, but in December 2004, the Applicant stopped attending the appointments. Because of this, in January 2005, the Montreal police took him to the hospital, where he was detained until April and misdiagnosed with chronic paranoid schizophrenia.

### C. Unexplained Denial of Security Clearance

8. In June 2009, the Applicant became a Canadian citizen. From October 2015 to April 2017, the Applicant worked for Iron Horse Security and Investigations ("**Iron Horse**") as a security guard.

9. Iron Horse had a contract with the Parliamentary Protective Service ("**PPS**"), to provide security guards to work on Parliament Hill. In 2016, Iron Horse indicated that it wanted the Applicant to work as one of the contracted security guards for PPS, so, on their instruction, the Applicant went to the PPS building to have his fingerprints taken and fill in the forms for a site access clearance request.

10. In December 2016, Haroon Atmar, Director of Communications and Scheduling Manager at Iron Horse, informed the Applicant that he did not receive site access clearance. However, Mr. Atmar could not tell the Applicant why he did not receive the clearance or who had denied his clearance.

## II. CHRC and NSIRA Complaints

### D. SIRC/NSIRA Complaint

11. On December 5, 2016, the Applicant wrote to the CSIS director requesting information about the denial of his security clearance, which he believed, at the time, had been denied by CSIS.

12. On March 10, 2017, the CSIS director responded that CSIS had not denied the Applicant's security clearance. Rather, "the requesting organization cancelled their request". CSIS did not tell the Applicant who cancelled his application or why it was cancelled.

13. Because of this, on December 20, 2017, the Applicant filed a complaint with the Security Intelligence Review Committee ("**SIRC**"), under s. 41 of the *Canadian Security Intelligence Service Act* ("***CSIS Act***"), complaining that the CSIS Director did not provide a satisfactory answer to his request for information. Specifically, the Applicant complained that "I still do not know who cancelled my application or why it

was cancelled", and "I wanted to find out why my security clearance was cancelled and who cancelled it".

14. Due to legislative changes, the complaint was continued before the National Security and Intelligence Review Agency ("**NSIRA**").

**E. Initial CHRC Complaint**

15. On January 26, 2018, the Applicant filed a complaint with the Canadian Human rights Commission against CSIS, the House of Commons ("**HOC**"), PPS, Iron Horse, and the RCMP.

16. On July 10, 2018, Jennifer Deavy, a CHRC Human Rights Analyst, emailed the Applicant. She informed him that the complaint against Iron Horse fell under provincial jurisdiction. She also encouraged the Applicant to continue the SIRC complaint and stated that the CHRC's inquiry regarding the other respondents would be closed until the Applicant had obtained more information from the SIRC proceedings. She invited the Applicant to contact the CHRC to further the matter after he obtained more information from SIRC.

**F. Updated CHRC Complaint**

17. The NSIRA hearing was held on July 18, 2019. During this hearing, the CSIS witness testified that CSIS shared information about the Applicant's mental health with the HOC and PPS. The Applicant was unaware of this sharing of information prior to hearing this testimony.

18. After receiving the NSIRA hearing transcripts in November 2019, the Applicant contacted the Commission to inform of the developments. He spoke on the phone with CHRC Human Rights Analyst Diego Hotte-Porras. During that call, Mr. Hotte-Porras and the Applicant agreed that his complaint form should be edited to reflect the newly discovered information.

19. On February 7, 2020, Mr. Hotte-Porras emailed the Applicant a link to edit his complaint form, and Applicant edited his complaint to allege

a. CSIS discriminated against the Applicant on the basis of mental disability, national origin, and ethnic origin by sharing mental health information from two briefs prepared for Citizenship and Immigration Canada in 2006 and 2009 ("**CIC Brief Allegations**"); and

b. CSIS discriminated against the Applicant by wrongfully diagnosing him with bipolar disorder and chronic paranoid schizophrenia and medicating him against his will ("**Misdiagnosis Allegations**").

20. The complaint also included separate allegations against the House of Commons and Parliamentary Protective Services. The Commission split these allegations off into separate files, and those matters have since been resolved.

**G. NSIRA Final Report Confirms CSIS Information Sharing**

21. On December 9, 2020, the Applicant received NSIRA's final report ("**NSIRA Report**"). The report confirmed the CSIS witness's testimony that on June 21, 2016, one or more representatives of CSIS met with two representatives from the HOC and PPS, and CSIS shared information about the Applicant's mental health. On June 28, 2016, as a result of receiving the information, the HOC and PPS advised CSIS that it was cancelling the May 31, 2016, site access clearance application.

22. The NSIRA Report found that CSIS shared information from two distinct sources:

a. Open source information from social media and legal proceedings, and

b. Two classified CSIS briefs prepared for Citizenship and Immigration Canada in 2006 and 2009, containing information about the Applicant's mental health ("**CIC Briefs**").

23. The NSIRA Report concluded that CSIS's sharing of information from the two CIC Briefs "would not have been approved by management".

24. The NSIRA report did not address any human rights issues. It did not address the question of whether CSIS's improper sharing of information constituted

discrimination. Nor did it address any issues related to CSIS's involvement in wrongfully diagnosing the Applicant with bipolar disorder and chronic paranoid schizophrenia and medicating him against his will.

## III. Section 41(1)(b) Proceedings

### H. Section 41(1)(b) Submissions

25. On February 20, 2020, the Commission notified the parties that it would prepare a section 40/41 report to determine whether the complaint should not be dealt with because it may be dealt with under another federal law, namely the *National Security and Intelligence Review Agency Act*. The Commission invited the parties to provide their positions on the issues, which they did between February and March 2020.

26. However, the Commission did not prepare a section 40/41 report.

27. On October 7, 2020, the Commission notified the parties that the file had been selected to be either deferred or referred to NSIRA (the email and attached notice stated both – it is unclear whether "deferred" is a typo) as part of a decision making pilot project. The Commission invited the parties to provide any new information.

28. Because of this, on October 8, the Applicant wrote to the NSIRA Registrar requesting NSIRA provide the Commission with a copy of the NSIRA Report. On October 16, 2020, the NSIRA Registrar responded that the report was in a redaction phase, and the Applicant would receive a copy as soon as it becomes available.

29. On October 16, 2020, the Applicant emailed the Commission to inform the Commission that the NSIRA Report was in redaction phase. The Applicant asked the Commission for an extension of time until the release of the report to provide information in response to the October 7, 2020, notice from the Commission.

30. In this same email, the Applicant stated that he needed to bring a complaint before both NSIRA and the CHRC because if he did not first obtain information through NSIRA, it would be impossible to know what happened in order to seek redress at

the CHRC. In 11 numbered paragraphs, the Applicant outlined the differences in the proceedings and the reasons why both were needed, including that

a. The Applicant had repeatedly attempted to obtain information from CSIS under the *Access to Information Act*, RSC 1985, c A-1, and the *Privacy Act*, RSC 1985, c P-21, and all had failed because CSIS used the *Security of Canada Information Disclosure Act,* SC 2015, c 20, s 2, to refuse to disclose information;

b. Only NSIRA has access to all information held by CSIS, no matter how highly classified the information may be; CHRC does not have that access;

c. NSIRA does not have the ability to provide redress for human rights violations; and

d. NSIRA can only make "non-binding recommendations".

**I. Section 41(1)(d) Questions**

31. On January 28, 2021, the Commission invited the parties to respond to a list of questions they posed to decide whether the Commission should refuse to deal with the complaint under s. 41(1)(d) of the *CHRA* on the basis that the allegations of discrimination "have been or could have been" addressed through another process.

32. On February 26, 2021, the Applicant provided answers to these questions, including that

a. The NSIRA complaint dealt only with a narrow issue concerning inadequate provision of information by CSIS;

b. The NSIRA complaint did not address the issues in the CHRC complaint, nor did it address any other human rights issues;

c. The Applicant was unable to raise the issue about whether CSIS's sharing of information was discriminatory because he was not aware of the possibility

that CSIS might have shared this information until the NSIRA hearing on July 18, 2019, and this fact was not on confirmed until the Applicant received the NSIRA final report on December 9, 2020;

d. NSIRA cannot order damages to a complainant nor issue any binding orders to remedy wrongdoing nor prevent it from happening in the future.

**J. Flawed Initial Section 41(1)(d) Report**

33. On February 15, 2022, the Commission sent a Report for Decision ("**Initial Report**") to the parties, which was prepared by Human Rights Officer Jennifer Huber, without considering the Applicant's submissions. The Initial Report recommended that the Commission not deal with the Complaint.

34. On February 17, 2022, Applicant's counsel wrote to the Commission informing that the Initial Report had been made on the basis of an incomplete record and the mistaken belief that no submissions had been received on the s. 41(1)(d) issue. The Applicant also made submissions as to why the complaint should not be dismissed.

**K. Supplementary Section 41(1)(d) Report**

35. On March 16, 2022, the Commission sent the parties a Supplementary Report for Decision ("**Supplementary Report**"), acknowledging that contrary to the Initial Report, the parties had provided submissions on the s. 41(1)(d) issue, and those submissions had not been considered in the Initial Report.

36. The Supplementary Report was prepared by the same Human Rights Officer as the Initial Report, Ms. Huber. Ms. Huber recommended the Commission not deal with the complaint because "the other overall procedure has addressed the allegation of discrimination overall." The Supplementary Report made this recommendation on the basis that the human rights issues in the complaint "have been, or could have been" dealt with through NSIRA.

37. The Supplementary Report's analysis consisted of four propositions as premises for the report's conclusion. Each of the four premises are false and unreasonable. The

four premises are as follows:

a. The Applicant admitted in the October 16, 2022, email that the complaints were the same.

   The Supplementary Report cherry-picked a quote from the Applicant's October 16, 2020, email that he "sought to file the same complaint simultaneously", while ignoring the rest of the email, the main point of which was to emphasize the differences between the two proceedings and the reasons why neither would be adequate on their own.

b. The CIC Brief Allegations had been dealt with by NSIRA.

   The Supplementary Report illogically concluded that "the issue of the sharing of [the CIC Brief] information was considered during the NSIRA hearing" on the basis that NSIRA "was aware the respondent had shared information concerning the complainant's mental health". This conclusion was illogical since awareness of a fact does not mean that a person considered the legal consequences of that fact.

c. The Misdiagnosis Allegations could have been dealt with by NSIRA, and the Applicant provided no explanation as to why they were not.

   The Supplementary Report concluded that the Misdiagnosis Allegations should be dismissed because the Applicant did not explain why he did not raise this issue at NSIRA. This conclusion could only be drawn by failing to consider key evidence and submissions. The evidentiary record before the Commission included the October 16, 2020, email, in which the Applicant explained that he did not raise the Misdiagnosis Allegations at NSIRA because NSIRA could not provide an adequate remedy. NSIRA can only give non-binding recommendations; it cannot award monetary damages nor issue binding orders to redress discrimination and prevent it in the future.

d. It is an abuse of process to allow allegations to be raised with the Commission that could have been raised at NSIRA.

The Supplementary Report relied on *Khapar v Air Canada*, 2014 FC 138; and *Bergeron v Canada (Attorney General)*, 2015 FCA 160 for the legal proposition that it is abuse of process to not raise human rights allegations at a prior proceeding. However, neither of the two cited cases were decided on this basis. In both cases, the discrimination allegations were addressed in the prior proceeding, and unlike NSIRA, those prior proceedings had the power to issue binding orders to redress discrimination.

## L. Applicant's Section 41(1)(d) Submissions

38. On March 30, 2022, the Applicant made submissions in response to the Supplementary Report. The Applicant made the following seven central arguments:

a. The Applicant's use of the word "same" in his October 16, 2020, email was an imprecise statement by an unrepresented litigant, and it would be unreasonable to be used as a basis to conclude that the two complaints were the same when, in that same email, the Applicant emphasized the differences between the two proceedings, and the substance of the complaints are obviously different.

b. The Supplementary Report contradicted itself since at paragraph 30 it claimed the proceedings were the same, but at paragraph 33 it acknowledged the differences between the two proceedings.

c. The Supplementary Report's claim that the Applicant did not explain why he did not raise the allegations at NSIRA was i) false since the Applicant set out his reasons for not raising the human rights allegations at NSIRA in 11 numbered paragraphs in his October 16, 2020, email to the Commission, and ii) contradicted by the Supplementary Report itself at paragraphs 20 and 23 where it mentions the explanation the Applicant gave.

d. The Supplementary Report made an illogical inference that NSIRA's awareness that CSIS shared information must have meant NSIRA "considered" the issue of information sharing. Awareness of a fact is not the same as consideration of the implications of a fact, nor is it the same as conducting an analysis of the legality of the fact.

e. *Khapar* and *Bergeron* are not authority for the proposition that it is abuse of process for a complainant to raise allegations with the Commission that could have been raised at a prior proceeding since in both cases the discrimination allegations were raised at the prior proceeding, and both cases involved other different factual circumstances from the Applicant's.

f. The legal test to be considered in this matter was set out by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, and none of the three criteria of that test are met in this case.

g. Even if the *Figliola* test were met, the Supreme Court in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, required that a case not be dismissed where unfairness would result due to a significant difference in "the purposes, processes or stakes involved in the two proceedings", and in the present case there were significant differences which would cause unfairness. NSIRA was an information-gathering proceeding with no powers to issue a binding remedy or provide damages, and the Commission does not have the same ability of NSIRA to gather information about the actions of intelligence agencies.

**M. Section 41(1)(d) Decision**

39. On June 2, 2022, the Commission sent the Applicant the Decision dated June 1, 2022, that the Commission had decided not to deal with the complaint. The attached Record of Decision is only two sentences long. The first sentence states that the Commission reviewed the Complaint Form, the Report for Decision (without specifying which whether this was the Initial Report or Supplementary Report), and

the submissions of the parties filed in response to the Report for the Decision. The second sentence states that the Commission decided not to deal with the complaint because "the other procedure has addressed or could have addressed the allegations of discrimination overall."

40. The Record of Decision does not acknowledge nor address *any* of the seven central arguments the Applicant made in his March 30, 2022, submissions.

## IV. Legal Grounds

41. The Decision is unreasonable because it is not transparent, intelligible, nor justified by way of its reasons.

42. It is not possible to discern the Commission's reasoning from the two-sentence Record of Decision. Nor is it possible to discern which reports and submissions the Commission reviewed or adopted the reasoning of.

43. The Decision is unreasonable because it is not based on internally coherent reasoning:

    a. The Supplementary Report contradicted itself on two key factual findings: i) that the NSIRA and CHRC complaints were the same, and ii) that the Applicant did not explain why he did not raise the Misdiagnosis Allegations at NSIRA.

    b. The Supplementary Report made an illogical inference when it based its conclusion that NSIRA had assessed whether the sharing of the CIC Briefs was discrimination contrary to the *CHRA* on the fact that that NSIRA was aware of the information sharing.

44. The Decision is unreasonable because it failed to account for the evidence before it about the Applicant's reasons for not raising human rights issues before NSIRA which are set out in 11 numbered paragraphs in an October 16, 2020, email from the Applicant to the Commission.

45. The Decision is unreasonable because it failed to meaningfully grapple with any of

the Applicant's seven central arguments.

46. The Decision is unreasonable because it failed to justify its departure from the binding precedent of the Supreme Court of Canada in *Figliola* and *Penner*.

47. The Decision is unreasonable because the outcome is contrary to the legislative intent of the *CHRA*. The outcome of the Decision is to insulate intelligence agencies from the purview of binding human rights mechanisms since intelligence agencies can preclude a viable complaint from being made at the CHRC by keeping their actions secret, requiring affected individuals to go to NSIRA to find out what has occurred. If the present Decision stands, individuals will be forced to forgo their right to a binding order of redress, including damages, when they seek information through NSIRA. Individuals will have to choose between seeking truth at NSIRA or justice at the CHRC. But even that choice is not a true choice, since it will be impossible for an individual to seek justice at the CHRC if the individual does not know what has been done or who precisely has done it.

48. The Decision is procedurally unfair.

49. Sections 18 and 18.1 of the *Federal Courts Act*.

50. *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2.

51. *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3, 5, and 41(1)(d).

**THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

a) A supporting affidavit and exhibits attached thereto; and
b) Such further and other materials as counsel may advise and this Honourable Court may permit.

**THE APPLICANT REQUESTS** the Canadian Human Rights Commission to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Commission to the Applicant and to the Registry: all

information considered, or available for consideration, by the Commission in reaching its Decision, including, but not limited to, all reports, submissions, records, assessments, correspondence, memos, and notes.

June 13, 2022

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