Court File No. 37770

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

BETWEEN:

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

APPELLANTS
(Respondents)

and

TUSIF UR REHMAN CHHINA

RESPONDENT
(Appellant)

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

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. By enacting the *Immigration and Refugee Protection Act* ("*IRPA*"), Parliament created a scheme according to which immigration matters, including detention review, are decided by the Immigration and Refugee Board, an independent expert administrative tribunal, and are reviewed by the Federal Court, a court specialized in immigration matters.

2. This Court has long recognized that in immigration matters, provincial superior courts ought to decline the exercise of jurisdiction to grant prerogative relief, including *habeas corpus*. There is no need to depart from that approach when reviewing immigration detention decisions of allegedly lengthy and uncertain duration. To the contrary, the reasons that compelled this Court's approach in *May v. Ferndale Institution* remain, and militate in favour of allowing this appeal. The Alberta Court of Appeal erred in finding that *habeas corpus* jurisdiction ought to be exercised in a subset of immigration detention cases. It did so based on misunderstandings of the *IRPA*'s detention scheme and the nature of *habeas corpus* review.

3. The *IRPA* scheme for review of immigration detention is a complete, comprehensive, and expert process as identified by this Court in *May v. Ferndale Institution*. Indeed, it would be difficult to conceive of one more complete, comprehensive, and expert. The *IRPA* grants exclusive jurisdiction to an independent and specialized quasi-judicial board, to hear and determine all questions of fact or law. The board is available for prompt, regular and meaningful review of detention based on clearly articulated grounds, including *Charter* grounds, and has broad remedial authority.

4. Contrary to the Court of Appeal's findings, *habeas corpus* review is not substantively broader or more favourable to detainees than review before the board and Federal Court. To the contrary, board detention reviews, on which the Minister of Public Safety and Emergency Preparedness bears the onus of justifying detention, are broader and more advantageous than review on *habeas corpus*. Further, despite procedural and remedial differences, the Federal Court provides expeditious judicial oversight substantively equivalent to *habeas corpus* review, and no less advantageous.

5. The Court below also erred in finding that the "only forum" in which immigration detainees can directly challenge detention on *Charter* grounds is by way of *habeas corpus* before the provincial superior courts. That is not the case. The board is required to make *Charter* compliant decisions in accordance with a statutory scheme specifically designed to achieve that result. The Federal Court also provides robust *Charter* review.

6. Furthermore, the board and Federal Court have extensive expertise in immigration matters that the provincial superior courts do not. Their expertise is crucial to ensuring that decisions regarding immigration detention are consistent with the important purposes of the immigration scheme as a whole.

7. There is no principled basis on which to provide access to *habeas corpus* for a limited and uncertain subset of immigration detention decisions. Doing so is not only unnecessary, but creates uncertainty with regard to when and in what circumstances *habeas corpus* will be available to immigration detainees, and how and whether the board may continue to exercise jurisdiction in respect of non-citizens who have sought recourse outside the legislative scheme.

B. STATEMENT OF THE FACTS

i. The Immigration Detention Review Scheme

8. Parliament has set out a statutory scheme for detention review under the *IRPA*[1] and the *Immigration and Refugee Protection Regulations ("Regulations")*.[2] It is set out in Part 1, Divisions 6 and 8 of the *IRPA*, which address Detention and Release and Judicial Review, respectively, in Part 4, which establishes and governs the Immigration and Refugee Board, in Parts 14 and 15 of the *Regulations*, and in the *Immigration Division Rules*.[3]

(a) The Detention Review Process

9. Section 55 of the *IRPA* allows a non-citizen to be arrested and detained if a Canada Border Services Agency ("CBSA") officer has reasonable grounds to believe that the person is inadmissible to Canada and is either a danger to the public or unlikely to appear for removal or a future proceeding. An officer may order the release of a detained non-citizen before the first detention review if the officer believes the reason for the detention no longer exists.[4]

10. The *IRPA* mandates that all detentions be regularly reviewed. The first review takes place within 48 hours of the detention.[5] A second review must take place at least once during the following seven days and at least once every 30 days thereafter.[6]

11. Detention reviews are conducted by the Immigration Division of the Immigration and Refugee Board (the "Board").[7] The Board is an administrative tribunal independent from the Minister of Citizenship and Immigration (who is primarily responsible for the administration of

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[1] SC 2001, c. 27.

[2] SOR/2002-227.

[3] SOR/2002-229; see also *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[4] *IRPA*, s. 56.

[5] *IRPA*, s. 57(1).

[6] *IRPA*, s. 57(2).

[7] *IRPA*, s. 54.

the *IRPA*), the Minister of Public Safety and Emergency Preparedness (who is responsible for the administration of the *IRPA* as it relates to enforcement, including detention), and the CBSA (which is the agency responsible for supporting the enforcement of the *IRPA*).[8] Thus, a Board member is an independent decision maker within an independent administrative tribunal.

12. Detention reviews are structured so as to be prompt, expeditious and accessible. While the Board is a quasi-judicial tribunal, detention reviews must be dealt with as informally and quickly as the circumstances and the considerations of fairness and natural justice permit and they must be conducted by way of hearing where practicable.[9] Notice of review hearings must be provided to the detainee and the Minister of Public Safety and Emergency Preparedness (the "Minister") and those reviews must be heard "without delay".[10] The Board is not bound by any legal or technical rules of evidence and may receive and base its decisions on evidence that it considers credible or trustworthy in the circumstances.[11]

13. The detainee may be represented by counsel if he or she wishes and the *IRPA* provides that a person who is under 18 years of age or unable to appreciate the nature of proceedings shall have a person designated to represent them.[12]

14. Having conducted a detention review, the Board may order the continued detention of an immigration detainee, may order their complete release, or may order their release on any conditions it considers necessary.[13]

15. The Board must release a detainee unless the Minister has satisfied the Board that one or more of the grounds specified in s.58 of the *IRPA* are made out. They are: (a) the detainee is a

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[8] *IRPA*, Part 4 & s. 4(1)-(2); *Canada Border Services Agency Act*, SC 2005, c. 38, ss. 2, 3, 5.

[9] *IRPA*, ss. 162(2), 173(1).

[10] *IRPA*, s. 173(b).

[11] *IRPA*, ss. 162(2) & 173.

[12] *IRPA*, s. 167(1).

[13] *IRPA*, s. 58.

danger to the public; (b) the detainee is unlikely to appear for immigration proceedings or removal; (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that the detainee is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; (d) the detainee's identity has not been, but may be, established; or (e) if the detainee is a designated foreign national, the Minister is of the opinion that the detainee's identity has not been established.[14]

16. While a specified ground for detention must be made out for detention to be maintained, this is not sufficient in and of itself. Even if s.58 grounds are made out, s.248 of the *Regulations* requires the Board to consider the following additional factors to determine if detention should continue: (a) the reason for the detention; (b) length of time in detention; (c) alternatives to detention; (d) delays or lack of diligence on the detainee or the government's part; and (e) factors that may assist in determining how long detention is likely to continue.

17. The factors set out in s.248 are a codification of the factors articulated by Rothstein J., then of the Federal Court, that must be considered in determining whether ongoing detention is justified pursuant to s.7 of the *Charter*.[15] Those factors were then endorsed by this Court in *Charkaoui*, as ensuring that extended periods of detention do not run afoul of the *Charter*.[16]

18. A detainee who is dissatisfied with the Board's decision, whether on *Charter* grounds or otherwise, may apply for judicial review before the Federal Court.

(b) The Federal Court Process

19. Judicial review applications under the *IRPA* are commenced by making an application for leave to the Federal Court.[17] Applications for leave must be disposed of without delay and in

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[14] *IRPA*, s. 58; see also: *Regulations*, ss. 244-248.

[15] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Sahin v. Canada (Minister of Citizenship and Immigration)* (T.D.), [1995] 1 FC 214, at 231 [*Sahin*]; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 [*Charkaoui*], at paras. 107-117.

[16] *Charkaoui*, *supra* note 15, at paras. 107-117.

[17] *IRPA*, s. 72(1); see also: *Federal Courts Act*, RSC 1985, c. F-7, ss. 18, 18.1.

a summary way.[18] Once leave is granted, judicial review proceedings are dealt with expeditiously and summarily. The flexibility of the *Federal Courts Rules* enables the Court to determine applications in a prompt, fair and cost efficient manner.[19]

20. When time is of the essence, the judicial review process may be expedited.[20] This occurs frequently where detention pursuant to the *IRPA* is at issue.[21]

21. Where a judge hearing an application for judicial review of a Board decision certifies that a serious issue of general importance is involved, an appeal will also lie to the Federal Court of Appeal.[22]

ii. Mr. Chhina's Immigration History

22. Mr. Chhina, who is now known to be a citizen of Pakistan, entered Canada on December 16, 2006 using the name Waqas Shaikh. On July 21, 2008, he successfully obtained refugee status and subsequently submitted an application for permanent residence.[23]

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[18] *IRPA*, s. 72(2)(d).

[19] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, Rule 4(1); *Federal Courts Rules*, SOR/98-106, Rule 3.

[20] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, Rule 4(1); *Federal Courts Rules*, SOR/98-106, Rules 3, 8.

[21] See e.g.: *Canada (Public Safety and Emergency Preparedness) v. Sigar*, 2016 FC 1014, at para. 3(1); *Canada (Public Safety and Emergency Preparedness) v. Mukenge*, 2016 FC 331, at paras. 1-3; *Ahmed v. Canada (Citizenship and Immigration)*, 2015 FC 876, at paras. 9-10; *Odosashvili v. Canada (Citizenship and Immigration)*, 2014 FC 308, at para. 1; *Canada (Citizenship and Immigration) v. B072*, 2012 FC 563, at para. 1 [*B072*]; *Tursunbayev v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 504, at paras. 10-13 [*Tursunbayev*]; *Canada (Public Safety and Emergency Preparedness) v. Karimi-Arshad*, 2010 FC 964, at para. 2 [*Karimi-Arshad*]; *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710, at para. 159(h) [*Brown FC*].

[22] *IRPA*, s. 74(d).

[23] Reasons for Judgment of the Alberta Court of Queen's Bench, dated September 2, 2016, Action No. 160576914X1 ("ABQB Reasons"), p. 1, lines 28-32 / Appellant's Record (AR), Vol. I, p. 1; Agreed Statement of Facts (ABQB), at para. 4 / AR, Vol. I, p. 40; *Chhina v. Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 ("ABCA Reasons"), at para. 9 / AR, Vol. I, pp. 12-13.

23. However, on February 16, 2012, the Refugee Protection Division of the Immigration and Refugee Board granted the Minister of Citizenship and Immigration's application to vacate Mr. Chhina's refugee status on the basis of misrepresentation.[24] Relatedly, the Board made a decision that Mr. Chhina is inadmissible to Canada on the basis of serious criminality and issued a deportation order against him.[25]

24. Mr. Chhina has been convicted in Canada of possession of a prohibited or restricted firearm, attempted fraud over $1000, unauthorized use of credit card data, uttering a forged document, obtaining or possessing identity information for the purpose of committing an indictable offence, counselling an indictable offence, personation with intent, fraud over $5000 and fraud under $5000.[26]

25. On April 11, 2013, Mr. Chhina was placed in immigration detention after having been incarcerated as a result of his criminal convictions. He was detained on the bases that he was unlikely to appear for deportation and would pose a danger to the public if released.[27]

26. Mr. Chhina's detention was reviewed by the Board within 48 hours of his initial detention and again within 7 days. Thereafter, it was reviewed at least every 30 days.[28]

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[24] ABQB Reasons, p. 1, lines 31-34 / AR, Vol. I, p. 1; ABCA Reasons, para. 9 / AR, Vol. I, pp. 12-13; *IRPA*, s. 109.

[25] Statutory Declaration of Tusif Ur Rehman Chhina, dated May 16, 2014, at paras. 6-7 / AR, Vol. I, p. 116; *IRPA*, ss. 36, 45.

[26] ABCA Reasons, para. 9 / AR, Vol. I, pp. 12-13.

[27] Statutory Declaration of Tusif Ur Rehman Chhina, dated May 16, 2014, at para. 8 / AR, Vol. I, p. 117; Immigration Division Detention Review Hearing Transcript ("Board Hearing Transcript"), April 12, 2013 / AR, Vol. III, pp. 53-66.

[28] Statutory Declaration of Tusif Ur Rehman Chhina, dated May 16, 2014, at paras. 8-15 / AR, Vol. I, pp. 117-118; *IRPA* ss. 57(1)-(2); see also: Board Hearing Transcripts, dated April 19, 2013, May 17, 2013 June 19, 2013, July 17, 2013, August 14, 2013, September 10, 2013, October 4 2013 / AR, Vol. II, pp. 118-200, Vol. III, pp. 1-52.

27. On November 4, 2013, the Board held a detention review and ordered Mr. Chhina's release from immigration detention on terms and conditions, pursuant to s.58(3) of the *IRPA*.[29]

28. In releasing Mr. Chhina, the Board member gave specific consideration to s.7 of the *Charter* and s.248 of the *Regulations*.[30] She found that despite Mr. Chhina being a flight risk and a risk to public safety, he ought to be released on terms and conditions, given the length of his detention to that point, and the delays in obtaining a Pakistani travel document for him, which rendered his date of removal from Canada uncertain. She found that the imposition of strict terms and conditions could mitigate the risks he posed on release.[31]

29. Mr. Chhina breached the terms and conditions of his release almost immediately, by failing to report as required.[32] As a result, on December 9, 2013, the CBSA issued a warrant for his arrest pursuant to s.55 of the *IRPA*.[33] However, the CBSA was unable to take Mr. Chhina into custody at that time as he had gone "underground" and could not be located. Mr. Chhina remained at large for a year until, on December 11, 2014, he was arrested by the Edmonton Police for crimes committed since his release.[34] He was then detained on his criminal charges until November 16, 2015.[35]

30. On November 17, 2015, having been released from criminal custody, Mr. Chhina was taken directly into immigration custody.[36] The Board held a detention review hearing the next

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[29] Order for Release, dated November 4, 2013 / AR, Vol. II, p. 84.

[30] Board Hearing Transcript, November 4, 2013 / AR, Vol. II, p. 106.

[31] Board Hearing Transcript, November 4, 2013 / AR, Vol. II, p. 102-117.

[32] Agreed Statement of Facts (ABQB), at para. 16 / AR, Vol. I, p. 42.

[33] ABCA Reasons, at para. 10 / AR, Vol. I, p. 13; ABQB Reasons, p. 2, lines 11-12 / AR, Vol. I, p. 2; see also: Agreed Statement of Facts (ABQB), para. 8(c) / AR, Vol. I, p. 41.

[34] Agreed Statement of Facts (ABQB), at paras. 17-18 / AR, Vol. I, p. 43; ABQB Reasons, p. 2, lines 11-16 / AR, Vol. I, p. 2.

[35] ABCA Reasons, at para. 10 / AR, Vol. I, p. 13; ABQB Reasons, p. 2, lines 12-16 / AR, Vol. I, p. 2.

[36] ABCA Reasons, at para. 10 / AR, Vol. I, p. 13; ABQB Reasons, p. 2, lines 16-19 / AR, Vol. I, p. 2; see also: Agreed Statement of Facts (ABQB), at para. 8 / AR, Vol. I, p. 41.

day, and made an order for Mr. Chhina's continued detention on the basis that he was unlikely to appear for his removal from Canada and that he posed a danger to the public.[37]

31. Mr. Chhina's detention was again reviewed by the Board six days later, and thereafter approximately every 30 days,[38] as required by the *IRPA* and *Regulations*.[39]

iii. The Proceedings Below

(a) Application for Habeas Corpus Before the Alberta Court of Queen's Bench

32. On May 18, 2016, Mr. Chhina filed an application for *habeas corpus* in the Alberta Court of Queen's Bench, arguing that his detention had become lengthy and indeterminate, rendering the detention illegal.[40]

33. Though Mr. Chhina had been detained on his latest period of immigration detention for 6 months at the time he filed his application, he argued that his periods in immigration detention ought to be viewed cumulatively. Counting the period he had spent in immigration detention prior to going "underground" for a year, he claimed his detention for a total of 13 months at the time of application was very lengthy and of uncertain duration.

34. Mr. Chhina, in his reliance on the length and alleged indeterminacy of his detention, sought to bring himself within the scope of the Ontario Court of Appeal's decision in *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*,[41] a decision which, some months earlier, had departed from the long-standing principle that provincial superior courts

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[37] Board Hearing Transcript, November 18, 2015, / AR, Vol. V, pp. 20-48.

[38] Board Hearing Transcripts, dated November 24, 2015, December 17, 2015, January 14, 2016, February 4, 2016, February 11, 2016, March 10, 2016, April 6, 2016, May 4, 2016, May 31, 2016, June 28, 2016, July 26, 2016, August 23, 2016, September 20, 2016, October 18, 2016, November 14, 2016, December 12, 2016 / AR, Vol. IV, pp. 161-200 to Vol. V, pp. 1-19, Vol. VI, pp. 33-145, Vol. VII, pp. 178-195, Vol. VIII, pp. 2-19, 25-39, 46-51, 56-72, 76-85.

[39] *IRPA* ss. 57-58; *Regulations* s. 248.

[40] ABCA Reasons, at para. 15 / AR, Vol. I, p. 13.

[41] 2015 ONCA 700 [*Chaudhary*].

ought to decline *habeas corpus* jurisdiction in cases arising pursuant to immigration legislation. The new approach, according to the Ontario Court of Appeal, applied where, by reason of its length and uncertain duration, immigration detention was alleged to violate the *Charter*.[42]

35. Three and half months later, on September 2, 2016, the Court of Queen's Bench heard and dismissed Mr. Chhina's application.[43] The Court declined to exercise its *habeas corpus* jurisdiction. Though invited to follow and apply *Chaudhary*, the Court found that the application before it pertained fundamentally to immigration matters, and therefore fell within one of the exceptions to the exercise of *habeas corpus* jurisdiction identified by this Court in *May v. Ferndale*.[44]

36. The Court also noted that Mr. Chhina's detention remained necessary to further the machinery of immigration control, that his detention was not very lengthy and of uncertain duration, and that no *Charter* breach was made out.[45]

(b) Appeal from the Dismissal of the Application for Habeas Corpus

37. On September 30, 2016, Mr. Chhina appealed from the Queen's Bench Order dismissing his *habeas corpus* application.[46]

38. His appeal came on for hearing on January 12, 2017 and the Alberta Court of Appeal issued its decision allowing his appeal six and half months later, on July 31, 2017.

39. The Court of Appeal found that the lower court erred in declining to exercise its *habeas corpus* jurisdiction. It endorsed the *Chaudhary* approach, finding that "where an [immigration

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[42] *Ibid*., at paras 54, 72, 75, 81, 111.

[43] ABQB Reasons / AR, Vol. I, p. 1.

[44] ABQB Reasons, p. 3, lines 22-41 & p. 4, lines 1-14 / AR, Vol. I, p. 4; *May v. Ferndale Institution*, 2005 SCC 82, at para 40 [*May v. Ferndale*]

[45] ABQB Reasons, p. 6, lines 3-41 / AR, Vol. I, p. 6.

[46] Civil Notice of Appeal, filed September 30, 2016 / AR, Vol. I, pp. 100-104.

detainee] claims that the decision to detain him is the continuation of a lengthy detention of uncertain duration, so that his detention has become unlawful as in violation of ss. 7 and 9 of the *Charter*, he is entitled to bring an application for *habeas corpus* under s. 10 of the *Charter*."[47]

40. In so doing, the Court of Appeal found that the *IRPA* process is not a complete, comprehensive, and expert process for review of "lengthy detention of uncertain duration" and that *habeas corpus* is more advantageous to immigration detainees both substantively and procedurally.

41. In particular, the Court of Appeal found: the Board and Federal Court review processes are "limited" in scope by the statutory conditions for detention set out in the *IRPA* and the *Regulations*, whereas *habeas corpus* review is not;[48] a *habeas corpus* application considers the legality of detention having specific regard to the detainee's *Charter* rights, whereas the Board and Federal Court review processes do not;[49] Mr. Chhina could not directly challenge the legality of his ongoing detention as contrary to the *Charter* before the Board or Federal Court;[50] the Board is "not equipped" to consider and determine whether continued detention violates the *Charter*;[51] Board members are not sufficiently independent;[52] and immigration detention does not raise core immigration issues.[53]

(c) Federal Court Application for Judicial Review

42. While his *habeas corpus* proceedings were ongoing, the Board's reviews of Mr. Chhina's detention continued to take place approximately every 30 days, as required by the

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[47] ABCA Reasons, at para. 68 / AR, Vol. I, p. 23.

[48] ABCA Reasons, at para. 43 / AR, Vol. I, p. 19.

[49] ABCA Reasons, at para. 37 / AR, Vol. I, p. 18.

[50] ABCA Reasons, at para. 45 / AR, Vol. I, p. 19.

[51] ABCA Reasons, at para. 48 / AR, Vol. I, pp. 19-20.

[52] ABCA Reasons, at para. 53 / AR, Vol. I, p. 20.

[53] ABCA Reasons, at para. 33 / AR, Vol. I, p. 17.

IRPA. On May 8, 2017, Mr. Chhina filed an application for leave and judicial review to the Federal Court regarding one of those ongoing Board review decisions.

43. The Federal Court granted leave, and an expedited schedule for hearing of the application for judicial review was set. Notably, Mr. Chinna's application for judicial review before the Federal Court took one week less to be heard and decided than his application for *habeas corpus* before the Alberta Court of Queen's Bench. However, it was dismissed as moot because travel documents had since been obtained for Mr. Chhina and his removal had been scheduled. Accordingly, the argument he had intended to advance on judicial review, which was that his detention was unlawful on the grounds that it was indeterminate, was no longer applicable. Both parties agreed the application was moot.[54]

(d) Appeal to this Court

44. Leave to appeal from the judgment of the Alberta Court of Appeal was granted by this Court on May 3, 2018. By the time leave was granted, Mr. Chhina had been released from immigration detention and removed from Canada. The respondent resisted the application for leave, *inter alia*, on the basis that it was moot. This Court nevertheless made the order granting leave.

45. In light of this, the Minister will be providing submissions on the merits, on the assumption that this Court has exercised its discretion to hear this appeal.[55] Doing so will allow the Court to resolve conflicting jurisprudence on an issue that would otherwise be evasive of appellate review, because of the temporary nature of immigration detention.[56]

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[54] *Chhina v. Canada (Citizenship and Immigration)*, 2017 FC 771.

[55] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[56] *R. v. Oland*, 2017 SCC 17, at para. 17.

PART II – STATEMENT OF QUESTIONS IN ISSUE

46. The following questions are in issue on this appeal:

a. Did the Court below err in not following this Court's decision in *May v. Ferndale* and the provincial superior courts' long-standing practice of declining *habeas corpus* jurisdiction in immigration matters;

b. Did the Court below err in finding that review of immigration detention decisions under the *IRPA* scheme, including judicial review by the Federal Court, is more limited and less favourable than review by way of *habeas corpus*;

c. Did the Court below err in finding that immigration detention decisions cannot be reviewed for *Charter* compliance by the Board and Federal Court and that *Charter* review can only occur on a *habeas corpus* application;

d. Did the Court below err in finding that review of immigration detention decisions does not require expertise in immigration matters; and

e. In any event, was it necessary and desirable for the Court below to depart from the principle set out in *May v. Ferndale* that *habeas corpus* jurisdiction should generally be declined in immigration matters?

PART III – STATEMENT OF ARGUMENT

47. The *IRPA* provides a scheme for review of immigration detention that is complete, comprehensive, expert, at least as broad as, and no less advantageous than, *habeas corpus*. Immigration detention review under the *IRPA* is one component of a broad and detailed statutory scheme reflecting Parliament's intention that the administration and enforcement of Canada's immigration laws be dealt with comprehensively by expert decision-makers.

48. The *IRPA*'s immigration detention scheme promotes access to justice by mandating prompt, regular, accessible and *Charter*-compliant review of detention by an independent quasi-judicial tribunal, where the Minister bears the onus of justifying detention. The scheme is also subject to judicial oversight by the Federal Courts, which have expertise in immigration matters.

A. *HABEAS CORPUS* AND ITS LIMITED EXCEPTIONS

i. Courts Have Long Declined to Exercise *Habeas Corpus* Jurisdiction in Immigration Matters

49. The importance of *habeas corpus*, the "great writ of liberty",[57] is clear. Lord Bingham wrote that *habeas corpus* is "widely recognized as the most effective remedy against executive lawlessness that the world has ever seen" and that the "simplicity of the writ is its strength and its virtue."[58] At the same time, *habeas corpus* is not without its limits. As noted by Lawton L.J. of the English Court of Appeal: "A writ of *habeas corpus* is probably the most sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures."[59]

50. While the right to have the validity of detention determined by way of *habeas corpus* is enshrined in the *Charter*,[60] the inclusion of *habeas corpus* in the *Charter* did not expand its availability or substantively change it. Courts still retain the discretion to decline *habeas corpus* jurisdiction in appropriate circumstances.

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[57] *May v. Ferndale*, *supra* note 44, at para. 19.

[58] T. Bingham, *The Rule of Law* (London, England: Penguin Books, 2010), at pp 13-14.

[59] *Linnett v. Coles*, [1986] 3 All ER 652 (CA) at 656.

[60] *Charter*, s. 10(c).

51. In *May v. Ferndale*, this Court identified two situations where *habeas corpus* jurisdiction ought to be declined: (1) where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be (as in the criminal law); and (2) where there is in place a complete, comprehensive, and expert procedure for review of an administrative decision that is at least as broad as, and no less advantageous than, *habeas corpus*.[61] These exceptions are predicated on the "development of various forms of judicial review and of rights of appeal" and the need to appropriately "restrict the growth of collateral methods of attacking convictions or other deprivations of liberty."[62]

52. The second exception developed in the field of immigration law. Because Canadian immigration legislation is complete, comprehensive, and involves expert decision making, *habeas corpus* jurisdiction has been declined in favour of the available administrative processes and, subsequently, judicial review before the Federal Court. As this Court stated in *May v. Ferndale*:

> 39 A second limitation to the scope of *habeas corpus* has gradually developed in the field of immigration law. It is now well established that courts have a limited discretion to refuse to entertain applications for prerogative relief in immigration matters […].
>
> 40 In *Reza v. Canada*, the trial judge refused to hear a constitutional challenge to the *Immigration Act* brought in provincial superior court. The Court confirmed once again that the trial judge "properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum" (p. 405 (emphasis added)). Thus, it can be seen from these cases that, in matters of immigration law, because Parliament has put in place a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded. [citations omitted]

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[61] *May v. Ferndale, supra* note 44, at paras. 36-40.

[62] *Ibid*., at para. 35.

53. The reasoning in *May v. Ferndale* was, in part, informed by this Court's earlier decisions in *Pringle v. Fraser*[63] and *Reza v. Canada*,[64] and the Ontario Court of Appeal's reasoning in *Peiroo v. Canada (Minister of Employment and Immigration)*.[65] While those cases did not directly involve immigration detention, all are clear in stating that provincial superior courts ought to decline jurisdiction in the immigration context, whether asked to do so in the context of a *habeas corpus* application (as in *Peiroo*), in the context of an application for relief in the nature of *certiorari* (as in *Pringle*), or in the context of a constitutional challenge (as in *Reza*).

54. Though this Court has not specifically considered the *detention* scheme under the *IRPA*, immigration detention clearly falls within the exception outlined in *May v. Ferndale*. This is reflected in the fact that, until recently, lower courts have applied the *Peiroo*/*May v. Ferndale* exception to challenges to ongoing immigration detentions. Courts have been of the view that such challenges are best brought before specialized decision makers and, subsequently, by way of judicial review before the Federal Court, rather than by way of *habeas corpus*.[66]

55. Of particular note, the Quebec Court of Appeal, sitting as a court of first instance, applied this line of reasoning to immigration detention specifically. In *Apaolaza-Sancho v. Director of Établissement de détention de Rivière-des-Prairies*,[67] the Quebec Court of Appeal applied this Court's analysis in *May v. Ferndale* in considering the features of the immigration detention review scheme.[68] Taking into account this Court's comments in *Charkaoui*[69] regarding the elements required to ensure a *Charter*-compliant detention review scheme,[70] the Court

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[63] [1972] S.C.R. 821 [*Pringle*].

[64] [1994] 2 S.C.R. 394 [*Reza*].

[65] 69 OR (2d) 253 [*Peiroo*].

[66] *Komera v. Canada (Minister of Citizenship and Immigration)*, 1999 ABQB 267; *Vega v. Canada* [1990] O.J. No. 520 (H.C.J.); *Kippax v. Attorney General of Canada*, 2014 ONSC 3685.

[67] 2008 QCCA 1542 [*Apaolaza-Sancho*].

[68] *Ibid*., at paras. 10-12, 18-20.

[69] *Charkaoui*, *supra* note 15.

[70] See *Apaolaza-Sancho*, *supra* note 67 at paras. 13, 17; *Charkaoui*, *supra* note 15, at paras. 28-29.

concluded that it should not exercise its jurisdiction to hear a *habeas corpus* application in respect of a detention pursuant to the *IRPA*.

ii. Recent Departures from the Established Exception: *Chaudhary* and *Chhina*

56. The *May v. Ferndale* exception to the availability of *habeas corpus* where there is a complete, comprehensive, and expert review mechanism was consistently applied by lower courts in immigration matters until, in 2015, the Ontario Court of Appeal, in *Chaudhary*, departed from the prevailing jurisprudence and carved out what it characterized as a "limited"[71] departure from the exception.

57. Specifically, the Court found that where, by reason of its length and uncertain duration, immigration detention is said to violate the *Charter*, provincial superior courts ought not to decline to exercise their *habeas corpus* jurisdiction.[72] Here, the Alberta Court of Appeal adopted and supplemented the Court's reasoning in *Chaudhary*.

58. Neither the *Chaudhary* nor *Chhina* courts appeared to conclude that the *IRPA* scheme was not complete, comprehensive, and expert in respect of immigration detention that is not "lengthy" and of "uncertain duration". They did not purport to open immigration detention decisions to review by way of *habeas corpus* generally, but rather limited their decisions to "exceptional cases".[73]

59. In limiting the availability of *habeas corpus* to these exceptional cases, the courts implicitly found that the *IRPA* scheme was otherwise complete, comprehensive, and expert. However, when dealing with detentions said to violate the *Charter* based on their length and alleged uncertain duration, that characterisation was lost.

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[71] *Chaudhary*, *supra* note 41, at para. 101.

[72] *Ibid.*, at paras. 50-54, 75, 111.

[73] *Ibid.*, at paras. 75, 111.

60. The *Chaudhary* court found, *inter alia*, that where detention is challenged on these grounds:

a. the question the court is to answer on a *habeas corpus* application is "more favourable"[74] to immigration detainees than the question to be answered on review before the Board or Federal Court;

b. on *habeas corpus* "the matter will be heard afresh"[75] whereas it is not heard afresh before the Board;

c. the onus operates in favour of detainees on *habeas corpus*, whereas it does not before the Board or Federal Court;[76]

d. *habeas corpus* applications can be heard more rapidly and are more accessible than Federal Court applications for judicial review;[77] and

e. immigration detention decisions do not require expertise in immigration law.[78]

61. The Court of Appeal in this case accepted the findings in *Chaudhary* and, in particular, focused on its view that the question before the Court on *habeas corpus* review is broader and more favourable to detainees than the question before the Board or, subsequently, before the Federal Court on judicial review.

62. This is evident throughout the Court of Appeal's reasons, but particularly in its indications that: the statutory conditions for detention "limit" the scope of review before the Board, whereas review by provincial superior courts is not "limited" in this way;[79] the Federal Court is "limited in scope by the decision below" and "constrained"[80] by standards of review,

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[74] *Ibid.*, at para. 84.

[75] *Ibid.*, at para. 91.

[76] *Ibid.*, at para. 106.

[77] *Ibid.*, at paras. 103-105.

[78] *Ibid.*, at para. 102.

[79] ABCA Reasons, at paras. 43 and 44 / AR, Vol. I, p. 19.

[80] ABCA Reasons, at para. 48 / AR, Vol. I, pp. 19-20.

whereas provincial superior courts are not; and "[a] *habeas* corpus application considers the legality of the detention having specific regard to the detainee's *Charter* rights" whereas the Board and Federal Court do not.[81]

63. The *Chaudhary* and *Chhina* courts ought not to have departed from the exception endorsed by this Court in *May v. Ferndale*. For immigration matters in general, including detention review, the scheme set out under the *IRPA* is a complete, comprehensive, and expert regime at least as broad as, and no less advantageous than, *habeas corpus.* The Board and Federal Court are not "limited" in ways that provincial superior courts are not, and the *Charter* is equally important and applies in the same way in each of these forums.

B. THE IMMIGRATION DETENTION SCHEME PROVIDES A COMPLETE, COMPREHENSIVE, AND EXPERT PROCESS FOR REVIEW

64. The *IRPA* immigration detention review scheme sets out a detailed process and grounds for review of immigration detention on its merits by an expert, independent and quasi-judicial tribunal in which there is a statutory presumption in favour of release and wide ranging remedial authority. It is complete, comprehensive, expert, just as broad as, and no less advantageous than *habeas corpus*.

i. The *IRPA* Detention Scheme Falls within the Exception Identified in *May v. Ferndale*

65. In *May v. Ferndale*, this Court compared the correctional grievance process at issue in that case, with the immigration scheme that had been at issue in *Pringle* and *Peiroo*. In so doing, this Court highlighted features of the immigration scheme that militated in favour of concluding that it was complete, comprehensive, and expert, and the absence of those features in the correctional grievance process.[82]

66. The *IRPA* scheme for review of immigration detention has all the features identified by this Court in that analysis as indicative of a complete, comprehensive, and expert scheme. In

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[81] ABCA Reasons, at para. 37 / AR, Vol. I, p. 18.

[82] *May v. Ferndale*, supra note 44, at paras. 59-63.

addition, the availability of judicial review to the Federal Court was the same under the immigration scheme considered in *May v. Ferndale* as it is for review of the Board's detention decisions. As a result, the Court of Appeal erred in finding that the exception in *May v. Ferndale* did not apply.

67. The first feature considered by this Court in *May v. Ferndale* was legislative intent, and specifically whether Parliament had granted exclusive jurisdiction to the detaining authority. The Court highlighted that the immigration scheme at issue in *Pringle*, in contrast to the correctional grievance scheme, granted the board in that case "sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction".[83]

68. Precisely the same language is used to grant the same power to the Board in s.162(1) of the *IRPA.*

69. The second feature this Court considered in *May v. Ferndale* was that the scheme at issue in *Pringle* and *Peiroo* provided for an appeal from decisions of immigration authorities to an independent administrative tribunal, with statutorily assured impartiality, whereas the correctional grievance process did not.[84]

70. Here, the CBSA's decision to detain an individual pursuant to s.55 of the *IRPA* is statutorily mandated to be reviewed, on a regular basis, by the Board, which is an independent and quasi-judicial tribunal.

71. The third feature this Court considered in *May v. Ferndale* was that the Immigration Appeal Division process at issue in *Peiroo* was one in which grounds for review were articulated, the process for review was clearly laid out, and a detailed procedure was provided for bringing applications before the Federal Court. In contrast, those features were not present in the correctional grievance process.[85]

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[83] *Ibid.*, at paras. 59-60.

[84] *Ibid.*, at paras. 62-63.

[85] *Ibid.*

72. Here, the grounds for review that must be applied by the Board are articulated, the process for review is clearly laid out, and a detailed procedure is provided for pursuing applications before the Federal Court.

73. Contrary to the findings of the Court of Appeal in this case, this Court's analysis in *May v. Ferndale* supports the conclusion that the *IRPA* detention review scheme is complete, comprehensive, and expert.

ii. Review by the Board and Federal Court is at least as Broad as and no Less Advantageous than *Habeas Corpus*

74. The Court of Appeal's finding that provincial superior courts ought to exercise their *habeas corpus* jurisdiction in a subset of *IRPA* detention cases was heavily predicated on its view that *habeas corpus* review is substantively broader or more favourable to detainees than review before the Board and Federal Court, and therefore is more advantageous. That is not the case.

(a) Habeas Corpus Review Is Not Substantively Broader or More Favourable than Review Under the IRPA

75. While there are important remedial and procedural differences between *habeas corpus* and judicial review in the Federal Court,[86] substantively and functionally, lawfulness review under *habeas corpus* is very similar to Federal Court judicial review.[87] Both are carried out with a view to assessing the statutory validity, procedural fairness, and reasonableness, including *Charter* compliance, of the administrative decision giving rise to the deprivation of liberty.[88]

76. *Habeas corpus* applications are determined by way of a three part analysis. First, the applicant must establish that they have been deprived of liberty. Second, the applicant must raise a legitimate ground upon which to question the legality of the deprivation of liberty. Third, assuming the applicant has discharged their burden on the first two parts, the onus shifts to the

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[86] *Mission Institution v. Khela*, 2014 SCC 24 at paras. 38-41 [*Khela*].

[87] *Ibid.*, at paras. 37-38.

[88] *Khela, supra* note 86, at paras. 37, 52, 53, 72-76, 79; see also: *May v. Ferndale, supra* note 44, at para. 77; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 79-82 [*TWU*].

respondent authorities to show that the deprivation of liberty was lawful.[89] If the detaining authority does not establish the lawfulness of the deprivation of liberty, the court will rule on a motion for discharge, or release.[90]

77. The purpose of *habeas corpus* is not for the courts to supplant administrative decision makers or derogate from administrative schemes, but rather, as stated by this Court, to ensure that "executive power is exercised in a manner consistent with the rule of law."[91]

78. The main issue in a *habeas corpus* application is therefore determining whether there is lawful authority for the detention. If there is lawful authority, the applicant is remanded; if not, they are released. As stated by Judith Farbey and Mr. Justice Sharpe in *The Law of Habeas Corpus*: "The process focuses upon the cause returned. […] The matter directly at issue is simply the reason given by the party who is exercising restraint over the applicant."[92]

79. This focus on the lawfulness of the cause or basis for the detention lies at the core of the writ of *habeas corpus* today, just as it did at its inception. In order for an administrative decision to detain to be lawful, the decision maker must have authority to make the decision, the process must be fair and the decision must be reasonable, including complying with the *Charter*.[93]

80. This Court has made clear that assessing the lawfulness of a detention necessarily requires review of the administrative decision from which the applicant's deprivation of liberty flows in light of the applicable statutory scheme. The Court of Appeal was incorrect to imply that *habeas corpus* review in the immigration detention context would involve consideration of different factors than under the *IRPA* scheme, and is therefore substantively broader or more

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[89] *Khela, supra* note 86, at para. 30.

[90] *Ibid.*, at para. 39.

[91] *Ibid.*, at para. 37.

[92] J. Farbey, R.J. Sharpe and S. Atrill, *The Law of Habeas Corpus*, 3d ed. (Toronto: Oxford University Press, 2011) at p. 21.

[93] *May v Ferndale*, *supra* note 44, at para. 77; *Khela*, *supra* note 86, at paras. 67, 72-75.

favourable than review under the *IRPA*.[94] The statutory scheme is equally important on *habeas corpus*. Neither the scheme, nor the Board's decision, "limit"[95] review under the *IRPA* in ways that do not apply on *habeas corpus*. Rather, the lawfulness of the Board's decision to detain will be the subject of review regardless of the procedural mechanism used to challenge it.

81. This Court's decision in *Steele v. Mountain Institution*[96] illustrates the point. In that case, a dangerous offender challenged his continued incarceration by way of *habeas corpus*.[97] He alleged that the ongoing denial of parole in his case violated s.12 of the *Charter*.

82. In conducting its *Charter* analysis, this Court had specific regard to the statutory criteria for a grant of parole and assessed whether the parole board's decision violated the *Charter* in view of those criteria. The Court's analysis was properly guided by the statutory scheme, and focused on the decision that had resulted in a deprivation of liberty, which was the cause advanced by the detaining authority to justify detention.[98]

83. The Court below placed particular stock in the fact that "[a] *habeas corpus* application is considered afresh" noting that this was a "significant advantage" of *habeas corpus* over the *IRPA* scheme.[99] This statement is difficult to reconcile with the scheme which, in reality, is no less advantageous. While required to consider prior decisions of the Board, "at each hearing, the [Board] member must decide afresh whether continued detention is warranted."[100] The Federal Court has emphasized this requirement noting that "the process requires vigorous re-evaluation

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[94] ABCA Reasons, at paras. 43-44 / AR, Vol. I, p. 19.

[95] ABCA Reasons, at paras. 43, 48 / AR, Vol. I, pp. 19-20.

[96] [1990] 2 SCR 1385 [*Steele*].

[97] While this Court found that the application should have been made by way of judicial review rather than *habeas corpus*, it nevertheless dealt with it as a *habeas corpus* application.

[98] *Ibid*., at 1409, 1411-1417; see also: *May v. Ferndale*, *supra* note 44, at paras. 79-86.

[99] ABCA Reasons, at para. 56 / AR, Vol. I, p. 21.

[100] *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, at paras. 8-13 [*Thanabalasingham*]; see also: *Canada (Public Safety and Emergency Preparedness) v. Sun*, 2016 FC 1186, at paras. 13-15.

of detentions"[101] and "an independent and fresh exercise of discretion is integral to the purpose and object of the detention review", otherwise "the requirement that the detention be reviewed fairly, openly and with a fresh perspective to evolving facts would be easily and frequently, if not invariably, defeated".[102]

84. The lower court's suggestion that provincial superior courts conducting *habeas corpus* review of immigration detention will not be "constrained"[103] by standards of review is equally difficult to reconcile. In *Khela*, this Court noted that where the merits of an administrative decision are challenged by way of *habeas corpus*, standards of review that apply on judicial review apply equally on *habeas corpus*. Accordingly, deference will be owed to the decision maker, for example, on his or her assessment of the application of the relevant statutory criteria to the facts.[104]

85. Moreover, this Court's jurisprudence regarding the standards applied by reviewing courts when discretionary administrative decisions are alleged to violate the *Charter* supports deference being owed in assessing whether an administrative decision-maker has run afoul of the *Charter*. Such deference is not, however, a barrier to effective *Charter* protection.[105]

86. Simply put, where immigration detention is challenged, whether to a provincial superior court on *habeas corpus*, or the Federal Court on judicial review, the court will have to consider the statutory criteria for detention, and whether they were applied in a manner consonant with the *Charter*, and will owe deference, at the very least, to the Board's findings of fact and mixed

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[101] *B072*, *supra* note 21, at para. 34

[102] *Canada (Minister of Citizenship and Immigration) v B147*, 2012 FC 655, at para. 33.

[103] ABCA Reasons, at paras. 48-49 / AR, Vol. I, pp. 19-20.

[104] See e.g. *Khela*, *supra* note 86, at paras 37, 76.

[105] *Doré* v *Barreau du Québec*, 2012 SCC 12, at paras. 5, 44-58 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, at paras. 37-42 [*Loyola*]; *TWU*, *supra* note 88, at paras. 57-58, 79-82.

fact and law.[106] None of these characteristics make the *IRPA* scheme any less advantageous than *habeas corpus.*

(b) The Burden of Proof Is Just as Advantageous Under the IRPA as on Habeas Corpus

87. Under the framework developed in *Chaudhary*, the detainee bears the burden of establishing that his or her detention is of "exceptional length" and of "uncertain continued duration" in order to raise a legitimate ground to challenge the detention by way of *habeas corpus*.[107] The onus then shifts to the Minister to justify the lawfulness of the detention, by establishing that the detention remains justified for immigration purposes and does not run afoul of the *Charter*.[108]

88. In contrast, under the *IRPA* review scheme, Parliament has mandated that release be the norm, and that detention be the exception, regardless of the length or anticipated duration of detention: 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 of the *IRPA* is made out.[109] Accordingly, release is the presumptive outcome on detention review and, like *habeas corpus*, the burden is on the Minister to justify the detention. The fact that Board members consider the reasons in prior detention review decisions does not weaken or derogate from this statutory requirement.[110]

89. Contrary to the Court of Appeal's suggestion that the Minister does not need to justify the length of detention and its uncertain duration,[111] the Federal Court of Appeal has made clear that the "onus is always on the Minister to demonstrate there are reasons which warrant the

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[106] Deference is not owed, however, on questions of procedural fairness, whether before the Federal Court on judicial review, or before provincial superior courts on *habeas corpus.*

[107] *Chaudhary*, *supra* note 41, at para. 81.

[108] *Ibid.*, at para. 81; see also: ABCA Reasons, para. 68 / AR, Vol. I, p. 23.

[109] *IRPA*, s. 58; see also: *Brown FC*, *supra* note 21, at paras. 117, 119.

[110] *Thanabalasingham*, *supra* note 100, at paras. 12-13

[111] ABCA Reasons, at para. 55 / AR, Vol. I, p. 21.

detention or continued detention."[112] While the Federal Court of Appeal has also said that once the Minister has made out a *prima facie* case, the detainee should lead some evidence or "risk continued detention," this does not mean that the substantive burden of proof is shifted to the detainee. [113] Rather, it simply recognises the practical reality, which also exists in the *habeas corpus* context, that if lawful reasons for detention are made out, the detainee will have to provide some answer to those reasons or else see their detention continue.

90. In assessing whether there remains a lawful basis to detain, the Board is also compelled to consider the factors set out in s.248 of the *Regulations*, which specifically include the length of detention to that point and the length of time detention is likely to continue. In so doing, the Board must accord "significant weight"[114] to the length and future duration of the detention. The detainee bears no onus in this regard.[115] The Board is also required to consider whether an alternative to detention exists and, if the Board orders the release of a detainee, it may impose any conditions on release that it considers necessary.[116]

91. In keeping with the Federal Court's reasoning in *Brown*, if the Board does not respect these standards in a given instance, it is a problem of maladministration, not an indication that, as a general proposition, the scheme established by Parliament is less advantageous than *habeas corpus*, or is not complete, comprehensive, and expert.[117]

92. Insofar as judicial review is concerned, the Federal Court is bound by the principles set out above. The Federal Court considers whether the Board's decision is reasonable within the context of a statutory scheme where release is presumptive. Further, this Court has indicated that

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[112] *Thanabalasingham*, *supra* note 100, at para. 16; see also *Brown FC*, *supra* note 21, at para. 119.

[113] *Thanabalasingham*, *supra* note 100, at paras. 16, 24.

[114] *Sahin*, *supra* note 15, at 231-232.

[115] *Regulations*, s. 248.

[116] *IRPA* s. 58(3); see also e.g. *Canada (Citizenship and Immigration) v. Li*, 2009 FCA 85, at para. 50 [*Li*].

[117] *Brown FC*, *supra* note 21, at para. 120.

deference must be given to the administrative decision maker where a decision is challenged on its merits in a *habeas corpus* application.[118] Accordingly, even though the onus rests on the applicant for judicial review to establish an error on the applicable standard of review, the *IRPA* scheme, which includes both review by the Board and the Federal Court, is at least as advantageous as *habeas corpus*, if not more so.

93. Finally, insofar as the onus is concerned, it bears emphasising that the *IRPA* review scheme is more beneficial to the applicant than the criminal appeal context discussed in *May v. Ferndale*, which was the first category of exception identified by the Court in that case. In that context, it is the detained appellant who bears the burden to establish an error by the Court below. Likewise, in the refugee context, at issue in *Peiroo* and considered in *May v. Ferndale*, the burden of proof to establish a credible basis for the refugee claim rested on the non-citizen and the burden on judicial review rested on the applicant. This Court nevertheless concluded that *habeas corpus* jurisdiction ought to be declined in those cases.

(c) Timeliness and Access Are Just as Advantageous Under the IRPA as on Habeas Corpus

94. The lower court's analysis in this case also relied heavily on the view that *habeas corpus* is more advantageous to immigration detainees because it is both more timely and more accessible than judicial review before the Federal Court.[119] However, looking at the scheme as a whole, which contemplates review by the Board before the Federal Court, the *IRPA* process is equally as advantageous to immigration detainees as *habeas corpus*.

95. Under the *IRPA* scheme, the detainee benefits from "vigorous re-evaluation"[120] of the legality of his or her detention, on the merits, at least every 30 days. As demonstrated in this case, a further review by the Board is more timely than a *habeas corpus* application, particularly considering that an early review can take place where circumstances have changed.[121]

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[118] *Khela*, *supra* note 86, at para. 75.

[119] ABCA Reasons, at para. 51 / AR, Vol. I, p. 20.

[120] *B072*, *supra* note 21, at para. 34.

[121] *Immigration Division Rules*, s. 9. See also: *R. v Ogiamien*, 2016 ONSC 4126, dates heard.

96. Board reviews are also more accessible than proceedings by way of *habeas corpus*. Immigration detainees are statutorily entitled to a review of the lawfulness of their detention at least every 30 days, and mechanisms are in place to ensure detainees' access to and attendance at Board detention review hearings.[122] Further, as Board review hearings are informal, without strict rules of evidence,[123] they are more accessible to a detainee than the formal court application required for *habeas corpus.*

97. Further, the *IRPA*'s regular mandatory detention review process enables the Board to monitor and address dynamic issues arising in the immigration process, such as whether authorities are making diligent efforts to obtain travel documents, as they evolve, and in a manner that discrete court processes may not. The Board process is designed to be flexible and responsive to changing circumstances.

98. Even beyond the Board review process, the scheme provided for in the *IRPA* is as timely as *habeas corpus.* Should a detainee wish to seek Federal Court judicial review of their detention, expedited procedures are available.[124] As noted above, Mr. Chhina's application for judicial review was heard more rapidly than his application for *habeas corpus* before the Court of Queen's Bench.[125]

99. Nor should the leave requirement in s.72 of the *IRPA* provide a basis to conclude that judicial review is less accessible. The leave requirement does not impose a significant hurdle.[126] A leave application will be granted so long as it raises a "fairly arguable case and a serious question to be determined".[127] The "fairly arguable case" standard is not exacting. The Federal

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[122] *IRPA*, s. 57(3); *Immigration Division Rules*, s. 23.

[123] *IRPA*, s. 173(c)-(d).

[124] See authorities cited *supra* note 21.

[125] *Chhina v. Canada (Citizenship and Immigration)*, 2017 FC 771; see also *R. v Ogiamien*, 2016 ONSC 4126, dates heard.

[126] *Peiroo*, *supra* note 65, at 259; *Urbanczyk v. Canada (MPSEP)*, 2009 FC 552 [*Urbanczyk*]; *Bains v. Minister of Employment and Immigration* (1990), 47 Admin. L.R. 317 (FCA) [*Bains*].

[127] *Urbanczyk*, *supra* note 126, at paras. 6-7.

Court of Appeal has said that the leave requirement is "the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that dispose no reasonably arguable case."[128] Furthermore, the same leave requirement existed in the immigration scheme this Court considered in *May v. Ferndale*.[129]

100. In addition, the establishment of a preliminary requirement to raise an arguable case for judicial review is entirely consistent with the approach taken to *habeas corpus* historically, and today. Historically, *habeas corpus* was a two stage process, much like the leave and judicial review process provided for in the *IRPA*. As this Court explained in *United States of America v. Desfossés*,[130] the historic procedure with respect to *habeas corpus* required the applicant, at the first stage, to both establish that they were detained, and to raise legitimate grounds to question the lawfulness of the detention. If the applicant did not do so, the writ would not issue: the court would not order the applicant brought to court and would not review the lawfulness of detention. Conversely, if legitimate grounds were raised, the writ would issue: the applicant and documents justifying the detention would be brought to court for review of the lawfulness of the detention.[131]

101. The traditional two stage process is still generally followed in Quebec and, at times, elsewhere.[132] Further, in light of the proliferation of *habeas corpus* applications in a time of strained judicial resources, the Alberta Court of Queen's Bench has implemented a process of early review akin to the historical approach. Where a respondent challenges an application for *habeas corpus* as improper, the Court will review the materials filed by an applicant and may require them to establish that their application raises legitimate grounds before any attendance in court. Only if the applicant meets that requirement will their application for *habeas corpus* be scheduled and heard on its merits.[133]

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[128] *Bains, supra* note 126.

[129] *May v. Ferndale*, *supra* note 44, at para. 39*; Peiroo, supra* note 65, at 259.

[130] [1997] 2 SCR 326 [*Desfossés*].

[131] *Ibid*., at paras. 8-10.

[132] *Côté-Savard c. Morasse*, 2009 QCCS 2995*; Elliot v. Canada (Correctional Services of Canada, Warden of Atlantic Institution)*, 2018 NBQB 1.

[133] *Latham v. Her Majesty the Queen*, 2018 ABQB 69, at paras. 1-11, 14-31.

102. While the more common modern practice, particularly where the applicant is represented by counsel, is to collapse the two stages into one hearing,[134] this does not mean that the applicant is absolved from the preliminary requirement to establish that the proposed application advances legitimate grounds to question the legality of detention.[135] If they do not do so, the court will not proceed on to the final stage, where the onus is reversed and lawfulness is considered on its merits.

103. Notably, there are several post-*Chaudhary* instances of provincial superior courts finding that an immigration detainee has failed to meet the threshold requirement of establishing that their detention is very lengthy and of uncertain duration. In those cases, the applications failed before the Courts moved on to consider the lawfulness of detention, because a legitimate ground to challenge the lawfulness of detention had not been raised.[136]

104. Finally, the fact that provincial superior courts are located in more places than Federal Courts does nothing to increase accessibility. A person who is detained has no ability to attend at either court on their own. Where their presence is required, arrangements must be made with the detaining authority for transportation to either court or for attendance via videoconferencing. Furthermore, the Federal Courts' location was no obstacle to this Court's endorsement of the *Peiroo* exception in *May v. Ferndale*.

iii. The Board and the Federal Court Can and Must Apply the *Charter*

105. The Court of Appeal's reasoning in this case was heavily influenced by its view that a detainee's *Charter* rights can only fully be taken into account in the context of a *habeas corpus* application.[137] That is not the case.

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[134] *Desfossés*, *supra* note 130, at para. 10.

[135] *Khela*, *supra* note 86, at para. 30.

[136] *Canada v Dadzie*, 2016 ONSC 6045 [*Dadzie*]; *Ebrahim Toure v. Minister of Public Safety*, 2017 ONSC 5878 [*Ebrahim Toure*]; *Philip v. Canada (Attorney General)*, 2018 ABQB 167 [*Phillip*].

[137] ABCA Reasons, at paras. 44-45, 48 / AR, Vol. I, pp. 19-20.

(a) The Board Must Make Charter Compliant Decisions

106. In determining whether or not to continue detention, the Board's decision must conform to the *Charter*.[138] The Board has sole and exclusive jurisdiction to hear and determine all questions of law that come before it.[139] Board members not only can, but must consider the *Charter* in rendering their decisions.[140] If continued detention would violate the *Charter*, the Board must not order continued detention.

107. The lower court in this case indicated that "the **only forum** in which [Mr. Chhina] can directly challenge the legality of the on-going detention as contrary to his *Charter* rights and obtain a *Charter* remedy is superior court by way of *habeas corpus*" [emphasis added] and that the Board is "not equipped to consider and determine whether continued detention violates the *Charter*."[141]

108. These statements are incorrect. It is beyond question that the Board can, must and does consider whether continued detention will run afoul of the *Charter*, and has by virtue of its expertise and specialization particular familiarity with the application of the *Charter* within the immigration detention context.[142] Indeed, s.248 of the *Regulations* sets out *Charter*-driven factors designed to ensure that the Board makes decisions that are *Charter* compliant.

109. Further, the legislative scheme contemplates that the Board will apply the *Charter* as it specifically provides, where necessary, for the filing of Notices of Constitutional Question in relation to matters before the Board.[143]

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[138] *R. v. Conway*, 2010 SCC 22, at paras. 77-80; *Canada (Attorney General) v PHS Community Services*, 2011 SCC 44 at para. 117; *Loyola*, *supra* note 105, at para. 35; *Doré*, *supra* note 105, at paras. 30, 35, 48; *Sahin*, *supra* note 15, at 230-231.

[139] *IRPA*, s. 162(1).

[140] *Sahin*, *supra* note 15, at 228-233; *Thanabalasingham*, *supra* note 100, at para. 14; *Canada (Citizenship and Immigration) v. B004*, 2011 FC 331, at para. 20; *Charkaoui*, *supra* note 15, at para. 108.

[141] ABCA Reasons, at paras. 45, 48 / AR, Vol. I, pp. 19-20.

[142] *Doré*, *supra* note 105, at para. 47.

[143] *Immigration Division Rules*, s.47.

110. The application of the *Charter* by the Board is demonstrated in cases such as *Li*.[144] There, the Federal Court of Appeal considered a Board member's analysis of the *Charter* impacts of detention on the applicants in relative detail. The Board member, who had on a prior review ordered the applicants detained, reversed her decision on a subsequent detention review as she concluded that continued detention would be contrary to s.7 of the *Charter*.

111. In reaching that conclusion, the member conducted a comparative analysis of other detention cases and the length of time required for removal, the weight that should be given to the various grounds for detention set out in *IRPA*, and the conditions that could mitigate flight risk while minimally impairing liberty.[145] While finding that the Board had erred in its approach to determining the length of time required for removal, the Court in *Li* confirmed that the Board must consider whether continued detention would violate the *Charter*.[146]

112. In *Charkaoui*, this Court made clear that where the *IRPA* detention scheme is properly administered, even lengthy detention will not run afoul of the *Charter*.[147] The *IRPA* detention review scheme itself is *Charter* compliant[148] and the Board is required to apply it in a manner consistent with the *Charter*. If it does not do so, any such error of administration will be corrected by the Federal Court on judicial review.

(b) The Federal Court Reviews Board Decisions for Charter Compliance

113. The Court of Appeal's comments regarding the Federal Court's capacity to conduct *Charter* review are also incorrect. The Federal Court is, of course, bound by the *Charter* and

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[144] *Li*, *supra* note 116.

[145] *Ibid*., at paras. 46-50; see also e.g.: *Shariff v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 640, at paras. 38, 40, 45 [*Shariff*]; *B072*, *supra* note 21, at paras. 6-13; *Karimi-Arshad*, *supra* note 21, at paras. 31-32, 48-49; *Walker v. Canada (Citizenship and Immigration)*, 2010 FC 392, at paras. 13-16; *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435, at paras. 21-26 [*Romans*].

[146] *Li*, *supra* note 116, at para. 74.

[147] *Charkaoui*, *supra* note 15, at paras. 98, 105-117, 123.

[148] *Brown FC*, *supra* note 21.

empowered to decide *Charter* issues on judicial review. It is a court of competent jurisdiction for the purposes of s.24(1) of the *Charter* and regularly considers *Charter* issues, both in the immigration context and otherwise. There is no basis in fact or law to suggest that more expansive *Charter* review is available before the provincial superior courts than before the Federal Court. Its review of Board decisions can and does include review on *Charter* grounds and it has engaged in robust review of Board decisions in that context.[149]

iv. The Board and Federal Court Have the Necessary Expertise in Immigration Matters

114. While the Court of Appeal in this case was of the view that immigration detention "does not require expertise in immigration law",[150] the Minister maintains that it does. The criteria applied in making detention decisions are embedded within a complex statutory scheme and exist to ensure compliance with that scheme and to achieve the important and wide-ranging objectives of the *IRPA*.[151] Board members have particular knowledge of the legislative scheme and its objectives as well as practical matters such as the processes involved in securing travel documents, the mechanics of removal, immigration processes the detainee is required to attend, and risk factors on release specific to the immigration context.[152]

115. Detention for criminal justice purposes is an issue that provincial superior courts are well versed in addressing. However, detention for immigration purposes is not. Unlike the prison context that was in issue in *May v. Ferndale*, immigration detention is not "closely connected

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[149] See e.g.: *Sahin*, *supra* note 15, at 228-235; *Azadi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 743 at paras. 4-5; *Romans*, *supra* note 145, at paras. 21-26, 50-63; *Ahmed v. Canada (Citizenship and Immigration)*, 2015 FC 792 at paras. 24-35; *Shariff*, *supra* note 145; *Karimi-Arshad*, *supra* note 21, at paras 45-48; *Canada (Citizenship and Immigration) v. Panahi-Dargahloo*, 2010 FC 647, at paras. 49-61; *Warssama v. Canada (Citizenship and Immigration)*, 2015 FC 1311, at paras. 1, 9-10, 25; *Tursunbayev*, *supra* note 21, at paras. 19-20, 100-101; *B072*, *supra* note 21, at paras. 32-34.

[150] ABCA Reasons, at para. 48 / AR, Vol. I, pp. 19-20.

[151] *IRPA*, s. 3.

[152] *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2003 FC 1225, at para. 42, upheld at 2004 FCA 4.

with the administration of criminal justice."[153] By way of example, patent errors in understanding detention criteria, such as what a flight risk is in the immigration context, have been made by provincial superior courts, flowing from their lack of understanding of the differences between criminal and immigration detention.[154]

116. Similarly, in this case, the Court was of the belief that that the party opposing release on detention reviews is the "Minister of Immigration"[155], when in fact it is the Minister of Public Safety and Emergency Preparedness.[156] Likewise, the Court suggested that it would be reasonable to think that Board members may not be independent of the Minister[157] when, as discussed above, the Board is an independent quasi-judicial body.[158]

117. Parliament provided that immigration matters, including detention review, be conducted by an expert administrative tribunal, the Board, in order to avoid such problems and to support the administration of a statutory scheme designed to achieve a broad range of goals.

C. THE DEPARTURE FROM *MAY v. FERNDALE* IS UNPRINCIPLED

118. The Court of Appeal's reasons for concluding that the *IRPA* does not provide a complete, comprehensive, and expert scheme for review at least as advantageous as *habeas corpus* are predicated on misunderstandings of both the scheme for review by the Board and the Federal Court, and *habeas corpus* review itself. On this basis alone, this Court ought to reject the *Chaudhary*/*Chhina* approach. Beyond this, however, there is no need to endorse this approach which, in any event, is unprincipled and may operate to detainees' ultimate detriment.

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[153] *Chaudhary*, *supra* note 44, at para. 102; *May v. Ferndale*, *supra* note 44, at para. 68.

[154] See e.g. *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 at paras. 31-32 [*Ogiamien*].

[155] ABCA Reasons, at para. 53 / AR, Vol. I, p. 20.

[156] *IRPA*, s. 4(2).

[157] ABCA Reasons, at para. 53 / AR, Vol. I, p. 20.

[158] *IRPA*, Part 4.

i. No Need for the New *Chaudhary*/*Chhina* Approach

119. The important purpose served by *habeas corpus*, as the great writ of liberty, should not be understated. However, not only is there nothing to indicate that departure from long-established principles and this Court's well-considered jurisprudence is necessary in a subset of immigration detention cases, but such a departure is likely to create uncertainty and to negatively impact the principled development of the law.

120. In *Charkaoui*, this Court held that prolonged detention under the *IRPA* is permissible so long as detainees are able to avail themselves of a fair, meaningful and ongoing review process.[159] Of the *habeas corpus* applications that have been brought since *Chaudhary* was decided, a notable proportion have been unsuccessful, either because they were rendered moot by virtue of the applicant's release prior to hearing, or because the applicants failed to satisfy the Court that they met the *Chaudhary* criteria, in that their detentions were not very lengthy and of uncertain duration.[160]

121. Of particular note is the fact that the nature of the review conducted by the courts on *habeas corpus* was precisely the type of review the Board conducts on detention reviews, or the Federal Court conducts on judicial review. Furthermore, the nature of the relief available on *habeas corpus* is precisely the type of relief that the Board can grant to remedy lengthy detention that is no longer appropriate. Therefore, there was no more advantageous, favourable or broad question or remedy available than would have been before the Board or Federal Court.

ii. The New Approach is Unclear

122. The new *Chaudhary*/*Chhina* approach is unclear in that it does not provide an objective basis upon which immigration detainees may determine whether *habeas corpus* will be available.

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[159] *Charkaoui*, *supra* note 15, at paras. 96, 98, 110.

[160] *Dadzie*, *supra* note 136; *Ebrahim Toure*, *supra* note 136; *Philip*, *supra* note 136; *Brown v. Canada (Public Safety)*, 2018 ONCA 14 at paras. 1, 12, 18.

(a) Lack of Clarity for Immigration Detainees

123. On the *Chaudhary*/*Chhina* standard, *habeas corpus* should be available to immigration detainees in "limited circumstances"[161] where a continuing detention is said to violate the *Charter* by reason of its length and uncertain duration.

124. However, the question of when a detention will be sufficiently lengthy and uncertain in duration to engage the *Chaudhary*/*Chhina* approach is inherently nuanced and fact driven. It does not provide immigration detainees any clarity on when their *habeas corpus* applications will meet the threshold. It therefore creates a risk of delaying immigration detainees' access to judicial review of their cases by encouraging them to pursue legal processes to which they ultimately may not be given access.

125. As the Federal Court of Appeal noted in *Li*, "there is no single, simple and satisfactory answer" to the question of when the length of a legitimate detention begins to infringe on the detainee's s.7 *Charter* rights. "It all depends on the facts and circumstances of the case."[162]

126. In *Charkaoui*, this Court did not consider Mr. Almrei's more than 5 years of detention to be unconstitutionally indefinite and illegal.[163] In *Ebrahim Toure*,[164] the Ontario Superior Court of Justice found that an applicant who had been held in immigration detention for more than four and half years had not met the threshold required to engage the Court's *habeas corpus* jurisdiction as the detention did not meet the test for uncertain duration. Conversely, in *Scotland v. Canada (Attorney General)*,[165] the same court found that a cumulative period of 17 months of immigration detention, comprised of shorter periods of detention spread out over the course of four years, was sufficiently lengthy and uncertain to justify *habeas corpus* review.

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[161] *Chaudhary*, *supra* note 41, at para. 101.

[162] *Li*, *supra* note 116, at para. 3.

[163] *Charkaoui*, *supra* note 15, at paras. 102, 105, 110.

[164] *Ebrahim Toure*, *supra* note 136.

[165] 2017 ONSC 4850.

127. An immigration detainee whose application is dismissed as not meeting the *Chaudhary* threshold may still apply for judicial review before the Federal Court, as no such threshold exists there. However, if this occurs, they may have been delayed in seeking judicial review and expended valuable resources in doing so. As a result, this derogation from the principle that *habeas corpus* is unavailable in the immigration context is more likely to disadvantage detainees, by delaying their access to the courts, than it is to create a more advantageous scheme for review of their detention.

(b) The Chaudhary/Chhina Approach is not Principled

128. The new *Chaudhary/Chhina* approach also gives rise to incoherence in the law and is not consistent with Parliament's clear intention that immigration matters be dealt with by expert tribunals and courts.

129. First, and most obviously, neither the decision in this case nor *Chaudhary* provide a principled reason why a limited sub-class of immigration detainees will be able to access *habeas corpus*, whereas most will not. In *May v. Ferndale* this Court endorsed an exception to the availability of *habeas corpus* when there is a complete, comprehensive, and expert scheme for review of detention. There is no principled reason to conclude that the *IRPA* scheme meets that test in certain cases, but not others, based only on the length and uncertain duration of the detention. In fact, those are factors that the *IRPA* specifically provides must be taken into account[166] and to which the Board must accord "significant weight."[167]

130. Indeed, given the specialized and detailed nature of the *IRPA* scheme, the clear articulation of criteria for detention and review, the presumption in favour of release, the requirement to consider and apply the *Charter*, the provision for independent decision-making and adjudication, and the provisions for accessing judicial review, it would be difficult to conceive of an administrative scheme any more complete, comprehensive, and expert. That does not change with the basis upon which the detention is impugned.

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[166] *Regulations*, s. 248(b) & (e).

[167] *Sahin*, *supra* note 15, at 231-232.

131. Second, the new approach provides provincial superior courts with the ability to release an immigration detainee on conditions.[168] This is inconsistent with Parliament's clear intention regarding the imposition of conditions for release.[169] This Court has, in the past, noted that where an administrative scheme is in place that allows for release on conditions, the imposition and supervision of such conditions should take place within the framework provided.[170]

132. Post-*Chaudhary*, however, the Ontario Court of Appeal has suggested that an order releasing an immigration detainee on conditions may validly be made by provincial superior courts and should provide that the conditions may be "varied or vacated if circumstances change **by either the Court or the [Board]**" [emphasis added]. The Ontario Court of Appeal has also said that in order to "minimize jurisdictional conflict and confusion", if the Court is asked to vacate and vary the conditions, it should ordinarily decline its jurisdiction and defer to the Board.[171]

133. This situation creates confusion for all concerned -- the detainee, the Board and the CBSA -- as to how conditions may be varied and by whom. It fails to provide guidance as to what cases may fall outside the "ordinary" such that the court, rather than the Board, can or should vary conditions. In addition, whereas the Board's jurisdiction to impose conditions is triggered by a detention pursuant to s. 55 of the *IRPA*, it is unclear on what basis the Board would retain jurisdiction where a court has ordered a detainee's release with court-ordered conditions outside the statutory scheme.

134. In summary, therefore, the *Chaudhary*/*Chhina* approach is not principled, and creates uncertainty. That uncertainty may operate to the detriment of immigration detainees and the coherent and principled application of the law.

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[168] *Ogiamien*, *supra* note 154.

[169] *IRPA*, s. 58(3).

[170] *Steele*, *supra* note 96, at 1418.

[171] *Ogiamien*, *supra* note 154, at paras. 59, 61.

PART IV – COSTS

135. In the circumstances of this case, costs should not be awarded to or against any of the parties.

PART V – ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 26th day of July, 2018.

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Donnaree Nygard

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Liliane Bantourakis

Counsel for the Appellants

PART VI – AUTHORITIES RELIED ON

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