File #37770

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

Minister of Public Safety & Emergency Preparedness and Attorney General of Canada

Appellants
(Respondents)

-and-

Tusif Ur Rehman Chhina

Respondent
(Appellant)

-and-

End Immigration Detention Network, Canadian Association of Refugee Lawyers, Defence for Children International-Canada, Amnesty International Canada, Community & Legal Aid Services Programme, Canadian Council for Refugees, Queen's Prison Law Clinic, Egale Canada Human Rights Trust, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Canadian Prison Law Association,
Interveners

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PART I: OVERVIEW

1. There is an emerging body of jurisprudence from the appellate courts in both Ontario and Alberta highlighting the way in which the existing immigration detention review regime permits, and in some cases, perpetuates unlawful deprivations of liberty.[1] The End Immigration Detention Network (EIDN) submits that problems with the immigration detention review system are not limited to the administration or application of the legislation but rather stem from constraints in the legislation itself. The writ of *habeas corpus* provides an accessible remedy for immigration detainees who are unsuccessful in gaining relief under the *Immigration Refugee Protection Act* (*IRPA*) as enforced through the Immigration Division (ID) and reviewable by the Federal Court. Excluding *habeas corpus* as a possible remedy for immigration detainees creates serious access to justice issues, particularly for detainees who face other barriers such as language, mental health issues, and lack of legal representation.

2. EIDN submits that there are significant statutory and legal differences in the ID/Federal Court process as compared with *habeas corpus* that render the former less accessible, notably (1) the failure of the Immigration Division to consider lengthy and indefinite periods of detention as determining factors for release (2) the inability of the ID to consider each review afresh (3) the leave requirement at Federal Court and (4) the limitations placed on the Federal Court to consider only the reasonableness of the ID decision rather than the lawfulness of the detention itself.

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[1] *Ali v Canada (Attorney General),* 2017 ONSC 2660 at para 19; *Chaudhary v. Canada (Public Safety and Emergency Preparedness*) [*Chaudhary*], 2015 ONCA 700 paras 85- 90 para 90 *Chhina v Canada (Public Safety and Emergency Preparedness),* 2017 ABCA 248 at paras 43 and 44; *Ogiamien v. Ontario (Community Safety and Correctional Services),* 2017 ONCA 839 [*Ogiamien*] at paras 26 and 44; *R. v Ogiamien, 2016 ONSC 4126* [upheld by the ONCA decision above]; *Scotland v. Canada (Attorney General)* [Scotland] 2017 ONSC 4850 at paras 72 -76.

PART II: POSITION ON THE APPELLANTS' QUESTIONS

3. EIDN submits that *habeas corpus* review is substantively broader and more favourable to migrant detainees than detention reviews before the ID and subsequent judicial reviews before the Federal Court. The court below did not err in finding that review of detention decisions under the *IRPA* scheme, including judicial review by the Federal Court, is more limited and less favourable than review by *habeas corpus.*

PART III: ARGUMENT

INTRODUCTION

Choice of forum is required to ensure access to justice for the most vulnerable detainees

4. The *IRPA* regime for immigration detention review must ensure full access to a fair and meaningful process for individuals to challenge the deprivation of their liberty.[2] The adequacy of the existing system ought to be considered through the lens of the most vulnerable people who are affected by it to ensure that their rights are protected.[3] Because the length of detention is only one factor to be considered by the ID under the *IRPA*, as

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[2] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 19, 20, and 28 [*Charkaoui*]; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 at paras 118-119.

[3] In September of 2017 an independent external audit of the ID was commissioned by the then Chair of the IRB, published in June of 2018. In the report, the Auditor highlighted significant obstacles to release facing detainees from across Canada with examples involving some of the most vulnerable people detained under the *IRPA*. This included individuals with mental health issues, unrepresented detainees, detainees with language barriers, those who refuse to attend or participate in detention review hearings, and people detained for lengthy periods of time. (Immigration and Refugee Board of Canada, Report of the 2017/2018 External Audit (Detention Review) [Audit]. The Audit pointed to the alarming situation of detained individuals with mental health issues, many of whom were simply unable to meet the statutory requirements for release because of past criminality and lack of evidence of rehabilitation or perceived non-cooperation stemming from mental health or addiction issues. "Fairness Issues for Detained Persons with Mental Health Problems." At the time of writing, this Report is the subject of the Respondent's pending Motion to Vary the Record. Should the motion be denied, EIDN withdraws its submissions in relation thereto.

time passes in detention, detainees are effectively …"powerless to articulate a fresh argument for release..."[4] Expressions of frustration by individuals detained for lengthy periods of time are often deemed as "non-cooperation" and used against the detainee at review hearings.[5]

5. Against this backdrop, EIDN submits that the availability of a remedy pursuant to the *IRPA* scheme, however "complete and comprehensive" must not preclude the right to a writ of *habeas corpus*. Individuals detained by the state are inherently vulnerable and ought to be able to choose a remedy that is most favourable to their interests.[6] Providing a choice of forum has been repeatedly emphasized by this Court as a key component of ensuring access to justice for those deprived of their liberty, and applies equally in the context of administrative detention.[7] As outlined in the Respondent's factum, giving detainees access to *habeas corpus* does not undermine the underlying purpose or effectiveness of the *IRPA* scheme but rather contributes to increased fairness within the

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[4] Audit, "Overarching observations," *supra* note 3.

[5] In *Alvin Brown v Ministry of Public Safety*, 2016 ONSC 7760 at paras 71- 74, Justice O'Marra commented that: "Any frustration expressed during the review hearings was quite understandable given the protracted nature of the removal process." Justice Sharpe of the Ontario Court of Appeal has also commented that a failure to attend review hearings after months of detention should not be held against an unrepresented detainee as a sign of non-cooperation that favours continued detention (*Ogiamien* ONCA, *supra* note 1 at para 26).

[6] In the context of criminal detention, see *R. v. Grant*, 2009 SCC 32 at para 22: "'Detention' also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control." (emphasis added).

[7] *Mission Institution v Khela*, [2014] 1 SCR 502, 2014 SCC 24 at para 56; *May v. Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82 at para 44; *Chaudhary*, *supra* note 1 at para 99; *R. v. Gamble*, [1988] 2 SCR 595 at para 52.

system. Notably, the Federal Court in *Brown* cited the availability of *habeas corpus* as a component that renders the *IRPA* regime constitutional.[8]

6. Notwithstanding the above, EIDN submits that the *IRPA* scheme for detention review is less advantageous than a *habeas corpus* application, making the right to this ancient, *Charter*-protected writ even more critical in preventing unlawful deprivations of liberty.

1. Lengthy and indefinite periods of detention are not determining factors for release at the Immigration Division

7. One of the Appellants' central arguments is that the *IRPA* regime is more advantageous to a detainee because "Parliament has mandated that release be the norm, and that detention be the exception, regardless of the length or anticipated duration of detention."[9] The Appellants argue that the *IRPA* contains a presumption in favour of release at each detention review, which is not the case on a *habeas corpus* application. The Appellants omit that the *IRPA* regime does not treat lengthy and indefinite detention as determining factors for release and fails to protect against these outcomes. Section 248(b) of the *IRPA* requires the ID to consider the length of time in detention, but this factor may be outweighed by any other, including the grounds for detention under section 58.[10]

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[8] In *Brown v. Canada (Citizenship and Immigration)* 2017 FC 710 at para 152 Justice Fothergill found that the assessment of the reasonableness of a detention may be conducted by the Immigration Division, the Superior Court on a *habeas corpus* application or by way of judicial review to the Federal Court, and that "the availability and effectiveness of these review mechanisms are sufficient to render the statutory scheme constitutional".

[9] Appellants' factum at paras 108-109, citing section s. 58 of the *IRPA*: the Board "shall order the release" of a detainee "unless" it is satisfied that at least one of the grounds set out in s. 58 is made out.

[10] *Immigration and Refugee Protection Act* S.C. 2001, c. 27 at s. 58 [*IRPA*]; *Immigration and Refugee Protection Regulations* (SOR/2002-227) at s. 248. The Audit demonstrates the ease with which duration of detention is displaced during detention reviews and the detrimental impact that this has on detainees (Audit, *supra* note 3).

8. Section 248 of the *IRPA* was crafted based on the factors set out by the Federal Court of Appeal in *Sahin,*[11] wherein the Court emphasized the gravity of the liberty interests at stake in immigration detention cases and explicitly held that if a detention is lengthy and if future detention time cannot be ascertained, these facts "would tend to favour release."[12] This critical safeguard was intended to underlie the application of Section 248 and yet it is absent from the current legislative regime. As such, even though the *IRPA* contains a statutory presumption in favour of release, length and uncertainty of duration of detention are only factors to be considered at a detention review which can be easily displaced by others. Conversely, in a *habeas corpus* application the factors of length and uncertainty of duration are rightly given overarching primacy in determining whether a detention has become illegal, a critical distinction for the person detained.

2. Immigration Division decisions are not considered afresh at each review

9. The impact of the aforementioned legislative deficiencies under the IRB review process are aggravated by the requirement that the ID set out "clear and compelling reasons" for departing from past decisions. In *Thanabalasingham,*[13] the Federal Court of Appeal held that the initial burden to justify ongoing detention always rests with the Minister, who can make out a *prima facie* case for detention by relying on previous decisions of the ID. Once this burden is discharged, the onus shifts to the detainee to introduce new evidence or arguments in favour of his/her release.[14]

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[11] *Sahin v. Canada (Minister of Citizenship and Immigration) (TD),* [1995] 1 FCR 214 (FC) [*Sahin*].
[12] *Ibid* at p 11. In *Charkaoui, supra* note 2, this Court affirmed the findings in *Sahin* and confirmed that when there is a lengthy anticipated detention or a detention in which the future length cannot be ascertained, this factor must weigh in favour of release (at paras 108 and 115).
[13] *Canada (MCI) v Thanabalasingham,* 2004 FCA 4 [*Thanabalasingham*].
[14] *Ibid* at paras 10, 14-16.

10. The Appellants maintain that the ID is at least as robust as a *habeas corpus* because like a Superior Court, the ID "must decide afresh whether continued detention is warranted", employing a "an independent and fresh exercise" of their discretion.[15] The Appellants contend that this duty is not diluted by the Board's requirement to provide "clear and compelling reasons" to depart from previous decisions.

11. The Appellants fail to consider that as the length of detention increases, it becomes more difficult for a detainee argue that the passage of time constitutes "new information", sufficient to meet the threshold of clear and compelling reasons to depart from the earlier disposition of the ID. As underscored by the Ontario Court of Appeal in *Chaudhary*, when faced with a significant evidentiary record comprised solely of past orders for continued detention, the ID is compelled to defer to past decisions and maintain detention, even when the detention may be impermissibly lengthy and indefinite.[16] This creates the dangerous situation that as time progresses, it becomes more justifiable, reasonable, and easier to maintain the *status quo* of detention based on reasons already established at prior reviews.

12. By requiring clear and compelling reasons to depart, Members of the ID are mandated to focus on what has changed since the last review hearing, in lieu of their duty to assess the current lawfulness of an individual detention. This Court has held that it would be inconsistent with Section 7 of the *Charter* to require new evidence of a change in circumstances in order to justify release in the face of a prior detention order.[17]

13. It is also of significant concern that as the length of detention increases, the Minister's burden of proof to justify ongoing detention *decreases*. This is because the Minister can

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[15] Appellants' factum at paras 99-102.
[16] *Chaudhary*, *supra* note 1 at paras 88-89.
[17] *Charkaoui*, *supra* note 2 at para 122. This gap in the *IRPA* regime is also confirmed by the statistics underscored by the Ontario Court of Appeal in *Chaudhary*, *supra* note 1at para 90.

rely solely on that same record made up of past detention orders to make out a *prima facie* case for continued detention. Thus as the number of detention orders goes up, the Minister's case to maintain detention becomes increasingly persuasive.[18]

14. In tandem with this, the *IRPA* scheme also allows for Canada Border Services Agency (CBSA) investigations for the purpose of executing removal continue indeterminately.[19] If the existing regime were to require the ID to consider an unduly lengthy or indefinite detention as factors mandating release, then the Minister's burden to justify detention would properly increase with length of detention, in line with fundamental human rights standards.

15. Access to a *habeas corpus* gives the detainee a necessary opportunity to interrupt the cycle of continued detention and critically assess the legality of the detention itself through fresh eyes to determine if continued detention can be justified.

3. The leave requirement in the Federal Court creates a barrier for access to justice for detainees

16. The leave requirement in s.72 of the *IRPA*[20] is particularly onerous for detainees. The Appellants contend that the "fairly arguable case and serious question to be determined" standard is not exacting and suggests that detainees may discharge this onus in the same manner as establishing that their detentions are of lengthy and uncertain duration in a

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[18] *Thanabalasingham, supra* note 13 at paras 10 and 11; *Chaudhary, supra* note 1 at paras 88-89; *Scotland, supra* note 1 at paras 73-74: "In effect, once a decision to detain is rendered at the first detention review, for all practical purposes the CBSA has met its burden, and at every subsequent detention review it is difficult, if not impossible, to displace the initial decision….The detention review process becomes a closed circle of self-referential and circuitous logic from which there is no escape."

[19] The *IRPA* regime is silent on the length of time that a CBSA investigation can continue.

[20] *IRPA*, *supra* note 10.

habeas application.[21] When challenging detention review decisions, the leave requirement presents a formidable barrier for detainees, because an ID decision will be reasonable and justified within the law as long as the ID "has regard to the evidence before it in assessing the factors in s. 248" of the *IRPA*.[22] The Federal Court has considerable discretion to grant or refuse leave and will rightly be reluctant to intervene in cases that do not present overt legal errors or issues of procedural fairness.[23]

4. The Federal Court is limited to considering only the reasonableness of the IRB decision rather than the lawfulness of the detention itself

17. If leave is granted, a judicial review is limited to questions of the reasonableness of a particular decision of the ID, not the lawfulness of the detention. It is the detainee who has the onus of showing that the ID's decision was unreasonable, incorrect, or procedurally unfair.[24] Although the Federal Court must undoubtedly consider whether the ID applied the statutory criteria for detention in a manner consistent with the *Charter*, unlike a Superior Court on a *habeas corpus* application, the Federal Court cannot order release in the event that a detention is found to be unconstitutional. It can only order a re-hearing of the detention decision under review.

18. The reasonableness standard of review set out by this Court in *Dunsmuir*[25] constrains the Federal Court such that it can only send a decision back for redetermination by another ID member if the decision falls "outside the range of possible, acceptable outcomes which

[21] Appellants' Factum at paras 99-100.
[22] *Chaudhary, supra* note 1 at para 83.
[23] *Chaudhary, supra* note 1 at para 83.
[24] Chaudhary, *supra* note 1 at para 95.
[25] *Dunsmuir v New Brunswick*, 2008 SCC 9.

are defensible in respect of the facts and the law."[26] As noted above, the *IRPA* gives the ID broad jurisdiction to order continued detention and the Board is permitted to rely solely on past decisions to detain to justify its own findings. As a result, decisions are likely to meet the reasonableness standard, insulating the unlawfulness of a detention from review by a higher court.

19. The serial nature of detention review decisions also has a severe impact on the remedy that is available at the Federal Court. This is because, as highlighted by the Respondent, "ID officials hear cases every 30 days, regardless of whether there is a review in process in the Federal Court, such that the decision for which review is sought is invariably moot by the time the Court considers the application."[27]

CONCLUSION

20. From the perspective a detained person the practical impact of these legislative limitations cannot be overstated. Even if a detainee is successful at challenging their detention at each stage of the process, that is if they are granted leave and if the order for detention is quashed by the Federal Court, the detainee will still be faced with several subsequent orders from the ID for continued detention which remain binding, unless each of those decisions is also challenged by way judicial review every 30 days. On redetermination, the ID is required to consider the reasons given by the Court, but it must also consider and provide reasons for departing from the subsequent detention orders. As such, continued detention may still be ordered even in the face of a Federal Court order

[26] The standard of review for factual/legal determinations made by administrative decision makers is reasonableness, *ibid* at paras 47-50.
[27] Respondent's factum at para 59. See also *Chaudhary*, *supra* note 1 at paras 92-96; *Canada (MPSEP) v Lunyamila*, 2018 FCA 22 at paras 20-29.

declaring a particular ID decision unreasonable. The process of review offered by the ID and Federal Court may prove fruitless for a detainee seeking to have their detention reviewed.

PART IV: SUBMISSIONS CONCERNING COSTS

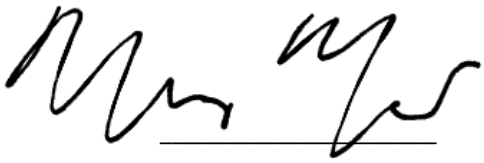
21. EIDN does not seek costs and asks that none be ordered against it.

PART V: ORDER SOUGHT

22. Nil.

All of which is respectfully submitted this 30th day of October, 2018.

Swathi Sekhar



Maija Martin

PART VI: TABLE OF AUTHORITIES

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