SCC File No 41132

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**FRANK DORSEY and GHASSAN SALAH**

APPELLANT

- and-

**ATTORNEY GENERAL OF CANADA**

RESPONDENT

- and-

**JOHN HOWARD SOCIETY OF CANADA**

INTERVENER

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# FACTUM OF THE INTERVENER, THE CANADIAN COUNCIL FOR REFUGEES

(Pursuant to Rules 37 and 42 *Rules of the Supreme Court of Canada,* SOR/2002-156)

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## PARTS I & II - OVERVIEW AND STATEMENT OF POSITIONS

1. *Habeas corpus* is critical at multiple junctures within the immigration and correctional legal regimes. The Canadian Council for Refugees (CCR) submits that for non-citizens serving criminal sentences, such as Mr. Salah, *habeas corpus* must be available to: (a) oversee arbitrary security reclassification refusals made at the intersection of immigration, criminal, and correctional law; (b) challenge the material conditions and all forms of imprisonment that unduly restrict the prisoner's liberty rights; and (c) protect against the maladministration of the correctional or immigration detention systems. The CCR submits that this Court should preserve its finding in *Chhina* and ensure that broad and equitable access to *habeas corpus* is maintained.[1]

## PART III – ARGUMENT

### A. *Habeas corpus* is critical to oversee arbitrary security reclassifications made at the intersection of immigration, criminal, and correctional law

2. "Crimmigration" describes the risk of increased punitive treatment of non-citizens through the convergence of criminal, correctional and immigration legal systems.[2] The crimmigration pipeline includes state systems embedded in systemic racism that move a person from arrest, to conviction, to imprisonment, and finally to removal from Canada. *Habeas corpus* must be interpreted in a manner consistent with its broad purpose so that it is available to oversee these processes, whether they result in new or continued deprivations of liberty.

#### (1) The crimmigration pipeline requires timely and effective oversight

3. Non-citizen prisoners experience incarceration, from sentence commencement to release on parole to deportation, differently than Canadian citizens. For non-citizen prisoners facing removal at the end of their sentence, the *Corrections and Conditional Release Act* (*CCRA)*[3] and

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[1] *Canada (Minister of Public Safety and Emergency Preparedness) v. Chhina,* 2019 SCC 29 [***Chhina***].
[2] See Sharryn Aiken, David Lyon, and Malcolm Thorburn, "Introduction: 'Crimmigration, Surveillance and Security Threats': A Multidisciplinary Dialogue" (2014) 40:1 Queen's L.J. 1; Idil Atak and James C. Simeon, "Introduction: The Criminalization of Migration: Context and Consequences" in Atak and Simeon, Eds. *The Criminalization of Migration: Context and Consequences* (Montreal: McGill-Queen's UP, 2018) at 5.
[3] S.C. 1992, c. 20.

*Immigration and Refugee Protection Act* (*IRPA*)[4] regimes operate together to (1) delay day parole and unescorted temporary absence eligibility for people who are subject to a removal order (unless removal has been stayed by a court, the Immigration Appeal Division, or the grant of a positive pre-removal risk assessment),[5] (2) presumptively hold people with an immigration status at a higher level of security regardless of their individual circumstances, as in Mr. Salah's case, and (3) facilitate removal from Canada immediately upon the grant of supervised release.[6]

4. Canada Border Services Agency (CBSA) operational guidelines highlight the integrated nature of the crimmigration regime by instructing its officers to work with correctional services to eliminate barriers to remove convicted non-citizens.[7] As such, Correctional Services Canada (CSC) must deliver a person released from criminal imprisonment to a CBSA officer at the completion of a criminal sentence,[8] at which point CBSA might elect to continue detention, proceed with making removal arrangements, or release the individual on conditions.[9] Importantly, CSC's assessments inform CBSA, as correctional authorities share information to help CBSA determine whether it will continue detention after a foreign national completes their criminal sentence.[10]

5. Even though deportation is the goal of the crimmigration regime, it is not a foregone conclusion. Individuals may apply under one or more of the *IRPA*'s "curative provisions" which, according to this Court, include pre-removal risk assessments, applications for permanent residence on humanitarian and compassionate grounds, applications for ministerial relief, and temporary resident permits.[11] These safety valves are referenced by this Court and the Minister when

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[4] S.C. 2001, c. 27.
[5] *CCRA*, s. 128(4), (6)
[6] Section 50(b) of the *IRPA* stays a removal order until sentence completion, which for most offenders means warrant expiry. For offenders subject to a removal order, however, the sentence is complete and removal can be effected upon the grant of parole: *CCRA*, s. 128(3).
[7] Government of Canada, Operational Manual, ENF 22: Persons Serving a Sentence at 3 [**ENF 22**].
[8] *IRPA*, s. 59.
[9] *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 223-226 **[*IRPR*]**; ENF 22 at 21-22.
[10] ENF 22 at 15.
[11] *IRPA*, ss. 24, 25(1), 115, 42(1); *Canadian Council for Refugees v. Canada*, 2023 SCC 17 at paras 62-78 [***Canadian Council for Refugees***].

assessing the constitutionality of immigration legislation.[12] Time, however, is of the essence for imprisoned people who want to access legal remedies to remain in Canada. Higher security classifications potentially limit access to legal counsel and legal alternatives that could halt their removal from Canada. Access to timely review of arbitrary and unreasonable security classification is therefore of the utmost importance to prisoners navigating the complexity of the crimmigration pipeline.

**(2) Immigration status works arbitrarily to block access to lower security classification**

6. The record before this Court demonstrates the significant potential for arbitrary decision-making at the intersection of correctional, criminal, and immigration law. Immigration status appears to be a determinative factor that blocks prisoners from being reclassified to minimum security.[13] In Mr. Salah's case, the mere fact of being subject to a deportation order increased his "escape risk" under the custody rating scale.[14] The Commissioner's Directives advise looking at a number of factors to assess escape risk, and the first factor named is "identify if the inmate is a Canadian citizen."[15] In his expert report Professor Michael Jackson writes:

> Prisoners who are subject to deportation orders face particular challenges when applying for minimum-security. Correction officials view the deportation order as a significant factor in evaluating escape risk which, as I have explained, must be rated as low for an offender to be eligible for minimum-security. Depending upon the circumstances of the particular case, deportation may elevate the risk of escape.[16]

7. Professor Jackson writes that to counter the perception they are an escape risk, a prisoner must show reliable evidence that in the country of deportation there is a realistic plan for where he

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[12] *Canadian Council for Refugees* at paras 62-78.
[13] Human Rights Watch, "Legal Analysis of Agreements Allowing Immigration Detention in Canadian Provincial Jails" (April 4, 2022); United Nations Working Group on Arbitrary Detention, "Preliminary Findings from its visit to Canada" (May 13 to 24 2024); Joint Submission to the Working Group on Universal Periodic Review to assist in its review of Canada, "Rights Violations Association with Canada's Treatment of Vulnerable Persons in Immigration Detention" (April-May 2018).
[14] *Dorsey v Canada, (AG),* 2023 ONCA 843 at paras 68-70 [***Dorsey* ONCA**]
[15] Appellants' Record, Volume II, Affidavit of Katherine Belhumeur, Exhibit "A", Commissioner's Directives at 272.
[16] Appellants' Record, Volume II, Expert Report, Affidavit of Michael Jackson at 119.

would live and support himself but this is "extremely difficult where the offender left the country to which he is to be to be deported as a child and has no remaining family or connections".[17]

8. Mr. Salah's experience outlined in his affidavit supports this: "My Parole Officer expressed our concern that I am being 'warehoused'.[18] The Warden replied that we were correct in that assertion, but that nothing could be done."[19] This is despite a detailed release plan[20] and other supporting documents that as Professor Jackson indicated should militate towards a minimum security classification including attestations from family he would live with and secured employment in Jordan when he returns.[21]

9. Mr. Salah's experience is not unique. For example: a long-time former permanent resident considered stateless was involuntarily transferred from minimum to medium security based solely on information from CBSA that it had had higher hopes of obtaining a passport from Vietnam than it had before;[22] a "lost Canadian" who grew up believing he was Canadian was issued a deportation order that prompted a transfer from minimum to medium security despite his citizenship being in dispute;[23] a citizen of Romania who was initially assessed as presenting a low escape risk became ineligible for minimum security once CBSA issued a deportation order, because he wanted to stay in Canada with his family (a goal he might achieve through alternative immigration processes).[24]

10. *Habeas corpus,* in situations where a removal order muddies a proper analysis of security risk, provides a necessary remedy. Non-citizens subject to immigration enforcement and serving sentences need timely access to superior courts so they can show "a legitimate ground to question the lawfulness of a reclassification refusal such that the reclassification would otherwise have been made".[25] Where immigration status is concerned, and where deportation is the state's goal, time is

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[17] *Ibid.*
[18] "Warehoused" means inmates are incarcerated without adequate resources, programming, or support for rehabilitation and preparation for reentry into society, as if they are being stored.
[19] Appellants' Record, Volume II, Affidavit of Ghassan Salah at 135, para 31.
[20] *Ibid*, Exhibit "C".
[21] See Affidavit of Salah in general.
[22] *Doan v. Matsqui Institution (Warden)*, 2014 BCSC 2388.
[23] *Clark v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1512; *Clark v. Canada (M.P.S.E.P.)*, 2009 FC 311 at para. 12.
[24] *Moldovan v. Canada (A.G.)*, 2012 ONSC 2682 at paras. 31-34
[25] *Dorsey* ONCA at para. 114, per Simmons J.

of the essence. *Habeas corpus* is a fundamental protection where the "more cumbersome grievance/judicial review procedure" may not be attending to liberty interests fully.[26]

**(3) Systemic racism affects decision-making within the crimmigration system**

11. This Court's decision on *habeas corpus* jurisdiction must be informed by the reality that racism is embedded in the immigration, criminal, and correctional systems.[27] Professor Robyn Maynard finds Black and racialized communities vulnerable to "widespread practices of anti-Black profiling and the ongoing collaboration between police services and CBSA."[28] Professor El Jones argues not only that intimacy is stripped from administrative processes in prisons but that intimacy itself is policed.[29] *Habeas corpus* can be a humanizing force, ensuring that those subject to the integrated crimmigration system should be treated with not only care but also that their fundamental liberty rights are respected.

12. The link between security classification and systemic racism is well established in a series of government reports. The 1995 Report of the Commission on Systemic Racism in the Ontario Criminal Justice system found that imprisoned people who spoke neither English nor French faced barriers to accessing temporary absences and parole.[30] In 2013, the Office of the Correctional Investigator reported overt racism, covert racism, and stereotyping as typical practices within Canada's federal penitentiaries.[31] The Auditor General of Canada found in 2022 that "[t]he process for assigning security classifications – including the use of the Custody Rating Scale and frequent overrides of the scale by corrections staff – result in disproportionately high number of Indigenous and Black offenders being placed in maximum-security institutions", and that "Indigenous and

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[26] *Dorsey* ONCA at para. 114, per Simmons J.
[27] El Jones, *Abolitionist Intimacies* (Winnipeg: Fernwood Publishing, 2022) at 50-55 **[Jones];** Robyn Maynard, *Policing Black Lives: State Violence from Slavery to the Present* (Winnipeg: Fernwood Publishing, 2017) at for example 182 **[Maynard]**.
[28] Maynard, *ibid* at 174.
[29] Jones, for example at 56-68.
[30] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer Ontario, 1995) at 316, 322.
[31] Office of the Correctional Investigator, *Annual Report: 2012-2013* (Ottawa: Queen's Printer, 2013) at 10.

Black offenders remained in custody longer and at higher levels of security before release".[32] Also in 2022, the Office of the Correctional Investigator reported that Black men spend more time in maximum security when compared with other groups, owing to factors considered in security classification.[33]

13. The assumption in CSC's risk assessment tool that prisoners facing deportation are automatically a higher escape risk is informed by race-based stereotypes about criminalized immigrants.[34] Former CSC Deputy Warden Robert George Clark, in his affidavit writes:

> …there has been an increase in public criticism of CSC risk assessment tools and processes as being culturally biased and inequitable…This is consistent with my own perception of that process, based on my decades-long involvement in supervising and overseeing such risk assessments. In some cases, I think it was easier for (mostly white) parole officers to humanize the experience of prisoners with whom they shared a common cultural identity or heritage, than with Indigenous or Black prisoners.[35]

14. The systemic racism within the crimmigration system highlights the importance of *habeas corpus* to supervise unlawful correctional decisions that keep imprisoned people from achieving greater liberty within prison walls.

**B. *Habeas corpus* is essential to challenge material conditions and all forms of immigration detention**

15. *Habeas corpus* is also critical to overseeing and intervening in unlawful state conduct in non-criminal immigration detention. As this Court noted in *Chhina*, *habeas corpus* is available to challenge unlawful decisions in the immigration detention context where the *IRPA* detention review scheme fails to offer as "broad and advantageous" a remedy.[36] The *IRPA* detention review scheme omits conditions of detention, leaving those decisions to the discretion of correctional

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[32] Office of the Auditor General of Canada, *Independent Auditor's Report 2022: Systemic Barriers - Correctional Service Canada* (Ottawa: Auditor General of Canada, 2022) at 4, 9, 23. [**Independent Auditor's Report 2022**]

[33] Office of the Correctional Investigator, *Annual Report 2021-2022* (Ottawa: Queen's Printer, 2022) at 52.

[34] Appellants' Record, Volume II, Expert Report, Affidavit of Michael Jackson at119.

[35] Appellants' Record, Affidavit of Robert George Clark at 45.

[36] *Chhina* at para. 40.

officials and CBSA, and the Immigration Division with "no explicit power to examine harsh or illegal conditions".[37]

16. The CCR urges the Court to consider the impact of its decision on the rights of migrants detained for immigration reasons. Immigration detention takes place in various forms and locations throughout Canada. Detainees may, for example, be held in one of three federal immigration holding centres, detention spaces at airports and ports of entry, inland enforcement offices, community residential facilities, as well as supervision under community case management, house arrest, or an electronic monitoring device.

17. While ten provinces committed to end immigration detention in provincial jails,[38] the practice has not ceased and is subject to renewal depending on political will.[39] The Ontario Superior Court has certified a class action on behalf of immigration detainees held in provincial jails, finding causes of action based on negligence and on ss. 7, 9, 12, and 15 of the *Charter*.[40] While damages are an important remedy for unlawful state conduct, *habeas corpus* must be available to supervise such conduct especially since it concerns a deprivation of liberty.

18. In June 2024, Parliament amended the *CCRA* and the *IRPA* by way of an omnibus budget bill, to allow for the creation of "immigrant stations" within federal penitentiaries.[41] Immigrant stations are federal or provincial correctional facilities or minimum-security detention centres managed or operated by CBSA or a peace officer pursuant to an agreement between CSC and CBSA.[42] CBSA and CSC are developing an agreement for the temporary use of CSC space for immigration detainees in Sainte-Anne-des-Plaines, Quebec (approximately 40 km northwest of

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[37] *Chhina* at para. 57.
[38] Human Rights Watch, "Canada: All 10 Provinces to End Immigration Detention in Jails" (March 24, 2024).
[39] Brigitte Bureau, "Ontario extends contract to jail migrants for another year" (Sept. 27, 2024), CBC News.
[40] *Richard v. Canada (Attorney General)*, 2024 ONSC 3800.
[41] *CCRA*, ss. 94.1 to 94.8 and *IRPA*, s. 142, enacted by *Budget Implementation Act, 2024*, S.C. 2024, c. 17, ss. 388, 390.
[42] *CCRA,* s. 94.1; *IRPA*, s. 142(2) outlines who is detained in a designated immigrant station; Library of Parliament, "Legislative Summary of Budget Implementation Bill C-69: An Act to Implement Certain Provisions of the Budget Tabled in Parliament on April 16, 2024" (May 31, 2024).

Montreal).[43] Immigrant stations within federal penitentiaries are proposed specifically for use with "high risk" detainees. CBSA is the sole decision-maker concerning transfer of immigration detainees into and out of immigrant stations, necessitating oversight through *habeas corpus*.

19. CBSA's management of immigration detention in a variety of locations highlights the need for supervision of the conditions in which they are held. Immigrant detainees become more vulnerable as they are transported away from their families, communities, care providers (including social workers, health, and mental health providers), and lawyers. Their ability to coordinate the collection of evidence necessary to meet requirements for release (including evidence of identity) or for other immigration processes, is affected.[44] Preserving avenues to challenge denied requests about changes in conditions or for transfers within the immigration detention system is thus imperative.

20. A broad approach to *habeas corpus* jurisdiction better protects vulnerable immigration detainees, subject to restraints on liberty in unfamiliar, opaque, and ever-shifting places.

**C. *Habeas corpus* remains critical to protect against the maladministration of detention and correctional systems**

21. *Habeas corpus* is an important safeguard against maladministration by state officials. Access to *habeas corpus* for all decisions that limit the liberty interest of imprisoned people is consistent with the broad purpose of the right and its entrenchment in s. 10(c) of the *Charter*.

22. In *Chhina,* this Court relied on a 2018 external audit of the Immigration Division (the "Laird Report") to support its conclusion that the *IRPA* detention review process was not as advantageous as *habeas corpus*.[45] The Laird Report examined how the *IRPA* detention scheme was being

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[43] Government of Canada, "Canada Border Services Agency and Correctional Service Canada to work together on a temporary solution to house high-risk immigration detainees" (News release online, September 6, 2024).
[44] Stephanie J. Silverman and Petra Molnar, "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada" (2016) 35 Refugee Survey Quarterly 109 at 124; University of Toronto, International Human Rights Program, "'We have no rights': Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada" (2015); Carrie Dawson, "In Plain Sight: Documenting Immigration Detention in Canada" (2016) 2:2 Migration, Mobility & Displacement at 135.
[45] *Chhina* at para 7.

administered in cases where immigration detention exceeded 100 days. Notable findings included: inaccuracies and inconsistencies in factual findings; failure to allow detained persons to hear and present evidence; barriers for detained persons to participate in hearings; an over-reliance on past decisions; and fairness issues for persons with mental health problems, among others. The report found "there is cause for concern to the extent that the courts have been critical of practices which the audit found to be present in many of the files reviewed."[46]

23. Despite procedural reforms to immigration detention in the wake of the Laird Report, maladministration remains a concern. In 2021, Human Rights Watch and Amnesty International jointly reported the use of solitary confinement, systemic racism, and discrimination against those with disabilities in immigration detention.[47] The report discussed how persons with mental illness received disproportionately coercive treatment, noted that CBSA has immense discretionary authority to decide where immigration detainees are held, and that there is inconsistency in detention conditions due to the various places detainees can be held. In 2023, Ontario conducted an inquest into the death of immigration detainee Abdurahman Hassan. The findings identified concerns with the use of segregation and the lack of support for detainees with mental health issues.[48] In July 2024, Ontario announced it will conduct an inquest into the death of Melkioro Gahungu who died in an immigration detention centre he was transferred to by CBSA following the completion of his criminal sentence.[49]

24. Just as *habeas corpus* provides a remedy for the maladministration of immigration detention, *habeas corpus* also acts as a check on the maladministration of the review process in the corrections system. Former Deputy Warden Robert George Clark pointed to three considerations that undermine the integrity of the security assessment and transfer decision-making process, based on his 30 years of experience: (1) bureaucratic aversion to risk that goes beyond the criteria in the

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[46] Immigration and Refugee Board, *Report of the 2017/2018 External Audit (Detention Review)* (July 20, 2018) [**Laird Report**].
[47] Human Rights Watch and Amnesty International (2021), "'I Didn't Feel Like a Human in There': Immigration Detention in Canada and its Impact on Mental Health" (June 17, 2021).
[48] Inquest into the death of Abdurahman Hassan, February 10, 2023 (Ontario); see also, Minister of Justice (British Columbia), Verdict at Coroners Inquest, Lucia Dominga Vega Jiminez, (October 7, 2014).
[49] Ontario, "News Release: Inquest into the Death of Melkioro Gahungu Announced" (July 3, 2024).

legal framework; (2) the presence of overriding political considerations external to the legal framework; and (3) the considerable room for bias and human error with respect to the accuracy and reliability of information.[50]

25. Likewise, Professor Jackson reports that characterizing the CSC grievance process as a "systemic barrier" is "warranted"[51] and that the realities of the grievance process as an effective and timely redress mechanism does not measure up to the rhetoric of the law and policy."[52] This "dissonance between the rhetoric and the reality" means that CSC "struggles to demonstrate" respect for the rule of law and how the system may thus erode respect for the rule of law.[53]

26. The approach in *Chhina* is instructive - where there is evidence of maladministration, *habeas corpus* is a remedy that ensures the fundamental right of liberty is protected. The CCR submits that this Court should preserve broad and equitable access to *habeas corpus* as it did in *Chhina*. The timely, accessible, and effective remedy of *habeas corpus* – an entrenched, fundamental right – must remain available, especially where the arbitrary use of state power can cause significant harm to vulnerable individuals.

## PART IV & V – SUBMISSIONS ON COSTS & ORDER SOUGHT

27. The CCR does not seek costs and requests no costs be ordered against it. The CCR takes no position on the outcome of this appeal but asks that the relevant issues be determined in accordance with the submissions made above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28 DAY OF MARCH 2025.

Jennifer Dagsvik

Jamie Liew

[50] Appellants' Record, Volume II, Affidavit of Robert George Clark at 37, para 32.
[51] Appellants' Record, Volume II, Expert Report, Affidavit of Michael Jackson at 119-120.
[52] *Ibid* at 118.
[53] *Ibid* at 127.

## PART VI – TABLE OF AUTHORITIES

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