CouCourt 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

and

TUSIF UR REHMAN CHHINA

RESPONDENT

and

END IMMIGRATION DETENTION NETWORK, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DEFENCE FOR CHILDREN INTERNATIONAL-CANADA, AMNESTY INTERNATIONAL CANADA, COMMUNITY & LEGAL AIDE 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

FACTUM OF THE APPELLANTS MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS AND ATTORNEY GENERAL OF CANADA IN REPLY TO THE INTERVENTIONS

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Each of the interveners' submissions suffers from significant flaws, such as addressing an issue not properly before the court, relying on facts not properly before the Court, or citing law that is of marginal relevance to the issues that are properly before the Court.

2. The appellants make the following consolidated submissions in reply to the facta of the interveners. In so doing, the appellants rely on the facts set out in their factum on appeal, dated July 26, 2018. To the extent that the appellants' previously filed submissions on the appeal already address the interveners' submissions, they will not be repeated.

PART II – STATEMENT OF QUESTIONS IN ISSUE

3. The issues in this appeal are set out in the appellants' previously filed factum.

PART III – STATEMENT OF ARGUMENT

4. Where the appellants have specific responses to issues in the interveners' facta they will be dealt with individually, but where similar issues are raised by more than one intervener, they will only be addressed once.

A. REPLY TO AMNESTY INTERNATIONAL

5. Amnesty International focuses on international human rights law. In general, international jurisprudence involving countries with schemes different from the *IRPA*'s complete, comprehensive and expert regime are of no assistance.[1] The appellants take no issue with the proposition that individuals are entitled to challenge the lawfulness of detention or that that entitlement extends to administrative detention. However, that is not the question in this case. Rather, the question is whether the provincial superior courts are correct to decline *habeas corpus* jurisdiction in favour of the processes of review contemplated by the *IRPA*. As noted in a case relied on by Amnesty International, domestic legal systems may institute differing methods for ensuring review of detention. *Habeas corpus* need not be the method of review. Rather, what matters is that the review be "real and not merely formal" and that the remedy of release be available.[2] *IRPA* review is not merely formal, and provides specifically for the remedy of release.

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[1] *Brown v. Canada (Public Safety)*, 2018 ONCA 14, at paras. 37-38 [*Brown ONCA*].
[2] *A. v. Australia*, UN Doc CCPR/C/59/D/560/1993, at para. 9.5.

6. In response to the submission that detention decisions ought to be reviewed by a body different than and independent from the body that ordered detention, under the *IRPA* scheme, detention ordered by the CBSA pursuant to s. 55 of *IRPA* is reviewed by a different and independent body: the Board. It is not accurate to say, as the intervener has, that on subsequent detention reviews the Board is "in effect reviewing its own order of detention".[3] On detention review, the Board considers the reasons for the continued detention afresh through a process of vigorous re-evaluation predicated on an independent and fresh exercise of discretion.[4] The Board's decisions, in turn, are reviewable by a different and independent body: the Federal Court.

7. The *IRPA* regime does not fall short of the requirements of international law.[5] The Board must consider the lawfulness, including any alleged arbitrariness, of detention. Lawfulness and arbitrariness are not "factors" which must be enumerated in the *IRPA* in order to ensure that detentions are *Charter* compliant. Rather, they are conclusions that may be reached after consideration of the relevant factors. In *Charkaoui v. Canada (Citizenship and Immigration)*, this Court found that long-term immigration detention will not be arbitrary or unlawful if accompanied by regular review on the basis of the same factors considered by the Board.[6]

8. Finally, in response to the submissions regarding stateless persons, statelessness is not a ground for detention under s. 58 of *IRPA*. To the extent that stateless persons for whom legitimate grounds of detention exist may face additional barriers to timely removal, the length and anticipated future duration of detention must always be considered in determining whether detention remains lawful in view not only of *IRPA*, but the *Charter*.

B. REPLY TO THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS ("CARL")

9. CARL's submission assumes that the exercise of judicial discretion to decline *habeas corpus* jurisdiction always amounts to a breach of s. 10(c) which must be justified under s. 1 and

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[3] Factum of Amnesty International, dated October 29, 2018, at para. 19.
[4] *IRPA*, s. 58; *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*]; *Canada (Citizenship and Immigration) v. B072*, 2012 FC 563, at para. 34; *Canada (Minister of Citizenship and Immigration) v B147*, 2012 FC 655, at para. 33.
[5] Factum of Amnesty International, dated October 29, 2018, at paras. 20-24.
[6] 2007 SCC 9 at paras. 107-117 [*Charkaoui*]; *IRPA Regulations*, s. 248.

proposes a test for such s.1 justification. As the respondent's motion for an extension of time to file a Notice of Constitutional Question was denied, this issue is not properly before the Court.

10. Further, in *May v. Ferndale Institution*[7] this Court set out the test to be applied in determining whether a superior court should decline to exercise its *habeas corpus* jurisdiction. The submission that this test applies only to cases "wholly unrelated to the legality of a detention"[8] lacks analytical coherence. *Habeas corpus*, by definition, is only available where the legality of detention is in issue.[9] CARL's position is tantamount to saying this Court endorsed an exception to the exercise of *habeas corpus* jurisdiction where no such jurisdiction exists.

11. CARL's suggestion that *habeas corpus* is more advantageous because the anticipated future length of detention is "on its own a basis for release" is unhelpful. In *Charkaoui*, this Court found that the anticipated future length of detention will be a factor weighing in favour of release but did not say that it was necessarily a determinative factor on its own. This is true whether the lawfulness of detention is examined in a *habeas corpus* application or under the *IRPA* regime. [10]

12. Finally, CARL's submission that "the nature and cost of *habeas corpus* litigation as compared to the *IRPA* process are such that *habeas corpus* is not likely to become the remedy of choice in short-term detention cases"[11] undermines the notion that *habeas corpus* is more accessible or advantageous than the *IRPA* scheme.

C. REPLY TO THE QUEEN'S PRISON LAW CLINIC ("QPLC")

13. As with CARL, QPLC assumes that the exercise of judicial discretion to decline *habeas corpus* jurisdiction always amounts to a breach of s. 10(c) which must be justified under s. 1. This issue is not properly before the Court.

14. Further, in response to QPLC's submission that only *habeas corpus* provides for a "holistic" review of detention, this Court has found that *habeas corpus* and judicial review are

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[7] 2005 SCC 82 [*May v. Ferndale*].
[8] CARL Factum, dated October 29, 2018, at paras. 3, 7 [CARL Factum].
[9] *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at paras. 10-12, *May v. Ferndale*, *supra* note 7, at paras. 74, 76; *Mission Institution v. Khela*, 2014 SCC 24, at para. 30 [*Khela*].
[10] CARL Factum, at paras. 23-24; *Brown ONCA*, *supra* note 1, at para. 31.
[11] CARL Factum at p. 8, footnote 31.

functionally similar. The distinctions between them are largely procedural and remedial.[12] Judicial review is not limited to mere 30 day increments, but occurs in consideration of the entire factual matrix before the Board, which includes the Board's prior decisions and the length to date and likely future duration of the detention.[13] Likewise, on *habeas corpus*, the Court must consider "the record of proceedings that resulted in the decision in question"[14] to determine whether the detention is lawful having regard to the statutory criteria and the *Charter*.

15. QPLC quotes selectively from the Court of Appeal for British Columbia's decision in *Khela v. Mission Institution (Warden),*[15] in support of its submission that the administrative decision giving rise to the deprivation of liberty is "quite irrelevant" on *habeas corpus*.[16] That passage, however, does not suggest that courts conducting *habeas corpus* review are able to ignore the administrative decision giving rise to the deprivation of liberty, whereas courts on judicial review are limited by it. To the contrary, the point of that passage is that *habeas corpus* and judicial review are substantively equivalent in scope. In particular, the Court of Appeal was rejecting the notion that *habeas corpus* is not available to review the reasonableness of an administrative detention decision. As a result, the fact that reasonableness review is being sought (rather than "jurisdictional" review) is "quite irrelevant" to the availability of *habeas corpus*.[17]

16. Contrary to QPLC's suggestion at paragraph 25 of its factum, this Court in *Charkaoui* made clear that the s. 10(c) right can be satisfied through *habeas corpus* or statutory mechanisms, so long as there is an opportunity for prompt review of the lawfulness of detention.[18]

D. REPLY TO THE CANADIAN COUNCIL OF REFUGEES ("CCR")

17. CCR frames its submissions with reference to alleged "maladministration" of the *IRPA* regime and procedural aspects of the Board and Federal Court processes. The alleged maladministration of the *IRPA* regime writ large, is not properly in issue on this appeal for the

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[12] *Khela*, *supra* note 9, at paras. 37-38.
[13] *IRPA Regulations*, s. 248; *Thanabalasingham*, *supra* note 4; *Sahin v. Canada* (Minister of Citizenship and Immigration) (T.D.), [1995] 1 FC 214.
[14] *Khela*, *supra* note 9 at para. 35.
[15] 2011 BCCA 450 [*Khela BCCA*].
[16] QPLC Factum, dated October 31, 2018, at para. 23.
[17] *Khela BCCA*, *supra* note 15 at paras. 71-79, 82.
[18] *Charkaoui*, *supra* note 6, at paras. 90-94.

reasons set out in the appellants' response to the respondent's motion to adduce new evidence. The fact that three superior court decisions found flaws in the Board's decision-making process merely points to the fact that in any system errors sometimes occur. The intervener omits any reference to judicial decisions that find otherwise[19] or to the thousands of cases that are dealt with by the Board without issue.[20] A limited number of administrative errors do not undermine the effectiveness of the scheme as a whole. The evidentiary record in this case does not permit this Court to reach any conclusions regarding systemic problems as that point has never been in issue.

18. Indeed, the only court to have made any substantive findings with regard to the administration of the *IRPA* regime in this case based on evidence in the record was the Court at first instance. In finding that Mr. Chhina's detention was justified and there had been no *Charter* breach that court necessarily found that there was no maladministration.[21]

19. The submissions to the effect that the Federal Court only conducts a "paper review", and is otherwise inferior in its process as compared to provincial superior courts is not accurate. First, the *IRPA* process is not limited to judicial review before the Federal Court. It also involves regular and mandatory review of lawfulness of the CBSA's decision to detain by the Board, which involves an in-person hearing on the merits. The process was recently described as follows in a post-*Chaudhary* decision arising out of Ontario:

> I am not satisfied that his detention was unlawful. He was subject to a continuing process of review every thirty days in a quasi-judicial process that has been recognized as being procedurally fair – the subject having a right to be represented by counsel, to call evidence, cross-examine witnesses and to receive disclosure in advance.[22]

20. Second, while Federal Court applications for judicial review proceed on the record before the administrative decision maker, provision is also made for the filing of affidavit evidence and cross-examination. A hearing of the application then takes place in open court

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[19] See e.g. *Canada v Dadzie*, 2016 ONSC 6045; *Toure v. Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 [*Toure*]; *Philip v. Canada (Attorney General)*, 2018 ABQB 167; *Brown ONCA*, *supra* note 1.
[20] *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710, at para. 100 [*Brown FC*].
[21] Reasons for Judgment of the Alberta Court of Queen's Bench, dated September 2, 2016, Action No. 160576914X1, p. 6, lines 3-41 / AR, Vol. I, p. 6.
[22] *Brown v. Ministry of Public Safety*, 2016 ONSC 7760, at para. 95; *Brown ONCA*, above note 1, at para. 29.

where the detainee or their counsel can make submissions.[23] As is evident from the record on this appeal, the same is true on an application for *habeas corpus*. As in this case, these applications are brought in chambers and typically proceed on the record produced by the detaining authority and affidavit evidence.

21. Further, the scope of Federal Court review is not limited by the reference to "clear and compelling reasons" in *Thanabalasingham*. Nor did that case place any onus on the detainee. The "clear and compelling reasons" requirement applies to the Board itself in its articulation of reasons for decision. It operates so as to ensure transparency and intelligibility in decision making in a context where prior decisions must be considered, but are not binding. Rothstein J.A., as he then was, explained that new or different evidence is not required in order to support the provision of clear and compelling reasons, which may be found even on the same record as was before the prior decision-maker.[24] The requirement was explained as follows:

> [12] The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> [13] However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

22. Finally, in response to the submission that the *IRPA* scheme disadvantages detainees because interim release orders are seldom available before the Federal Court, this ignores the fact that the Board is empowered to make release orders, and indeed must do so unless the detaining authority has discharged its burden. Further, the fact that stays are generally not available to detainees, but may be available to the Minister on judicial review of a Board release decision, is not a function of any inherent weakness in the *IRPA* scheme, but is rather a natural consequence of the fact that interim injunctions are generally intended to preserve the *status quo* pending judicial determination on the merits.

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[23] *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22), Rule 15(1).
[24] *Thanabalasingham*, *supra* note 4, at para. 11.

E. REPLY TO THE CANADIAN PRISON LAW ASSOCIATION ("CPL")

23. CPL encourages this Court to make findings with respect to "deprivation of liberty gone bad"[25] in the correctional context. The correctional and immigration contexts are vastly different, and, as noted by this Court, involve completely different legislative schemes.[26] Further, in the correctional context, *habeas corpus* applications will almost always turn on deprivations of the *residual* liberty interest as there is an underlying valid deprivation of liberty flowing from conviction and sentence. That is not generally the case in the context of immigration detention and is certainly not true in this case, where it is the validity of the detention as a whole, and not merely a residual liberty interest that is in issue.

24. The intervener does not raise "a narrow point of law" that can be settled "without the need for fulsome argument by the opposing parties".[27] As is evident from the cited cases arising in the correctional context, the CPL's position runs counter to the bulk of jurisprudence on this issue at both the appellate and trial levels. CPL is not asking for uncontroversial propositions to be clarified, but rather for a decision that would overturn the prevailing jurisprudence, on a point not in issue, without the benefit of full argument or an appropriate record.

F. REPLY TO THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ("BCCLA")

25. BCCLA suggests that the availability of *habeas corpus* to immigration detainees has been expanded beyond cases of allegedly lengthy and indeterminate detention. In *Toure*, the Ontario Court of Appeal considered a similar argument by an immigration detainee, based on that Court's prior decision in *Ogiamien v. Ontario (Community Safety and Correctional Services)*.[28] The Court found that *Ogiamien 2* "while recognizing that there may be other exceptional circumstances where *habeas corpus* is available to an immigration detainee, maintains the *Chaudhary* test".[29] Thus, the law in Ontario currently is that the *IRPA* detention scheme is generally a complete comprehensive and expert process at least as advantageous as

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[25] CPL Factum, dated October29, 2018 at para. 3.
[26] *May v. Ferndale*, *supra* note 7, at paras. 59-64.
[27] *Ibid*, at para. 29.
[28] 2017 ONCA 839 ["*Ogiamien 2*"].
[29] *Toure*, *supra* note 19, at para. 25.

habeas corpus, and immigration detainees may only have recourse to *habeas corpus* where the *Chaudhary* criteria are met or in "other exceptional circumstances."

26. Much is made of the non-discretionary nature of *habeas corpus* review. In *Khela*, this Court explained that there are in fact two points at which a court exercises discretion on a *habeas corpus* application: first, when determining whether the court should decline jurisdiction because one of the exceptions set out in *May v. Ferndale* exists; and second in determining whether to discharge the applicant. What is non-discretionary is that if neither of the *May v. Ferndale* exceptions applies, and the applicant goes on to raise a legitimate ground upon which to question the legality of a deprivation of liberty, the matter must proceed to a hearing.[30]

27. The BCCLA stresses that the initial onus on a detainee to raise a legitimate ground to question the legality of the detention, before the matter will proceed to a hearing on the merits, is a real step which requires that the detainee provide evidence to trigger the respondent's need to justify the detention.[31] There is no such onus or requirement on the detainee in proceedings before the Board and the Board has no discretion not to conduct a statutorily mandated review. Further, this reflects the similarity between the leave requirement for Federal Court judicial review and the detainee's initial burden on *habeas corpus.*

G. REPLY TO THE CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

28. CCLA emphasizes *Charter* rights and values, including liberty and equality. The *IRPA* scheme does not prioritize the applicant's liberty interest any less than *habeas corpus*. The question, regardless of the procedural mechanism used to challenge the detention, is whether the detention is lawful having regard to the legislative scheme which provides for the detention, the record, and the *Charter*. The CCLA is effectively arguing that the exercise of the discretion endorsed by this Court in *May v. Ferndale* violates the *Charter*. For the reasons set out above in response to CARL and QPLC, that issue is not before the Court on this appeal.

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[30] *Khela*, *supra* note 9, at paras. 41, 42, 78.
[31] BCCLA Factum, dated October 31, 2018, at para. 24.

29. In as far as CCLA may suggest, based on *Brown FC,*[32] that the minimum requirements for lawful detention under the *IRPA* include the availability of *habeas corpus*[33] and that the Federal Court is of the view that *habeas corpus* ought to be available to immigration detainees generally, that is not the case. In the passage relied on, the Federal Court was referring to decisions of the CBSA and provincial correctional authorities regarding location and conditions of detention, not the Board's decisions regarding detention or release.[34] Further, to the extent that the Federal Court referred to the impact of the *Chaudhary* decision at that particular time, those comments do not constitute an endorsement of the *Chaudhary* approach, but simply acknowledge provincial appellate jurisprudence on the issue.

30. While the appellants acknowledge that there is no automatic right of appeal from a Federal Court judgment on judicial review, the parallel the intervener draws between rights of appeal in the provincial superior courts and in Federal Court immigration proceedings is not apposite. Immigration detainees have an automatic right to lawfulness review before the Board at regular intervals and, unlike *habeas corpus*, detainees need not apply for that review. On judicial review, there is no initial threshold other than to raise an arguable case for leave. For the reasons set out in the appellants' factum on appeal, those aspects of the *IRPA* scheme are at least as broad and advantageous as the *habeas corpus* process. Limits on access to appeal rights, which apply to both the detainee and the detaining authority, after multiple levels of review, do not undermine the breadth and efficacy of the *IRPA* process.

H. REPLY TO COMMUNITY & LEGAL AID SERVICES PROGRAM ("CLASP")

31. CLASP focuses largely on whether provincial superior courts have the jurisdiction, on *habeas corpus*, to release detainees on conditions. CLASP advocates in favour of conditional release for certain classes of detainees, notably those who may present with mental health issues.

32. The appellants take no issue with the proposition that the availability of conditional release in appropriate cases is critical to the proper and *Charter*-compliant administration of the immigration detention scheme. Indeed, release on conditions is expressly provided for in the

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[32] *Supra* note 20.
[33] CCLA Factum, dated October 31, 2018, at para. 27.
[34] *Brown FC*, *supra* note 20, at para. 159(i); see also *Toure*, *supra* note 19, at para. 72.

IRPA[35] and, before ordering continued detention, the Board is required to consider alternatives to detention such as conditional release, even if grounds for detention are made out.[36]

33. In response to the allegations that the Board abdicates its jurisdiction to make findings on breaches of conditional release, that point is not in issue on this appeal. CLASP's submissions are inconsistent with the criteria and processes contemplated by the *IRPA* and are predicated, in part, on statements of counsel unsupported by the evidence. The only evidence CLASP does refer to is a report regarding an external audit commissioned by the Board itself, which is the subject of a new evidence motion that has yet to be decided. The conclusions set out in that report are of limited utility for the reasons set out in the appellants' response to the new evidence motion.

I. REPLY TO DEFENCE FOR CHILDREN INTERNATIONAL ("DCI")

34. The issues raised by DCI do not arise on the facts of this case. *IRPA* contains specific provisions dealing with children and detention.[37]

PART IV – COSTS

35. The appellants agree that no costs ought to be awarded to or against the interveners.

PART V – ORDER SOUGHT

36. For all of these reasons, the appellants maintain their request for an order allowing this appeal, and setting aside the judgment of the Alberta Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 7th day of November, 2018.

Donnaree Nygard Counsel for the Appellants	Liliane Bantourakis Counsel for the Appellants

[35] *IRPA*, ss. 56(1), 58(3)-(6), 58.1; *IRPA Regulations*, s. 250.1.
[36] *IRPA Regulations*, s. 248(e).
[37] *IRPA*, ss. 60, 167(2); *IRPA Regulations*, s. 249.

PART VI – TABLE OF AUTHORITIES

Legislative Provisions	**Cited at para.**
Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22 / *Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés*, DORS/93-22	20
Rule 15 EN / FR	
Immigration and Refugee Protection Act, S.C. 2001, c. 27 / *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27	6, 8, 32, 34
Section 55 EN / FR	
Section 56 EN / FR	
Section 58 EN / FR	
Section 60 EN / FR	
Section 167 EN / FR	
Immigration and Refugee Protection Regulations, SOR/2002-227 / *Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227	7, 14, 32, 34
Section 248 EN / FR	
Section 249 EN / FR	
Section 250.1 EN / FR	