S.C.C. File No. 37770

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS AND ATTORNEY GENERAL OF CANADA

APPELLANTS
(Respondents)

- and -

TUSIF UR REHMAN CHHINA

RESPONDENT
(Appellant)

-and-

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I AND II: OVERVIEW AND STATEMENT OF POSITION

1. Community & Legal Aid Services Programme [“CLASP”} at Osgoode Hall is an interdisciplinary legal aid clinic that serves low-income Toronto residents. It prioritizes marginalized persons and those with mental health concerns, including immigrants, refugees, and persons without status.

2. Mental health is of central importance to individuals facing removal and/or detention. There is no question that immigration detention, even if short term, causes and/or exacerbates psychological illnesses. Once detained, individuals with mental health concerns are at greater risk of having their detentions maintained due to an inability to advocate for themselves and provide suitable alternatives to detention. This poses unique challenges for obtaining release.

3. As such, the availability of habeas corpus to those in immigration detention and the ability of the Superior Court to order conditions of release is of particular importance to CLASP’s clients. CLASP submits that any limitation on the jurisdiction of the superior courts to order conditions of release to those in immigration detention will effectively deny *habeas corpus* to those with mental health concerns. This is an access to justice issue.

4. CLASP further submits that the Immigration Division (ID) has no mechanism or procedure in place for the determination of whether a breach of release conditions did in fact occur. This abdication of its jurisdiction to make a determination on a breach is one of the primary causes for the need to seek *habeas corpus* in the first place. As such the Appellant’s argument that any concurrent jurisdiction of the Superior Court to order release conditions will cause confusion is without merit. Instead it appears to be an attempt to absolve statutory immigration decision makers from Judicial scrutiny.

5. CLASP accepts the facts as set out in the Appellant’s and Respondent’s facta.

PART III – ARGUMENT

Preliminary Matter

6. The Parliament’s acceptance of the fundamental importance of *habeas corpus* -- a writ that is

"widely recognized as the most effective remedy against executive lawlessness that the world has ever seen"[1] -- by enshrining it in the constitution is unquestionable. Section 10 of the *Charter* is available *to all* individuals claiming unlawful detention by the Executive.

7. Nevertheless, the Appellant suggests at paragraph 128 of its memorandum, that *Charter* rights are not so significant; that Parliament can effectively change its mind. That its intent that "*immigration matters be dealt with by expert tribunals and courts*" somehow overrules its previous intent that the right to *habeas corpus* be enshrined in the *Charter.*

8. This is profoundly wrong. It is "later intentions" that must comply with the *Charter*, not that the *Charter* must accommodate later intentions. In any event, Parliament's intent that *immigration matters be dealt with expert tribunals and courts* is not an attempt to supersede the Charter. Immigration matters are distinct from fundamental freedoms. Incarcerating individuals in maximum security prisons for no criminal purpose and without regard for procedural fairness is **not** an immigration matter but fundamentally a *s.7 Charter* one.

Access to Justice and Release Conditions

9. The Appellant argues that the superior courts **should not** have the ability to release an immigration detainee on conditions and that such an approach is unprincipled. It asks this court to ignore the reasoning of the Ontario Court of Appeal in *Ogiamien* which states:

> [47] I do not accept the general proposition advanced by the AG that a judge has never had authority to impose conditions when granting *habeas corpus*. I agree with the submission of *amicus* that such a rigid view would unduly impair the inherent powers of the Superior Court to ensure that its orders are effective. It would also be inconsistent with the need to ensure that the fundamental common law and constitutional right to *habeas corpus* remains a flexible and effective remedy. As the Supreme Court of Canada observed in *Mission Institution v. Kehla*, at para. 54: "This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions."
>
> [48] It would be inconsistent with the public interest if the judge on *habeas corpus* lacked the authority to impose appropriate conditions to protect public safety and respect for the law. Moreover, there are cases where outright or unconditional release would be inappropriate but where incarceration is not justified. In such cases, applicants would be

[1] Tom Bingham, *The Rule of Law* (London, England: Penguin Books, 2010), at 13-14. [Book of Authorities, Tab 1].

> denied access to the remedy of *habeas corpus* because judges would inevitably feel compelled to maintain detention if their only other option was outright release. To deprive the Superior Court of jurisdiction to craft an appropriate order in such a case would represent an undue and unwarranted restriction on the remedy of *habeas corpus*.[2]

10. CLASP echoes the above finding and respectfully adds that that it is a matter of *Access to Justice* for those most vulnerable that the Superior Court retain the jurisdiction to order conditions.

11. It is notable that the Appellant at paragraph 129 of its memorandum submits that the *Chaudhary*/*Chhina* approach is unprincipled because only a limited sub-class of immigration detainees would be able to access *habeas corpus* [those with detentions that are lengthy and of uncertain duration]. Not only has the Ontario Court of Appeal in *Ogiamien* clarified that *habeas* should not have such limits, but it is the Appellant's position that would result in only a limited sub-class of immigration detainees having *habeas* access; those of *sound mind.* [3]

12. As *Ogiamien* found, some cases occupy a mid-ground in which unconditional release is inappropriate, but incarceration is not justified.[4] In these cases "judges would inevitably feel compelled to maintain detention if their only other option was outright release".[5]

13. Detainees who suffer from mental health conditions occupy this middle space. It is expected that those with severe mental health issues will require conditions upon release; for example undergoing counselling, therapy, mandatory attendance at a rehabilitative program or living with a surety, to ensure that they do not pose a safety risk or a flight risk. Any limitation on the ability of the Superior Court to order such conditions would effectively bar these individuals from *habeas* relief. Adopting the Appellant's approach, it cannot be Parliament's intention that section 10 of the *Charter* is not available to the most vulnerable.

14. Moreover, the *Alberta Rules of Court* and *Judicature Act* grant superior courts the power to "give any relief or remedy described or referred to in or under these rules or any enactment", including the power to grant "either absolutely or on any reasonable terms and conditions that

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[2] *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 at para 47-48, [2017] OJ No 5702.
[3] *Ibid* at para 41.
[4] *Ibid*; see also *Scotland v Canada (AG)*, 2017 ONSC 4850, [2017] OJ No 4242; *Ali v Canada (AG)*, 2017 ONSC 2660; on appeal OCA File: C63860.
[5] *Supra* note 3 at para 48.

seem just to the Court."[6]

15. In Ontario, the *Habeas Corpus* Act specifically grants superior courts the ability to order release conditions by granting bail to a detainee pursuant to a *habeas corpus* application:

> 7. Although the return to a writ of *habeas corpus ad subjiciendum* is good and sufficient in law, the court or judge before whom the writ is returnable may examine into the truth of the facts set forth in the return, by affidavit or other evidence, and may order and determine touching the discharging, bailing or remanding of the person.[7]

16. The Court of Appeal in *Ogiamien* specifically refers to this section in ruling that release on habeas corpus can be conditional:

> [49] The case law provides many examples where release on *habeas corpus* is conditional. *Amicus* refers to the prison transfer cases where the order on *habeas corpus* is not that the successful applicant be released outright but that he or she be transferred to a less restrictive form of incarceration: see *R. v. Miller*, 1985 CanLII 22 (SCC), [1985] 2 S.C.R. 613, 52 O.R. (2d) 585. Most directly on point is the historical use of *habeas corpus* as the principal means of securing bail pending trial in criminal proceedings: see Judith Farbey and R. J. Sharpe, *The Law of Habeas Corpus*, 3rd ed. (Oxford: Oxford University Press, 2011) at pp. 148, 153-156. Bail is a form of conditional release. Section 7 of the *Habeas Corpus Act*, R.S.O. 1990, c. H.1, a pre-Confederation statute that continues to apply in Ontario, confirms the use of a *habeas corpus* to obtain bail. Bail has also been granted on *habeas corpus* in relation to both immigration and extradition detentions: *Ex parte Augustin*, [1976] C.A. 478, 31 C.C.C. (2d) 160 (Que. C.A.); *Re Lawrence and the United States and The Queen* (1980), 54 C.C.C. (2d) 551 (Man. C.A.). Post-*Chaudhary* decisions of the Superior Court have imposed conditions on release from immigration detention on *habeas corpus*. As noted by Nordheimer J. in *Ali v. Canada (Attorney General)*, 2017 ONSC 2660 (CanLII), at para. 40: "If this court is ordering a release, then it is this court that should set the appropriate terms and conditions." See also *Scotland v. Canada (AG)*, 2017 ONSC 4850 (CanLII), at paras. 78-79.
>
> [50] The strict and rigid proposition advanced by the AG cannot withstand scrutiny in the face of these authorities and the principle that *habeas corpus* must remain a flexible and effective remedy.[8]

17. Other common-law jurisdictions have established that judicial discretion in granting habeas corpus relief for immigration detainees includes release with conditions. As in *Ogiamien,* the Supreme Court of New Zealand (NZSC) has premised its jurisdiction to grant conditional *habeus*

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[6] *Alberta Rules of Court*, Alta Reg 124/2020, s 1.3(1)(b); *Judicature Act*, RSA, c J-2, s 8.
[7] *Habeas Corpus Act*, RSO 1990, c H.1, s 7.
[8] *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 at para 49-50, [2017] OJ No 5702.

corpus relief from the historical use of the writ to secure bail in criminal proceedings:

> [40] The reason for using habeas corpus in this way was to secure the right either to be tried according to law (including in accordance with the requirements for prompt trial in the 1679 Act) or release, including on terms as to bail. But where bail was granted, the jurisdiction being exercised included the inherent common law power to grant bail.
>
> [41] **….. The High Court's inherent substantive jurisdiction to grant bail can still be invoked today** (where not modified by statute) by different processes: on summary application, by judicial review, or by the **procedure of habeas corpus**, if necessary.[9]

18. In granting conditional release, the NZSC also recognizes the obligations of signatories to international human rights instruments. Like Canada, it has committed to avoiding unnecessary restrictions upon persons seeking refugee protection under the *1951 Refugee Convention*:

> [101] This is a case where national security issues arise. **It is also a case about the liberty of someone who has refugee status in New Zealand and who is entitled to the benefit of the Refugee Convention requirement that only such restrictions upon his liberty as are necessary should be imposed upon him.** The applications fail to be considered against the background of concern for liberty recognised by the Bill of Rights Act and the common law. **Accordingly the case raises significant matters of public interest which require careful balance.**
>
> [102] The respondents should have an opportunity to provide any additional material they wish to place before the Court relevant to the exercise of the jurisdiction to grant bail or vary the terms of the warrant of commitment. The material so far supplied has not been directed to the issues of bail and custody. They are not necessarily the same as the considerations upon which a security risk certificate can be justified. **Both parties should also be given the opportunity to address the Court further as to whether either jurisdiction should be invoked and, if so, what orders and conditions are appropriate**.[10]

19. The Supreme Court of the United States (USSC) in *Zadvydas v. Davis* (2001) held that release by writ of habeas corpus could be conditioned in ways that are appropriate to the individual detainee's circumstances:

> "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by

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[9] *Zaoui v Attorney-General,* SC CIV 13/2004 *at paras 40-41.*
[10] *Ibid* at paras 101-102.

> statute. **In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances**, and the alien may no doubt be returned to custody upon a violation of those conditions. " [emphasis added]. [11]

20. Following suit, the High Court of Australia (HCA) in *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) fashioned habeas corpus as a flexible remedy in immigration detention cases. Referencing the USSC's *Zadvydas* decision, the court granted habeas relief subject to conditions "to ensure that the orders made for the applicant's release both recognize and facilitate the continuing obligation of the Minister to remove the applicant if he is able to do so." [12]

21. This qualification was subsequently reiterated by the HCA in *Al-Kateb v Godwin* (2004) and *Plaintiff M47-2012 v Director General of Security* (2012).[13] In both cases the court held that it "may attach conditions to be observed upon release, analogous to those attending release upon the provision of bail":

> [109] As Gleeson CJ indicated in Al-Kateb v Godwin[139], with particular reference to United States authority, **a discharge upon habeas corpus from immigration detention may be made upon terms and conditions.[14]**

22. Similarly, the High Court of England also employs a flexible, adaptable approach to habeas corpus relief. In *YG, R (on the application of) v Secretary of State for the Home Department (2008)* [15], the court noted that the risk factors associated with a detainee's release should not preclude the court from granting habeas corpus relief.

23. Given the concurrence of common-law jurisdictions on the importance of release with conditions in habeas corpus relief, there is no compelling reason why superior courts in Canada should not follow suit.

<u>*No mechanism for review of breaches at the Immigration Division*</u>`

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[11] *Zadvydas v. Davis*, 533 U.S. 678 (2001) at p. 699
[12] *Al Masri v. Minister for Immigration & Multicultural & Indigenous Affairs,* [2002] FCA 1009 at para 57.
[13] *Al-Kateb v Godwin* [2004] HCA 37 [Al-Kateb].
[14] *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 at para 109 [Plaintiff M47].
[15] *YG, R (on the application of) v Secretary of State for the Home Department* (2008) at paras 29, 80.

24. The Appellant further argues that providing the Superior Court with the jurisdiction to order conditions would cause confusion in the ability of the Immigration Division to supervise such conditions. However, this argument ignores one of the central problems within the immigration detention regime, and a substantive cause for unlawful detentions in the first place: that the Immigration Division has currently abdicated its jurisdiction to make an independent determination of whether an alleged breach of its previous release condition has in fact occurred.

25. This abdication has resulted in a detention review regime with no impartial or independent adjudication of an alleged breach. A regime where the CBSA's allegations of a breach of a previous release order are simply accepted as fact and where the CBSA determines the amount of bond monies to be forfeited/estreated. The Immigration Division has limited its jurisdiction solely to the determination of the suitability of an alternative; whether a release plan can offset the heightened flight risk and/ or danger (given the breach).

26. In the criminal justice system, this process of determining a breach requires a hearing with all of the legal safeguards and protections of the criminal justice system. Under the *Immigration and Refugee Protection Act's* ("IRPA") detention scheme, these vital legal safeguards and protections are not available despite having the same sanction (incarceration in a maximum security prison). There is no equivalent of a bail hearing and no evidence is led. There is also no opportunity to cross-examine the officers who alleged that a breach occurred.

27. Given that the consequence of finding a breach often leads to a more onerous release plan, the blanket acceptance of the CBSA Hearing Officer's say-so, may effectively amount to an insurmountable barrier to release. It is submitted that this is a violation of the principles of fundamental justice required to prove lawful detention under section 7 of the *Charter*.

28. The procedural injustice that results from the Immigration Division's abdication of its jurisdiction to make an independent determination of an alleged breach was highlighted by Justice Morgan in *Scotland*.

> [61] In a procedural sense, Mr. Scotland's case discloses numerous instances of ID adjudicators deferring or delegating the question of whether there has been a breach of release terms to CBSA officers. In my view, this constitutes a violation of one of the most essential principles of fundamental justice – that the statutorily designated decision-maker must actually make the decision in issue. The power to decide whether a given action

> constitutes a breach of a term of release for a former detainee is conferred on the ID, and as such is "to be exercised by the authority on which the statute has conferred it and by no other authority": *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC), [1997] 1 S.C.R. 12, quoting John Willis, "Delegatus non potest delegare" (1943), 21 Can. Bar Rev. 257, 259.
>
> [62] This improper reliance on the CBSA and its frequent undermining of the independent decision-making authority of the ID members is what makes it nearly impossible for Mr. Scotland to have his point taken seriously. The CBSA is for the most part responsible for the erroneous judgments which have resulted in Mr. Scotland's ongoing detention; it is little wonder that the review process yields no progress toward remedying these errors. This delegation of authority to the enforcement agency who is a party to the case against Mr. Scotland provides a graphic illustration of improper self-judging.
>
> [63] …In giving the CBSA such a level of deference that the enforcement agency effectively usurps the adjudication role, the ID has engaged in a form of legal process that is not in compliance with the most basic precepts of procedural justice.[16]

29. Unfortunately the problems highlighted in *Scotland* remain. The Immigration Division has failed to put in place a procedure, at the 48 hour detention review, for the determination of whether a breach of a previous release order did in fact occur.

30. The inherent problems in the immigration detention regime were underscored in a highly critical federal audit of the Immigration Detention regime that was released in August of 2018. It stated in part:

> This practice is completely inconsistent with the most basic tenets of procedural fairness, including the right to hear and present evidence in an open hearing, and to question witnesses. The practice was in place in Central Region for several years and appears to have continued even after Tribunal-wide training in February 2016 that addressed the need to allow potential bondspersons to testify. The audit was told that the practice was finally abandoned in 2017. The fact that it was not identified as problematic until relatively [17]

31. Given the above, the Appellant's attempt to remove *habeas corpus* as a remedy before the Superior Court is essentially an attempt to insulate immigration statutory decision makers from judicial scrutiny. The so-called confusion with how the Immigration Division would be able to

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[16] *Scotland v Canada (AG)*, 2017 ONSC 4850 at paras 61-63, [2017] OJ No 4242.
[17] Canada, Immigration and Refugee Board, *Report of the 2017/2018 External Audit (Detention Review)*, online: https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx#intro

supervise release orders made by the Superior Court is a red herring given that it currently fails to supervise breaches of its own release orders.

32. As such, in the absence of any mechanism or procedure for the independent determination of whether a breach has actually occurred the Superior Court plays a fundamental role. It is submitted that the very act of having court ordered conditions for release will compel the Immigration Division to not simply accept the CBSA's allegations but first make an independent determination of a breach. This *prima facia* adjudication in and of itself would be instrumental in ensuring that immigration detention is in line with *Charter* values and the principles of fundamental justice.

33. The Appellant's argument at paragraph 133 of its Memorandum is confusing. There is absolutely no reason why the Immigration Division would not retain jurisdiction to impose or vary conditions pursuant to s.55 of IRPA once an individual is arrested by the CBSA. That the arrest was made due to an alleged breach of a court ordered condition as opposed to a tribunal order release condition is irrelevant. The Immigration Division's statutory mandate to determine 1) whether a breach occurred giving rise to a ground for detention, and 2) whether there is a suitable alternative to detention; remains.

34. The Appellant's true concern seems to be about the effect that court ordered conditions would have on the CBSA's current unfettered ability to arrest and detain. Conditions imposed by an *independent court* are clearly quite different than conditions imposed by a tribunal that simply accepts the CBSA's allegations. The CBSA would now be required to have good grounds before arresting an individual for an alleged breach. This is something gained not something lost.

35. Finally, there is no reason why a superior court ordering release with conditions cannot also retain the jurisdiction to decide how these conditions may be modified or policed. It is open for a superior court to decide that the Immigration Division retains jurisdiction over an Applicant for determining breaches or allowing modifications. Such a determination was made by the Supreme Court of the Yukon in *J. (D.) v. Yukon Review Board* (2000). In ordering *habeus corpus* of an applicant remanded in mental health detention, the Court enumerated several conditions of release and expressly provided that the Yukon Review Board retain its jurisdiction over the applicant,

specifying that "any changes to the terms and conditions set out [by the court] that may be required should be brought back to the Board for its consideration and disposition."[18]

36. The whole purpose behind granting *habeas corpus* is undermined by disallowing the Superior Courts from ordering release conditions and instead deferring to the very body, that due to an abdication of its statutory duty, caused the need for an application for *habeas corpus* in the first place. In any event and to the extent any confusion remains, the central importance of the remedy of *habeus corpus* as a means of challenging the deprivation of liberty "should not be compromised by concerns about conflicting jurisdiction".[19]

PART IV: COSTS

37. CLASP seeks no costs and respectfully requests that none be awarded against it.

PART V: ORDER SOUGHT

38. CLASP takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 30th day of October, 2018.

SUBODH BHARATI
Of Counsel for the Intervener,
Community & Legal Aid Services
Programme

[18] *J. (D.) v. Yukon Review Board*, 2000 CarswellYukon 62, 2000 YTSC 513, [2000] Y.J. No. 80 at para 51.[Book of Authorities, Tab 2].
[19] *May v Ferndale Institution*, 2005 SCC 82 at para 6, [2005] 3 SCR 809; *R v Miller*, [1985] 2 SCR 613 at para 35, [1985] SCJ No 79.

PART VI – TABLE OF AUTHORITIES

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