SCC File No: 37770

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

B E T W E E N :

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

APPELLANTS
(Respondents)

– and –

TUSIF UR REHMAN CHHINA

RESPONDENT
(Appellant)

– and –

EGALE CANADA HUMAN RIGHTS TRUST

APPLICANT/ INTERVENER

FACTUM OF THE INTERVENER, EGALE CANADA HUMAN RIGHTS TRUST

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

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PART I – FACTS

1. Egale Canada Human Rights Trust ("Egale") accepts and adopts the facts as stated by the Respondent Tusif Ur Rehman Chhina.

PART II – POSITION ON THE ISSUES

2. The fundamental question engaged in this appeal is whether the process for challenging immigration detention through the provisions in the *Immigration and Refugee Protection Act* (IRPA), including Federal Court judicial review, constitute a complete, comprehensive and expert scheme which is at least as broad as *habeas corpus* and no less advantageous.[1]

3. The Alberta Court of Appeal focused on measuring the IRPA scheme against *habeas corpus* in relation to assessing the length and indeterminacy of detention. While length and indeterminacy is one method of measuring the legality of detention, Egale intervenes in this appeal to draw this Court's attention to the importance of taking into account the factors of location and conditions of detention in measuring the IRPA scheme against *habeas corpus*. More specifically, Egale's position is that:

a) a review of the location and conditions of detention is vital for detained migrants from vulnerable demographic groups, such as the LGBTQ community;

b) it is not clear that decision makers under the IRPA scheme must consider location and conditions of detention as a factor in determining release or continued detention;

c) it is clear that decision makers under the IRPA scheme have no power to remedy location and conditions of detention which are harsh or illegal;

d) by contrast, *habeas corpus* empowers a judge to consider and to remedy harsh or illegal location and conditions of detention;

e) the IRPA scheme is not equally advantageous to *habeas corpus* because it does not empower decision makers to review and remedy harsh or illegal location and conditions of detention.

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[1] *Chhina v. Canada (Public Safety and Emergency Preparedness)* 2017 ABCA 248 at para. 7

PART III – STATEMENT OF ARGUMENT

A) The importance of a review and remedy of location and conditions of detention

4. The Alberta Court of Appeal assessed the completeness, comprehensiveness, and expertise of IRPA's statutory scheme in determining the legality of immigration detention based on the length and indeterminacy of detention. However, the legality of detention can be assessed not only based on the length and indeterminacy of detention, but on the location and conditions of detention. A detention which is brief and determinate can be illegal if the location and conditions of detention subject the detainee to harsh and inhumane treatment.[2]

5. Egale has intervened in this appeal due to the wide-reaching impact on LGTBQ migrants and other demographic groups for whom the location and conditions immigration detention can pose particular hardship and at times human rights violations. While this issue is important for the LGBTQ community, there are certainly other demographic groups subject to immigration detention with unique vulnerabilities, such as children, women, and people with physical or mental health needs. Within these vulnerable groups, however, it continues to be a challenge to recognize the vulnerabilities of the LGBTQ community. For example, CBSA's detention policy manual lists vulnerable groups for whom "detention may cause a particular hardship". Examples include minors, pregnant women and nursing mothers, and people with mental and physical health issues. The LGBTQ community is not listed among these vulnerable groups, despite the risks of harsh and inhumane conditions described below.[3]

6. An evaluation of the legality of immigration detention based on the location and conditions of detention is critical for LGBTQ migrants in immigration detention. The potential violations faced by LGBTQ migrants in immigration detention include:

- Physical and sexual violence,
- Social isolation and segregation,

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[2] *Brown v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 710 at para. 4
[3] ENF 20, section 5.11

- Barriers to accessing medical care, including HIV medication and hormonal treatment,
- The development or exacerbation of mental health issues.[4]

7. Other groups may face these violations, but the LGBTQ community faces these violations because they are LGBTQ.[5]

8. Many LGBTQ migrants are forced to take steps to conceal their sexual orientation or gender identity in order to reduce the possibility of experiencing these harms, which is in itself a violation of their rights. Further, the discovery of a detained migrant's sexual orientation or identity can lead to abuses such as homophobic violence or the detention of transgender migrants in facilities with members of the opposite sex.[6]

9. The potential for conditions of detention to violate the rights of LGBTQ migrants has been recognized in other jurisdictions. For example, the European Court of Human Rights has recognized that the conditions of detention of LGBTQ migrants are illegal when they are segregated and lose access to detention centre services or when their segregation amounts to non-penal solitary confinement.[7]

10. As stated above, the potential risks of harsh conditions may be present in any detention, regardless of duration. Because of the heightened risk of these conditions arising for vulnerable demographic communities such as the LGBTQ community, a quick and effective method is required to review the conditions and location of detention which may give rise to inhumane conditions.

B) Lack of clarity regarding whether the IRPA scheme allows for a consideration of the location or conditions of detention

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[4] Shana Tabak and Rachel Levitan, "LGBTI Migrants in Immigration Detention: A Global Perspective", 37 *Harvard Journal of Law and Gender*, 2014
[5] Ibid.
[6] *Brown*, para. 63, 64; Transgender woman files human rights complaint after detention in men's jail, *The Globe and Mail*, July 4, 2014.
[7] *X. v. Turkey*, Application No. 24626/09, ECHR 2013

11. Despite the importance of considering location and conditions of detention in determining the legality of detention, it is not clear that the IRPA scheme requires consideration of the location and conditions of detention.

12. There is no statutory obligation on the Immigration Division (ID) to consider the location and conditions of detention in a detention review hearing. Pursuant to ss. 57(1) and 58 of the IRPA, the Immigration Division's detention review is confined to an examination of the reasons for detention. The factors to be considered by the Immigration Division in Regulations 244-249 do not list the location and conditions of detention as relevant factors. [8]

13. In *Brown*, the Federal Court examined the constitutionality of the IRPA detention regime. Despite the absence of a statutory requirement to consider the location and conditions of detention, the Court concluded that the detention regime was constitutional because Immigration Division adjudicators are required to consider alternatives to detention, such as release, bail bond, periodic reporting, and detention in a form that is less restrictive to the individual.[9]

14. However, the Immigration Division's obligation to consider alternatives to detention or detention in a less restrictive form does not require it to consider whether a detainee's conditions or location of detention is harsh or illegal.

15. This obligation does not assist a detainee for whom grounds for detention exist, but who is detained in an inappropriate location or under inhumane conditions. As a practical matter, there is no impetus for the ID to factor such conditions into its decision because it is powerless to remedy them. The requirement to consider is illusory without the power to remedy.

[8] IRPR, R. 244-248, IRPA, s. 58(1)
[9] *Brown*, supra, para. 129-138

C) Decision makers under the IRPA scheme have no power to remedy location and conditions of detention

16. It is clear that the ID has no power to remedy harsh or inhumane conditions and location of immigration detention. The only power conferred to the ID is to order release, or continued detention.[10]

17. The ID has acknowledged its lack of authority to remedy harsh/illegal conditions or location of detention.[11]

18. The Federal Court has also recognized the ID's lack of power to remedy harsh or inhumane conditions and location of detention. However, the Court found that this lack of authority is constitutional because such considerations are relevant in ordering continued detention or release:

> "The ID's lack of jurisdiction over the location and conditions of detention therefore does not contravene either s. 7 or s. 9 of the *Charter*. An ID member is constitutionally required to consider the availability, effectiveness, and appropriateness of alternatives to detention, as well as less restrictive forms of detention, before deciding whether an individual should be released."[12]

19. While an ID Member may be required to consider less restrictive forms of detention, the fact remains that she has no power to issue a remedy other than release. She would not, for example, be able to order access to hormone therapy for a transgender detainee, or access to HIV medication, or detention with detainees of a similar sexual orientation or gender identity. It is therefore possible for an ID member to order the continued detention of a person experiencing

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[10] IRPA, s. 58; Immigration and Refugee Board, Chairperson's Guideline 2: Detention, section 1.1.4

[11] *Canada (Citizenship and Immigration) v. Jama* [2007] IDD No. 6 (IRB): "The Minister's officers are responsible for determining the place of detention in any given case; the Immigration Division has no authority, as far as I am aware, to order that detention be maintained at a given location such as, in this case, a mental health facility."; *Canada (Citizenship and Immigration) v. XXX* [2008] IDD No. 0018-A7-00915 (IRB): "It is clear to me that, in this case, it is preferable for Mr. XXXX to be held in a hospital that can monitor his health care needs. I am well aware that I have no jurisdiction to decide where he is held."

[12] *Brown*, supra, at para. 138

harsh or inhumane conditions if the criteria for continued detention is otherwise met under s. 58 of *IRPA*.

20. The Federal Court on judicial review would be bound to uphold the Member's decision based on the ID's lack of jurisdiction to remedy such conditions. Even if the Federal Court were moved to grant the application for judicial review, its power under s. 18.1 of the Federal Courts Act is limited to quashing the decision and remanding it back to the ID.[13]

21. In *Brown*, the Court found three possible methods for immigration detainees to challenge the conditions and location of detention:

(a) Detainees may challenge the location or conditions of detention with the Canada Border Services Agency (CBSA);

(b) Detainees in provincial facilities may challenge the location or conditions of their detention in accordance with the procedures of that facility;

(c) Detainees may bring applications for *habeas corpus* in Superior Courts.[14]

22. If the ability for detainees to seek *habeas corpus* is removed from these options by this Court, the only remaining remedies would be challenging the location and conditions of detention before the CBSA or the provincial detention authorities. This would amount to requesting a jailor to remedy the conditions of jail. This is not an effective remedy consistent with the rule of law.

23. Regarding a challenge to conditions and location of detention with CBSA, there is no formal or legal process or timeline to guide a complaint. This leaves CBSA with complete discretion over the conditions and location of detention. There is no legal process requiring CBSA to respond at all to a complaint regarding conditions which may subject an LGBTQ detainee to physical or psychological harm. A judicial review application to the Federal Court could challenge the CBSA's failure to remedy conditions and location of detention, but such challenges would be time consuming and uncertain given the discretionary, limited mandate of the Federal Court on

[13] Federal Courts Act, s. 18.1
[14] *Brown*, at para. 137

judicial review. This discretionary, time consuming process has been found to be inferior to *habeas corpus*.[15]

24. Once an individual is placed in a provincial correctional facility, CBSA loses control over the conditions and location of their detention. CBSA does not control the location of the detention facility, and detainees are not provided an opportunity to make submissions about the propriety of the facility nor are they provided with reasons for the choice of facility.[16]

25. A challenge to the location and conditions of detention with provincial correctional facilities is not an effective remedy for an immigration detainee because it is made in a penal context, and such relief is discretionary and time consuming.

D) *Habeas corpus* is effective in reviewing and remedying the illegality of the location or conditions of detention

26. By contrast to the statutory review process under IRPA, *habeas corpus* allows detainees to challenge the legality of their detention in relation to the conditions and location of detention. As this Court has stated:

> A prisoner is entitled to the writ of *habeas corpus* when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits."[17]

27. In *May v. Fernadale*, this Court relied on its previous jurisprudence to find that the scope of liberty capable of review on a *habeas corpus* application encompasses deprivations of liberty imposed:

> In *Martineau v. Matsqui Institution Disciplinary Board*, 1979 CanLII 184 (SCC), [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:

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[15] *Toure v. Minister of Public Safety*, 2017 ONSC 5878, at paras. 71, 72
Ogiamien v. Ontario (Community Safety and Correctional Services), 2017 ONCA 839, at para. 18 (citing *Chaudhary*)
[16] *Brown*, para. 105
[17] *R. v. Miller*, [1985] 2 SCR 613, at p. 639

> In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls. [Emphasis added; p. 622.][18]

28. The Ontario Court of Appeal has recently affirmed that Courts on *habeas corpus* applications can consider matters other than length and uncertainty of detention:

> "I accept Mr. Toure's general submission and his reliance on *Ogiamien #2*; the principle applied in *Chaudhary* is not restricted to the specific facts considered in that case. In *Ogiamien #2*, at para. 41, this court rejected the contention that *habeas corpus* will only be available in immigration matters in the case of lengthy detentions of uncertain duration."[19]

29. Most recently, the Ontario Court of Appeal relied on this Court's decision in *May* in defining *habeas corpus* remedies that go beyond release from imprisonment:

> "The majority in *May* reviewed the purpose behind the writ of *habeas corpus*. Fish and LeBel JJ., at para. 21, quoted from a decision of Black J. in the United States Supreme Court where he said that the purpose of *habeas corpus* was 'the protection of individuals against erosion of their right to be free from wrongful restraints against their liberty.' That protection was stated in broad terms. It was not restricted to imprisonment but to any restraint on a person's liberty. Such restraints can take many forms."[20]

30. Superior Courts have explicitly acknowledged that an application for *habeas corpus* relief encompasses a review and remedy of the conditions and location of detention. In *Almrei*, a Superior Court reviewed the climatic conditions of the Plaintiff's immigration detention and made an order requiring the issuance of appropriate apparel to Mr. Almrei. In *Toure*, the Superior Court on a *habeas corpus* application involving an immigration detainee examined the conditions and location of his detention at length, and ordered that he be transferred from a maximum security provincial facility to a minimum security immigration holding centre.[21]

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[18] *May v. Fernadale Institution* 2005 SCC 82, para. 25
[19] *Toure v. Canada (Minister of Public Security and Emergency Preparedness),* 2018 ONCA 681 at para. 23
[20] *Wang v. Canada* 2018 ONCA 798
[21] *Canada v. Dadzie*, 2016 ONSC 6045, at paras. 32-33; *Toure*, note 19, at paras. 67-92; *Almrei v. Canada (Attorney General),* 2003 CanLII 17113 (ON SC)

E) *Habeas corpus* is more advantageous than the IRPA scheme in reviewing and remedying the legality of the location and conditions of immigration detention

31. A timely, effective review and remedy for LGBTQ detained migrants is required to address the location or conditions of detention that could amount to harsh, inhumane treatment. To paraphrase this Court from its decision in *May*, the rule of law must run within the walls of immigration detention.

32. The IRPA scheme has no process for such a review, and in fact does not confer such powers to the ID. Location and conditions of detention are left to the full discretion of administrative officers of the state.

33. By contrast, *habeas corpus* is a timely remedy for reviewing and remedying conditions or location of detention which result in harsh or inhumane treatment. The scope of *habeas corpus* is not confined to ordering release or continued detention, but to providing a remedy for detentions conditions which are illegal.

34. The IRPA scheme is not a complete and comprehensive scheme which is equally advantageous to *habeas corpus* because it does not empower decision makers to review and remedy for harsh or illegal location and conditions of detention.

PART IV AND V – COSTS AND ORDER SOUGHT

35. Egale does not seek costs in this matter and asks that costs not be awarded against it in the event that the appeal is dismissed or granted. Egale requests that the appeal be determined in accordance with the above submissions.

ALL OF WHICH IS RESPECTULLY SUBMITTED, this 31st day of October, 2018

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PART VI – TABLE OF AUTHORITIES

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PART VII – STATUES, REGULATIONS, RULES

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

244 For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

- **(a)** is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act;
- **(b)** is a danger to the public; or
- **(c)** is a foreign national whose identity has not been established.

245 For the purposes of paragraph 244(a), the factors are the following:

- **(a)** being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;
- **(b)** voluntary compliance with any previous departure order;
- **(c)** voluntary compliance with any previously required appearance at an immigration or criminal proceeding;
- **(d)** previous compliance with any conditions imposed in respect of entry, release or a stay of removal;
- **(e)** any previous avoidance of examination or escape from custody, or any previous attempt to do so;
- **(f)** involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph

244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

- **(g)** the existence of strong ties to a community in Canada.

246 For the purposes of paragraph 244(b), the factors are the following:

- **(a)** the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;
- **(b)** association with a criminal organization within the meaning of subsection 121(2) of the Act;
- **(c)** engagement in people smuggling or trafficking in persons;
- **(d)** conviction in Canada under an Act of Parliament for
    - **(i)** a sexual offence, or
    - **(ii)** an offence involving violence or weapons;
- **(e)** conviction for an offence in Canada under any of the following provisions of the *Controlled Drugs and Substances Act*, namely,
    - **(i)** section 5 (trafficking),
    - **(ii)** section 6 (importing and exporting), and
    - **(iii)** section 7 (production);
- **(f)** conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for
    - **(i)** a sexual offence, or
    - **(ii)** an offence involving violence or weapons; and
- **(g)** conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the *Controlled Drugs and Substances Act*, namely,

- **(i)** section 5 (trafficking),
- **(ii)** section 6 (importing and exporting), and
- **(iii)** section 7 (production).

247 **(1)** For the purposes of paragraph 244(c), the factors are the following:

- **(a)** the foreign national's cooperation in providing evidence of their identity or assisting the Department or the Canada Border Services Agency in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father, in providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;
- **(b)** in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;
- **(c)** the foreign national's destruction of their identity or travel documents, or the use of fraudulent documents by the foreign national in order to mislead the Department or the Canada Border Services Agency, and the circumstances under which the foreign national acted;
- **(d)** the provision of contradictory information by the foreign national with respect to their identity during the processing of an application by the Department or the Canada Border Services Agency; and
- **(e)** the existence of documents that contradict information provided by the foreign national with respect to their identity.

(2) Consideration of the factors set out in paragraph (1)(a) shall not have an adverse impact with respect to minor children referred to in section 249.

248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

- **(a)** the reason for detention;
- **(b)** the length of time in detention;
- **(c)** whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
- **(d)** any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and
- **(e)** the existence of alternatives to detention.

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**

58 **(1)** The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

- **(a)** they are a danger to the public;
- **(b)** they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
- **(c)** the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
- **(d)** the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or
- **(e)** the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

***Rules of the Supreme Court of Canada,* SOR/2002-156**

47 **(1)** Unless otherwise provided in these Rules, all motions shall be made before a judge or the Registrar and consist of the following documents, in the following order:

- **(a)** a notice of motion in accordance with Form 47;
- **(b)** any affidavit necessary to substantiate any fact that is not a matter of record in the Court;
- **(c)** if considered necessary by the applicant, a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require;
- **(d)** the documents that the applicant intends to rely on, in chronological order, in accordance with subrule 25(3); and
- **(e)** except in the case of a motion for intervention, a draft of the order sought, including costs, in print and electronic format.

- **(2)** Parts I to V of the memorandum of argument shall not exceed 10 pages.
- **(3)** There shall be no oral argument on the motion unless a judge or the Registrar otherwise orders or directs.

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55 Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

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57 **(1)** The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person’s interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

- **(2)** A motion for intervention shall

- **(a)** identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
- **(b)** set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.