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**

Applicants (Respondents)

and

TUSIF UR REHMAN CHHINA

Respondent (Appellant)

RESPONDENT'S FACTUM ON APPEAL

(Pursuant to r.42 of the Rules of the Supreme Court of Canada)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The appeal brought by the Attorney General of Canada (AG) concerns access to *habeas corpus* before a justice of a provincial superior court by an individual detained under federal immigration legislation.[1] Access to *habeas corpus* and release, if the detention is unlawful, are entrenched rights set out in s. 10(c) of the *Charter of Rights and Freedoms*, 1982.[2]

2. Although this Court has recognized that there is a complete, comprehensive and expert regime as broad as *habeas corpus* in immigration matters generally, it has not addressed access to *habeas corpus* by a non-citizen challenging the lawfulness of their detention under federal immigration legislation. A judicial discretion which excludes a detainee completely from access to *habeas corpus* and from release if the detention is found to be unlawful, is an infringement of that person's rights under s. 10(c) of the *Charter*. The onus lies with the AG to justify this. The AG has failed to do this

3. The Respondent maintains that there is no need to engage in an analysis applying the principles set out by this Court in *May v. Ferndale*[3] and reaffirmed in *Mission Institution v. Khela*,[4] because the rationale for a denial of rights under s. 10(c) of the *Charter* is not justified, nor proportional. If, however, the reasoning is seen to be relevant in respect of this Respondent's case, he maintains that the Alberta Court of Appeal,[5] relying on the reasoning of the Ontario Court of

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[1] *Immigration & Refugee Protection Act* [*IRPA*], S.C. 2001, c. 27, ss. 56-58.

[2] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c11, [*Charter*] s. 10: "Everyone has the right on arrest or detention … (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful. See also *Bill of Rights*, S.C. 1960, c. 44, s. 2(c)(iii).

[3] *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 [*May*].

[4] *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

[5] *Chhina v. Canada (Minister of Public Safety & Emergency Preparedness [MPSEP])*, 2017 ABCA 248 [*Chhina* ABCA Reasons], Application Record [AR], Vol. I, pp. 10-23.

Appeal in *Chaudhary* v. *AG Canada*,[6] correctly applied this Court's analysis to conclude that the Respondent should not have been denied access to *habeas corpus*. The detention scheme under the IPRA, coupled with judicial review with leave in the Federal Court, is not a complete, comprehensive and expert regime as broad as *habeas corpus*. The reasoning of this Court in *May* and *Khela* dictate that the Attorney General's appeal should be dismissed.

B. STATEMENT OF FACTS

4. ***Respondent's Background:*** Tusif Ur Rehman Chhina [Chhina] always maintained he is a citizen of Pakistan. He arrived in Canada on December 6, 2006 at Toronto, using a false name to enter. He successfully filed a refugee claim in his own name.[7] This decision was vacated on February 12, 2012 on grounds of misrepresentation.

5. Following a s. 44(1)[8] report issued by the Canadian Border Services Agency (CBSA), Chhina was found to be inadmissible for serious criminality.[9] He was ordered deported on December 21, 2010. CBSA intended to seek a danger opinion in January 2011, but this application was withdrawn on January 23, 2013.[10]

6. CBSA applied for a travel document for Chhina first on April 23, 2013.[11] Pakistan acknowledged that he was one of its citizens, but requested time to investigate irregularities with his passport.[12] A document was eventually obtained and he was removed in September 2017.

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[6] *Chaudhary v. Canada (MPSEP)*, 2015 ONCA 700, [2015] OJ No 5438 [*Chaudhary*]. This judgement was also followed by the Ontario Court of Appeal in *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services* [*MCSCS*]*)*, [2017] OJ No. 5702 (CA) [*Ogiamien 1*].

[7] Statutory Declaration of Tusif Ur Rehman Chhina ("Chhina"), dated May 16, 2016, at para. 6, AR Vol. I, p. 116.

[8] *IRPA*, s. 44(1).

[9] *IRPA*, s. 36(1)(a).

[10] Agreed Statement of Facts (ABQB), para. 7, AR, Vol.I, p.41.

[11] Ex 2 to Statutory Declaration of Chhina, dated May 16, 2014, para. 5, AR, Vol.I, p. 151.

[12] Ex 2 to Statutory Declaration of Chhina, dated May 16, 2014, para. 5, AR, Vol.I, p. 148.

7. Chhina had a criminal record. He was detained under the provisions of the *IRPA* after he served sentence, initially for 7 months and then for 23 months.[13] He was released on conditions at a detention review hearing before an official from the Immigration Division (ID) on November 4, 2013. That official noted that s. 248 of *Regulations* "borrowed verbatim from the *Sahin* decision which relates to s. 7 of the *Charter*",[14] however there was no analysis under s. 7 of the *Charter*.

8. Chhina co-operated with CBSA – he was prepared to sign any document, except one requiring him to renounce his religion,[15] he was interviewed[16] and participated in telephone calls with the Pakistani consul to assist in establishing his identity. His family also fully co-operated[17].

9. While incarcerated Chhina completed 17 life skill and other courses to better himself.[18]

10. During his immigration detention at the Calgary Remand Centre, China was kept in a maximum-security unit and locked up for 22 hours a day.[19]

11. CBSA first applied for a travel document for Chhina on April 23, 2013.[20] Pakistan acknowledged that he was a Pakistani citizen, but requested time to investigate irregularities with his passport.[21] He was eventually removed from Canada in September 2017.

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[13] Chhina spent 5 day in criminal detention during this time.

[14] ID Transcript of Detention Review Hearing Nov. 4, 2013, p. 20 lines 31 – 34, AR, Vol. II, p. 106; referring to the *IRPR*, *infra*.

[15] Statutory Declaration of Chhina, dated May 16, 2014, para. 5, AR, Vol.I, p. 115.

[16] Agreed Statement of Facts (ABQB), para. 10, AR, Vol. I, p.42.

[17] Agreed Statement of Facts (ABQB), para. 30 – 31, AR, Vol.I, p.45.

[18] Agreed Statement of Facts (ABQB), para. 41, AR, Vol.I, p.47.

[19] Statutory Declaration of Chhina (ABQB), para. 38, AR, Vol.I, p.123.

[20] Ex 2 to Statutory Declaration of Chhina, dated May 16, 2014, para. 5, AR, Vol.I, p. 151.

[21] Ex 2 to Statutory Declaration of Chhina, dated May 16, 2014, para. 5, AR, Vol.I, p. 148.

12. **Immigration Division [ID] /Federal Court Detention Review Scheme:** Chhina was detained under the *IRPA*. The Respondent notes:

a. Detention under the provisions of the *IRPA* is initiated by a CBSA officer, who can detain if there are 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.[22] This officer can release if the reason to detain no longer exists, and notwithstanding this finding can impose conditions on release.[23]

b. Where a person is detained, the "reasons" for their detention are reviewed by an ID official.[24] The Immigration Division is a branch of the IRB. As the Alberta Court of Appeal

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[22] A CBSA has specific powers to detain: an officer

- may issue a warrant for the detention of a non-citizen on the basis that they are (1) inadmissible, and (2) either (a) a danger to the public, or (b) unlikely to appear for some further proceeding (*IRPA*, s. 55(1)).
- may detain a person who is neither a citizen nor a protected person, without a warrant, on the basis of the grounds above, or if the officer is not satisfied of their identity (*IRPA*, s. 55(2)).
- may detain a non-citizen upon their entry to Canada if the officer (1) considers the detention necessary to continue their examination, or (2) has reasonable grounds to suspect that the person is inadmissible "on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality" (*IRPA*, s. 55(3); the relevant grounds of inadmissibility are set out at *IRPA* ss. 33-37, hereinafter "security/criminality").
- and *must* detain a Designated Foreign National, either upon entry or designation (*IRPA*, s. 55(3.1); designation is a result of the Minister designating one's arrival in Canada as "irregular" under *IRPA*, s. 20.1), which is not further addressed as those provisions were not engaged in the case at bar.

[23] *IRPA*, s. 56(1). Where admissibility for security/criminality is alleged, there are specific conditions which must be imposed, *IRPA*, s. 56(3) and (4); the conditions are set out in *IRPR*, *infra*, s. 250.1.

[24] This is different from a review when a person is charged with an offence. The *Criminal Code*, R.S.C., 1985, c. C-46, s. 515 (1) provides, where a detained person is charged with an offence, the justice shall, unless a guilty plea is accepted, order that the accused be released on his giving an

noted,[25] its members are administrative officers, i.e. civil servants appointed under the Public Service Employment Act.[26] There is no requirement that they be lawyers or have any formal training.[27] They hold hearings, but are not bound by rules of evidence. They are front line officers,[28] responsible for determining if a person should be removed from Canada, allowed to leave voluntarily and if a person should be detained or released.[29]

c. The detention review process is administrative.[30] ID officers regularly[31] hold hearings to review the reasons for a person's continued detention. The detained person must be "present" (though not physically present) at each review.[32] The Minister normally has counsel present, although this is not contemplated nor required by the legislation.

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undertaking without conditions, unless the prosecutor can show cause why continued custody is justified.

[25] *Chhina* ABCA Reasons, AR Vol. 1, p. 19, para 43.

[26] Public Service Employment Act. S.C. 2003, c. 22; *IRPA*, s. 172(2); *Chaudhary*, *supra* note 6, para. 36. The IRB Chairperson and members of the Refugee and the Immigration Appeal Divisions are appointed by the Governor in Council, *IRPA* s. 153(1)(a).

[27] *IRPA*, s. 153(4) provides that 10% of the members of the four Divisions of the IRB as a whole must be members of at least five years standing at the provincial bar or the Chambre des notaires du Québec. It is not clear if this applied to each Division or all four as a whole: the Immigration Division, the Refugee Division, the Immigration Appeal Division and the Refugee Appeal Division.

[28] They are to follow a Code of Conduct, which is public, but for which there is no enforcement mechanism. IRB, "Code of Conduct for Members of the Immigration and Refugee Board of Canada", 15 December 2012.

[29] *IRPA*, ss. 44-45, 54-61.

[30] *Chaudhary*, *supra* note 6, at paras. 82, 87-89; *Ogiamien*, *supra* note 6, at paras. 16-17; *Chhina* ABCA Reasons, AR Vol. 1, p. 18, para 40; p. 19, para. 43.

[31] *IRPA*, s. 57, the reviews occur at 48 hours, 7 days, and thereafter every 30 days.

[32] *IRPA*, s. 57(3).

d. On a review of the reasons, the official is to release the person unless it is satisfied that the person is a danger to the public;[33] unlikely to appear for particular further proceedings or for removal ("flight risk");[34] is being investigated on a reasonable suspicion of being inadmissible for security/criminality;[35] or is subject to efforts to establish the person's identity.[36] In considering whether there are grounds for continued detention, the official is required to take into consideration factors laid out in the *Immigration & Refugee Protection Regulations*.[37]

e. If the ID official is satisfied that there are grounds for continued detention, it may order that the person continue to be detained[38] or that the person be released imposing "any" conditions,[39] and in some cases mandatory prescribed conditions.[40] Where there are grounds for continued detention, the ID official is required to consider the reason for detention, the length of time the person has been detained and if possible how much longer they are likely to be detained, whether the person or IRCC or CBSA is responsible for "any unexplained delays or unexplained lack of diligence", and whether there are any alternatives to detention.[41] The current and future length of detention are but two "factors" to be considered in deciding whether to continue detention.

f. Detention review hearings are not *de novo*, although the Federal Court of Appeal noted that ID officers were reviewing "the reasons for the continued detention" and that "at each hearing,

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[33] *IRPA* s. 58(1)(a).

[34] *IRPA* s. 58(1)(b).

[35] *IRPA* s. 58(1)(c).

[36] *IRPA*, s. 58(1)(d).

[37] *IRPA*, ss. 58(1) and 61; *Immigration & Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], s. 244 requires that listed factors be considered. The factors are divided by putative ground: flight risk (*IRPR*, s. 245), danger to the public (*IRPR*, s. 246), identity not established (*IRPR*, s. 247, except for minors) and other factors, i.e. reason for detention, length, future length, unexplained delays (*IRPR*, s. 248). These latter factors were taken from the reasoning in *Sahin v Canada (MCI)*, [1995] 1 F.C. 214, at para. 31; see *Charkaoui v. Canada (MCI)*, [2007] S.C.J. No. 9, at para. 108.

[38] *IRPA*, s. 58(2).

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

[40] *IRPA*, s. 58(5). The prescribed conditions are those set out in *IRPR*, s. 250.1.

[41] *IRPR*, s. 248.

the member must decide afresh whether continued detention is warranted."[42] The Court concluded that the onus was always on the Minister, but once the Minister had made out a *prima facie* case, which could be established in reliance on the prior reasons for continued detention, the detainee "must lead some evidence or risk continued detention."[43] The Court noted:

> Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a member, I agree with the Minister that if a member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.[44]

g. As the AG notes, a detainee who wishes to challenge a decision to continue detention may seek leave to judicially review the matter in the Federal Court.[45] The review is of a single decision, such that subsequent detention decisions must be reviewed as the earlier ones become moot.[46] While applications are to be dealt with summarily, unless the time is shortened by way of motion to the court – itself a matter of discretion - it takes 85 days to perfect an application for

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[42] *Canada (Minister of Citizenship & Immigration* [*MCI*]) v. *Thanabalasingham*, 2004 FCA 4; [2004] FCJ No. 15 [*Thanabalasingham*], at para. 8.

[43] *Thanabalasingham*, *ibid*., at paras. 14-16.

[44] *Thanabalasingham*, *ibid*., at para. 10.

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

[46] In *Bruzzese v. Canada (MPSEP)*, 2014 FC 230, [2015] 2 FCR 693, by the time the application was heard in the Federal Court, six decisions were under review. At para. 1 and 2 of its reasons, the Court noted that it was considering the judicial review applications to review the decisions to continue the applicant's detention made by ID officials: Ronald Stratigopoulos on October 4, 2013; Mary Lou Funston on November 1, 2013; Iris Kohler on September 16, 2013 (relied on by other officials); Ama Beecham on December 10, 2013; Lori Del Duca on January 14, 2014; and David Young on February 7, 2014. Similarly, in *Canada (MPSEP) v. Lunyamila*, 2018 FCA 22 [*Lunyamila*], at paras. 20-29 there were several decisions of the ID under separate applications for judicial review which were consolidated into one proceeding. The Court raised the concern about decisions becoming moot because of the 30-day detention reviews, but did not find that they could be held in abeyance pending a judicial review application of a single decision to detain or release, even where a stay of the order has been given.

leave.[47] No reasons are given for granting or refusing leave. It is a process which is unpredictable given the wide inexplicable variation in the grant rates among members of the court.[48]

h. The AG notes that appeals to the Federal Court of Appeal may be made upon certification that a serious issue of general importance is involved.[49] That Court has clarified that the question must raise an issue of broad significance or general importance and transcend the interests of the parties, such that a case which raised the illegality of an individual detention on standard grounds of review would not meet the test to proceed with an appeal.[50]

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[47] *IRPA* s 72(1), 15 days to file the originating notice; *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, Rule 10, 30 days to file the applicant's record from the date of filing the application or receiving the reasons; Rule 11, 30 days to file the Respondent's record; Rule 13, 10 days for the Applicant to file a reply.

[48] The leave provision appears to be arbitrarily applied as is apparent in the several studies that have been done over several decades concerning the exercise of the leave discretion in the Federal Courts: it is very unevenly applied. See, Ian Greene & Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" (1992) 4(4) Int'l J. Refugee L. 71 [Greene & Shaffer] at 79-81; Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38(1) Queen's L.J. 1 [Rehaag (1)]; Jon B. Gould, Colleen Sheppard, & Johannes Wheeldon, "A Refugee from Justice: Disparate Treatment in the Federal Court of Canada" (2010) 32(4) Law & Policy 454 [Gould et al.]; and Sean Rehaag, "Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw", Working Paper (14 September 2018) [Rehaag (2)]. Absent a requirement to provide reasons, the leave process leads to arbitrary and inconsistent decision making.

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

[50] See *Lunyamila*, *supra* note 46, at paras. 44-52. The appeal from the Federal Court's decision to quash five consecutive release orders, for which stays had been granted by the Federal Court, was dismissed, not on the merits, but because the Federal Court judge was determined by the Court of Appeal to have improperly framed the certified question.

13. **Alberta Court of Queen's Bench:** In May 2016, Chhina filed an application for a writ of *habeas corpus* in the Court of Queen's Bench.[51] Justice Mahoney declined jurisdiction and dismissed the application on September 16, 2016.[52] He was of the view that the issues could be addressed by the Federal Court and that Chhina had not demonstrated that his detention was both lengthy and of uncertain duration, nor that his *Charter* rights had been breached.

14. **Alberta Court of Appeal:** It reversed the judgement of the Queen's Bench, finding:

a. *Habeas corpus* is not discretionary. It is available to everyone in Canada, not just citizens.[53] The exception recognized in '*Peiroo'* does not apply. She challenged the refusal of her refugee claim and the issuance of a removal order, both core immigration matters.[54] The outcome of Chhina's *habeas corpus* application would not affect his immigration status.[55]

b. As the Court of Appeal for Ontario noted in *Chaudhary*[56] there are critical differences between the federal detention review process and *habeas corpus.*

c. *Choice of Remedy and Forum:* Monthly reviews under the *IRPA*, given the role of the ID official, the statutory conditions to consider, of which length of time is but one, the serial nature of the process and the deference given to previous decisions to detain, can lead to cumulative decision making, without constituting a fresh review of the legality of the detention. The statutory conditions and nature of the review limit its scope. The central question on the *habeas corpus* application is whether, because of its length and uncertain duration, the detention has become illegal in violation of ss. 7 and 9 of the *Charter*. A superior court is the only forum in which the Respondent can directly challenge the legality of the ongoing detention as a breach of his *Charter* rights and obtain a Charier remedy. This would not interfere with the purpose of *IRPA.*[57]

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[51] *Chhina v. Canada (MPSEP),* ACQB Reasons for Judgement, September 2, 2016, AR Vol. 1, p. 1; Amended Originating Application *Chhina v. Canada*, June 2016, AR Vol. 1, p. 31.

[52] *Chhina* ABQB, Reasons for Judgement, Mahoney J., AR Vol. 1, p. 30-35.

[53] *Chhina* ABCA Reasons, AR Vol. 1, p. 15, para. 25.

[54] *Chhina* ABCA Reasons, AR Vol. 1, p. 16, para. 30.

[55] *Chhina* ABCA Reasons, AR Vol. 1, p. 17, para. 33.

[56] *Chaudhary, supra* note 6, at para. 79.

[57] *Chhina* ABCA Reasons, AR Vol. 1, p. 19, para. 43-46.

d. *Expertise of Provincial Superior Courts:* Applications dealing with the legality of detention do not require expertise in immigration law. ID hearing officers are not equipped to consider and determine whether continued detention violates the *Charter*. They and the Federal Court can decide there is a *Charter* breach, but it cannot fairly be said that ID officers have *Charter* expertise. The Federal Court is constrained by standards of review and in scope by the decision below. Superior courts have vast experience in *Charter* litigation.[58]

e. *Timeliness of and access to the remedy:* Access to *habeas corpus* is more readily available in local superior courts, where leave to appeal is not required. Whether the detention is legal is determined. by a single judge informed in the law; not a series of officers without *Charter* expertise constrained by others' decisions. Moreover, even if leave is granted by the Federal Court, judicial review is discretionary with the onus on the detainee to show the decision was incorrect, unreasonable, or procedurally unfair. *Habeas corpus* is a non-discretionary remedy. There is no compelling reason to deny immigration detainees redress to a constitutionally protected remedy.[59]

f. *Nature of the remedy and burden of proof:* The *IRPA* provides that the onus is on the Minister to demonstrate that detention is warranted (*IRPA*, s. 58). Once the Minister makes out a *prima facie* case for continued detention, the evidentiary burden shifts to the detainee. The Minister can satisfy the onus by relying on the prior reasons to detain. There must be "clear and compelling" reasons to depart from the prior reasons: *Thanabalasingham*.[60] *Habeas corpus* provides a fresh consideration. If a legitimate basis is raised to question the detention's illegality, the onus is on the Minister to justify this.[61]

PART II – POINTS IN ISSUE

15. The Respondent maintains the judgement of the Court of Appeal for Alberta should be upheld by this Court because that Court did not err in concluding that the Court of Queen's Bench should not have declined jurisdiction:

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[58] *Chhina* ABCA Reasons, AR Vol. 1, p. 19-20, para. 48-49.

[59] *Chhina* ABCA Reasons, AR Vol. 1, p. 20-21, para. 51-54.

[60] *Thanabalasingham, supra* note 42, at para. 10.

[61] *Chhina* ABCA Reasons, AR Vol. 1, p. 21, para. 54-59.

a. Access to *habeas corpus* and to release if a person's detention is found unlawful are constitutional rights which can only be denied where justified in a free and democratic society.

b. This Court's reasoning in *May* was properly applied by the Court of Appeal.

PART III – ARGUMENT

A. There is a right to access *habeas corpus* and to be released if the detention is unlawful. There is no justification for denying an immigration detainee access to a provincial superior court to challenge the lawfulness of his detention.

16. Chhina was asserting the right under s. 10(c) of the *Charter* to access the remedy of *habeas corpus* and to be released if his detention was found to be unlawful.[62] This section provides that:

> Everyone has the right on arrest or detention … to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.[63]

17. This Court has recognized the importance of the writ for persons who have had their liberty infringed.[64] It has been described as "a cornerstone of liberty", "a means of judicial control over the arbitrary behavior of the executive government", "the birthright of free people and a constitutionally recognized remedy."[65] In *May* this Court characterized it as a

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[62] AR Vol.1, p. 32. Remedy sought was *habeas corpus*, and the applicable acts and regulations cited, included the *Charter* s. 7, s. 9, s. 10(c), s. 12, and s. 24(1).

[63] *Charter*, s. 10; See also *Habeas Corpus Act*, R.S.O. 1990, Ch. H.1.

[64] *May*, *supra* note 3, at para. 19-22; *Khela*, *supra* note 4, at paras. 27-29; *R. v. Miller*, [1985] 2 SCR 613; [1985] SCJ No. 79 [*Miller*], at paras. 14, 34-36; *Cardinal v. Kent Institution*, [1985] SCJ No. 78; [1985] 2 SCR 643 [*Cardinal*], at para. 13; *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662; [1985] SCJ No. 80 [*Morin*], at para. 13; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

[65] *Chaudhary*, *supra* note 6, at para. 38. *Habeas corpus* is seen as a fundamental remedy for persons detained in other countries, such as Ireland, eg *In the matter of Art. 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [S.C. No. 183 of 2000] [Aug 28, 2000] and the United States, see *Boumediene v. Bush*, 553 U.S. 723 (2007).

> …crucial remedy in the pursuit of two other fundamental rights protected by the *Charter*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*).[66]

18. The *Charter* did not create new remedies,[67] so where *Charter* claims are advanced they are heard in courts which have the competence to address them in the context of the proceedings before them. A provincial superior court is a court of inherent and plenary jurisdiction over constitutional matters[68] but this does not mean that it must be the Court to hear applications raising *Charter* issues if there is another competent court with the jurisdiction to do this.

19. Federal courts are statutory courts created for the better administration of the laws of Canada.[69] Parliament has given jurisdiction over federal laws, including immigration laws, to these courts.[70] And while the Federal Courts have no plenary jurisdiction over constitutional matters,

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[66] *May*, *supra* note 3, at para 22; *Chhina* ABCA Reasons, AR Vol. 1 p.

[67] *Mills v. The Queen*, [1986] 1 SCR 863; [1986] SCJ No. 39 [*Mills*], at para. 31.

[68] Superior Courts are 's. 96 courts' i.e. they existed at the time of confederation as common courts of inherent jurisdiction. *Constitution Act, 1867*, 30 & 31 Victoria, c.3 (UK), RSC 1985, Appendix II, No. 5 [*Constitution Act, 1867*], s. 96. See *Canada (AG) v. Law Society of BC* (Jabour), [1982] 2 SCR 307; [1982] SCJ No. 70; *Canada (Labour Relations Board) v. Paul L'Anglais*, [1983] SCJ No. 12; [1983] 1 SCR 147; *Strickland v. Canada (AG)*, [2015] SCJ No. 37; 2015 SCC 37.

[69] *Constitution Act, 1867*, s. 101. "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for … the Establishment of any additional Courts for the better Administration of the Laws of Canada." See the *Federal Courts Act*, note 45, ss. 3 and 4. Both the Federal Court and the Court of Appeal are additional courts of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and superior courts of record having civil and criminal jurisdiction.

[70] This ousts the jurisdiction of the provincial superior courts to deal with immigration matters, see *Pringle v. Fraser*, [1972] SCR 821, (1972), 26 D.L.R. (3d) 28 [*Pringle*], at para. 9. The Appellant sought prerogative relief in the Ontario Superior Court to quash a deportation order, instead of pursing an appeal before the Immigration Appeal Board [IAB], a tribunal with the powers of a superior court of record. This Court found that the jurisdiction of the superior court had been ousted

they can address constitutional issues which arise in their consideration of the application of federal laws.[71] Justice Estey noted in *Northern Telecom* "…. the Federal Court is in the same position as any statutory court, provincial or federal, and therefore can determine the constitutional issue arising as a threshold question in the review of the administrative action in issue."[72]

20. Canadian courts have shown deference to Parliament's choice to give jurisdiction over federal matters to federal courts, even though there may be concurrent jurisdiction with superior courts in constitutional matters. This is exemplified in *Reza.*[73] He raised a challenge to the constitutional validity of federal legislation by application for declaratory and injunctive relief before the Ontario Superior Court, not the Federal Court. This Court concluded:

> The Ontario Court (General Division) and the Federal Court had concurrent jurisdiction to hear the respondent's application but, under s. 106 of the Courts of Justice Act, any judge of the General Division had a discretion to stay the proceedings. Ferrier J. 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. In view of our decision in *Kourtessis v. M.N.R.,* [1993] 2 S.C.R. 53, this was the correct

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because of the appellate remedy at the IAD, including on equitable grounds. Parliament's authority to deny or remove certiorari jurisdiction from provincial superior courts over deportation orders was not challenged.

[71] *Canada (AG) v. TeleZone*, [2010] SCJ No. 62; 2010 SCC 62; *Canada (AG) v. McArthur*, [2010] SCJ No. 63; 2010 SCC 63; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, [2010] SCJ No. 66; [2010] 3 SCR 657.

[72] *Northern Telecom Canada v. Communication Workers of Canada*, [1983] SCJ No. 55; [1983] 1 SCR 733; *Canada (MCI) v. Tobiass*, [1997] 3 SCR 391; [1997] SCJ No. 82, at para. 48; citing *Roberts v. Canada*, [1989] 1 SCR 322, at p. 331, "the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts"; *McNamara Construction (Western) v. The Queen*, [1977] 2 S.C.R. 654. The Court has recognized, see for e.g. *Tropwood A.G. v. Sivaco Wire & Nail*, [1979] 2 SCR 157, [1979] SCJ No. 39, that "federal law" is a "body of federal law, be it statute, common law or other, competently enacted or recognized by Parliament, upon which the jurisdiction could be exercised" by Federal Courts (p. 161).

[73] *Reza v. Canada*, [1994] 2 SCR 394, [1994] SCJ No. 49; paras. 16, 21; see also, *Chaudhary*, *supra* note 6, at para. 68.

approach.

21. Where there is concurrent jurisdiction in respect of constitutional challenges seeking relief under s. 24 of the *Charter*,[74] or s. 52 of the *Constitution Act, 1982*,[75] a provincial superior court judge may refuse to entertain the application where there is comprehensive statutory scheme and an effective and appropriate review process in the Federal Court.

22. A claim under s. 10(c) of the *Charter* differs from the remedies contemplated in s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982.* It provides rights – to seek habeas corpus and to be released if the detention is unlawful – which can only be effected in a provincial superior court. The Federal Court was not given habeas corpus jurisdiction. So while Parliament has established a scheme for the admission and removal of non-citizens, which grants the power to detain to administrative officers, this cannot be taken as an intention to override the jurisdiction of a provincial superior court to determine the lawfulness of a detention by way of *habeas corpus*. [76]

23. The common law has long recognized, however, that provincial superior courts have a discretion to refuse to entertain an application for a writ of *habeas corpus* because of the existence of another appropriate remedy. This appears to have developed, largely because appellate remedies

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[74] *Charter* s. 24(1): "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[75] *Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK), 1982, c11 [*Constitution Act, 1982*], s. 52(1): "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[76] *May, supra.*, note 3 at para. 53, 60. The reference by this Court in May was to *Pringle v. Fraser*, supra. which was decided before the Charter was enacted and addressed ouster of concurrent jurisdiction, which does not arise here as the Federal Court does not have *habeas corpus* jurisdiction, except in respect of Canadian Forces personnel stationed abroad, see Federal Courts Act, note 45, s. 18(2)

provided a more appropriate avenue of redress.[77]

24. After the *Charter* came into effect, this Court addressed the scope and availability of *habeas corpus*. In *Miller*[78] Justice LeDain, in considering whether *habeas corpus* was available to challenge a form of confinement, noted:

> After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting *should not be compromised by concerns about conflicting jurisdiction*. ….. [*Habeas corpus*] should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

25. Recently this Court revisited the scope and availability of *habeas corpus*, reaffirming the reasoning of the Court in *Miller*.[79] It concluded in *May,* and reaffirmed this in *Khela*,[80] that there were very limited instances where a superior court judge could decline to hear an application for a writ of *habeas corpus*. Two examples were identified in *May:*

> In principle, the governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the Criminal Code, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or

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[77] See for e.g. *Goldhar v. The Queen*, [1960] SCR 431, at pp. 438-439, 440-441; *Re Perry and Steele*, [1959] PEIJ No. 1, at para. 6-9; *Re McIntosh*, [1942] OJ No. 310, at para. 3.

[78] *Miller*, *supra* note 64, at para. 36; see also *Morin*, *supra* note 64, at para. 13. This equally applies to the concerns that the AG raised at paragraphs 131 to 133 of her memorandum. The superior court can impose conditions on release, as can an ID official. The Ontario Court of Appeal addressed this in Ogiamien, providing a workable solution. See *Ogiamien 1*, *supra.*, note 6, at para. 59-60. This was addressed as well by this Court in *Steele*, *supra,* note 84, at para. 84.

[79] *May*, *supra* note 3, at para. 31; *Khela*, *supra* note 4, at para. 33.

[80] *Khela*, *supra* note 4, at para. 42.

> (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.[81]

26. Both exceptions identified by this Court are ones where the core issue was not detention *per se* but the substantive decision on the merits, i.e. a challenge to a conviction which led to detention or, as in *Peiroo*, a challenge to a deportation order leading to removal, which could also lead to detention, although she was not actually detained.[82]

27. The case at bar concerns a detainee seeking release by way of *habeas corpus*. It is not an 'end run' around the Federal Court seeking to quash a removal order or status decision. The Respondent was seeking to use *habeas corpus* in its traditional form – as a means to directly challenge the lawfulness of his detention, pending the disposition of his immigration issues.[83] This Court has not recognized a discretion on the part of a superior court judge to decline jurisdiction where the challenge is purely to the lawfulness of a detention.[84]

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[81] *May*, *supra* note 3, at para. 50.

[82] *Peiroo v. Canada (MEI)* (1989), 69 OR (2d) 253, [1989] OJ No. 805 (CA), leave to appeal ref'd, [1989] SCCA No. 322, [*Peiroo*]. *Pringle*, *supra* note 70, the other immigration case cited by the Court in *May*, *supra* note 3, at para. 39, involved an application for certiorari in a superior court, not *habeas corpus.* It concerned a challenge to the validity of a deportation order, not detention. It was a case where Parliament had given jurisdiction to determine the validity of deportation orders to a board with the powers of a statutory court, ousting the superior court's jurisdiction.

[83] *May*, *supra* note 3, at paras. 21, 31; citing *Miller*, *supra* note 64; *Peiroo*, *supra* note 82, at para. 21; *Chaudhary*, *supra* note 6, at para. 62.

[84] In *May*, *supra* note 3, at paras. 41-50, this Court addressed the developing expansion of limits to *habeas corpus* jurisdiction in the prison context and otherwise in reliance on cases like *Steele v. Mountain Institution* [1990] 2 SCR 1385 *[Steele]*, at para. 83. Although decided after the *Miller*, *Morin* and *Cardinal* trilogy, the Court had not referenced them, nor had there been reliance on s. 10(c) of the *Charter*. The Minister's reliance on *Steele* at paragraphs 81-83 of her memorandum, is misplaced. In *May*, *supra* note 3, at paras. 42-43 it was clarified that a new exception was not created by the Steele judgment and the limits recognized by the lower courts in the prison context

28. This submission is strengthened by a consideration of the availability of the remedy in light of its entrenchment in s. 10 of the *Charter*. Although this did not change its availability or the substance of the application as the AG has noted, the common law discretion to be exercised by a court in declining jurisdiction is constrained by section 1 of the *Charter*. Rights and freedoms set out in the *Charter* may only be infringed where this is demonstrably justified in a free and democratic society under s. 1 of the *Charter*. While it is a common law 'rule' as to the exercise of a judicial discretion, this Court has indicated that such rules must be interpreted in a manner consistent with the *Charter*. It has revisited common law rules where it is apparent that they do infringe rights or freedoms under the *Charter*.[85] As this Court indicated in *R. v. Swain*:[86]

> Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.
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> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be

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unduly limited the scope and availability of *habeas corpus* and were incompatible with the Court's jurisprudence.

[85] *R. v. Swain*, [1991] 1 S.C.R. 933, [1991] S.C.J. No. 32 [*Swain*], at para. 49-50; *R. v. Daviault*, [1994] S.C.J. No. 77; [1994] 3 S.C.R. 63 *[Daviault]*, at para. 49; R. v. Clayton, [2007] S.C.J. No. 32, at para. 105-106; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; [1994] S.C.J. No. 104 *[Dagenais]*, at para. 67; *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 SCR 65 *[CBC]*, at para 13.

[86] *Swain, supra*., note 85 at para. 49-50.

undertaken.

29. Here the common law rule governing the exercise of discretion by a superior court judge to refuse to hear an application for *habeas corpus*, does not need to be refashioned: it needs to be clarified. The '*Peiroo*' exception – declining jurisdiction in immigration matters where there is a complete, comprehensive and expert procedure for review of an administrative decision – does not extend to applications brought by detainees seeking to challenge the lawfulness of their detention pending a determination of their status in Canada.

30. It should not matter whether there is a complete, comprehensive, and expert procedure in place in the Federal Court because the issue in the case at bar is, at its core, the lawfulness of a detention, not the validity of a removal order or other status decision under immigration legislation.[87] *Habeas corpus* has always been available to persons seeking to use it as it was traditionally intended – to challenge the lawfulness of that person's detention.[88] As this Court stated in *May*:

> Thus, as a matter of general principle, *habeas corpus* jurisdiction should not be declined merely because of the existence of an alternative remedy. Whether the other remedy is still available or whether the applicant has foregone the right to use it, its existence should not preclude or affect the right to apply for *habeas corpus* to the Superior Court of the province: Sharpe, at p. 59.[89]

B. The statutory scheme for detention review under the *IRPA* is not as broad as nor more advantageous than *habeas corpus*.

31. While the Respondent maintains that the general principle applies, it is acknowledged that this Court has recognized two limited exceptions to this principle: where there is an appeal to a court of appeal to correct the errors of a lower court and release if need be and where there is a

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[87] *Miller*, *supra* note 64, at para. 36; *Morin*, *supra* note 64, at para. 13; *May*, *supra* note 3, at paras. 31, 50; *Khela*, *supra* note 4, at paras. 33, 42.

[88] *Miller*, *supra* note 64, at para. 36; *Morin*, *supra* note 64, at para. 13; *May*, *supra* note 3, at paras. 31, 50; *Khela*, *supra* note 4, at paras. 33, 42.

[89] *May*, *supra* note 3, at para. 34.

complete, comprehensive and expert procedure for review of an administrative decision.[90] It is the latter exception which the AG maintains applies in this case.

32. The case which has become the short term for this exception, *Peiroo*,[91] was a judgement of the Court of Appeal for Ontario. Ms. Peiroo was challenging a removal order issued against her and her exclusion from the refugee determination process.[92] The Court of Appeal for Ontario upheld the decision of the Ontario Superior Court judge to refuse to hear the application:

> Parliament has established in the [Immigration] Act, particularly in the recent amendments which specifically address the disposition of claims of persons in the position of the appellant, a comprehensive scheme to regulate the determination of such claims and to provide for review and appeal in the Federal Court of Canada of decisions and orders made under the Act, the ambit of which review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus* with certiorari in aid. In the absence of any showing that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeas corpus* jurisdiction of the Supreme Court of Ontario, it is my view that this court should, in the exercise of its discretion, decline to grant relief upon the application for *habeas corpus* in the present case, which clearly falls within the purview of that statutory review and appeal process.[93]

33. If the existence of an alternative procedure to review an administrative decision is a

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[90] *May*, *supra* note 3, at para. 50.

[91] *Peiroo*, *supra* note 82, at para. 21.

[92] *Peiroo* (*supra* note 82) has been referenced by this Court in *May*, *supra* note 3, at para. 41 and in *Khela*, *supra* note 4, at para. 55 and because of this has been referenced by the AG as historical recognition by this Court that the *IRPA* provides a "complete, comprehensive, and expert parallel process". However, this is the actually the first time that this Court has been asked to directly address this issue in the context of an immigration detainee challenging the lawfulness of detention, pending a final resolution of status in Canada. This is significant as the Minster assumes at para. 99 of her memorandum that this Court had the immigration legislation before it when it referenced the *Peiroo* judgement in *May v. Fernadale*, *supra*. note 3 at para.39. The legislation in play when *Peiroo* was considered was the *Immigration Act*, S.C. 1978, while the legislation in place today is the *IRPA*, S.C. 2001.

[93] *Peiroo*, *supra* note 82, at para. 21.

relevant consideration when a detainee under federal immigration legislation comes before a provincial superior court judge seeking to challenge the validity of their detention by way of *habeas corpus* pending a final resolution of their status in the country, then the Respondent maintains that the Court of Appeal did not err in concluding that the federal review and appeal process is not a complete, comprehensive and expert procedure such that a superior court judge should decline to hear the application.

34. The Court of Appeal for Alberta[94] agreed with the Ontario Court of Appeal in *Chaudhary*, that on a comparison between the administrative processes in the *IRPA* and *habeas corpus*- as to the question to be answered, the onus and the review process – *habeas corpus* was more advantageous.[95] It then applied the reasoning of this Court in assessing the significant differences between the Federal Court review process and *habeas corpus*, as to (1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.[96] It concluded, as this Court did in *May* and *Khela*, that the review was not as broad and advantageous as *habeas corpus*.[97] As the factors overlap, the review process the third of the first three points, which concerns the Federal Court is addressed under nature of the remedy and burden of proof.

Immigration Division Officials

35. The AG maintains that the proceedings before the Immigration Division, coupled with a review in the Federal Court is a complete, comprehensive and expert scheme such that *habeas corpus* should not be available to immigration detainees. As it urged before the Court of Appeal for Alberta, the AG maintains before this Court at paragraph 64 of its memorandum, that the appropriate comparison is between the ID official on a detention review and a provincial superior court on a *habeas corpus* application.[98] The Respondent maintains that while the Court can

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[94] *Chhina* ABCA Reasons, AR Vol. 1, p. 17, para. 36.

[95] *Chaudhary*, *supra* note 6, at para. 78-84.

[96] *May*, *supra* note 3, at paras. 39-40, 65; *Khela*, *supra* note 4, at para. 38; *Chaudhary*, *supra* note 6, at para. 97.

[97] *Chhina* ABCA Reasons, AR Vol. 1, p. 22, para. 61.

[98] *Chhina* ABCA Reasons, AR Vol. 1, p. 21, para. 54.

consider the proceedings before the Immigration Division in the overall context and particularly in determining the scope of the Federal Court's jurisdiction on review, the comparison between the process before these administrative officers and a justice of a provincial superior court is inappropriate. The Immigration Division provides no judicial oversight of deprivations of liberty under the *IRPA*. The comparison must be between the provincial superior courts and the Federal Court.

36. Further, there are significant deficiencies in respect of the Immigration Division. As noted, it is not a judicial body and:

a. While ID officials are independent, its members need not be legally trained. They may be very familiar with their home statute, but one cannot assume that they have an expertise in administrative law or human rights principles. [99]

b. It is a creature of statute: the *IRPA* requires that ID officials review the past reasons for continuing detention not the legality of the detention itself.[100] Officials cannot consider other factors, such as the location of detention or the conditions of detention.

c. Once a person is detained, ID officials must have compelling reasons to depart from earlier decisions to detain.[101] The burden on the detainee to establish grounds for release becomes exponentially higher, the longer the detention continues, notwithstanding that the onus technically remains on the Minister.[102]

d. ID officials hear cases every 30 days, regardless of whether there is a review in process in the Federal Court, such that the immediate past decision becomes moot with every new

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[99] *IRPA*, s. 153(4). The AG compares ID officials to the appeal board in *Pringle, supra.* note 70 and *Peiroo, supra.* note 82. There was no appeal tribunal for Peiroo only leave and judicial review in the Federal Court. And Pringle had an appeal to the Immigration Appeal Board, which had the powers of a superior court of record. See *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3.

[100] *IRPA*, s. 57.

[101] *Thanabalasingham*, *supra* note 42. at paras. 10, 14-16.

[102] *Chaudhary*, *supra* note 6, at paras. 89-90.

decision made.[103]

37. The comparators canvassed by the Court of Appeal for Ontario and adopted by the Court of Appeal for Alberta – the question to be answered and the onus[104] - are both appropriate and supportive of the conclusion that the Immigration Division, in addition to not providing a judicial determination of the need to detain, is not a body that can otherwise substitute for a superior court judge reviewing the lawfulness of a detention on an application for a writ of *habeas corpus.*

Question to be answered

38. On a *habeas corpus* application, the detainee must establish that they are detained and that reasonable and probable grounds exist for the complaint. The Court then determines if the detention is lawful. This could, but need not, be linked to an individual decision to detain. In the immigration cases brought in recent years before the courts, the review of detention was of the ongoing process,[105] much like the review in *Steele*.[106] If the challenge is to the length and uncertain duration of the detention, this is the issue addressed by the Court in order to determine if the applicant's rights under s. 7, s. 9 or possibly s. 12 have been infringed. If they have been then the detention is unlawful.[107] The proceeding before the Immigration Division entails a consideration by the ID official of the statutory grounds for detention set out in s. 58 of the Act. If a ground to detain is made out, then the length and expected duration of the detention are factors to consider in determining whether or not to continue detention.[108] The official has no declaratory powers but

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[103] *Lunyamila*, *supra* note 46, at paras. 20-29.

[104] *Chaudhary*, *supra* note 6, at para. 79; *Chhina* ABCA Reasons, AR Vol.1, p. 17, para. 36.

[105] *Chaudhary*, *supra* note 6, at para. 91. The immigration detainees seeking to challenge the lawfulness of their detention in recent years have been individuals detained over lengthy periods. There have been dozens of decisions made to continue detention by ID officials, such that the review is not of a single decision. see *Chaudhary*, *supra* note 6; *Brown v. Canada (MPSEP)*, 2018 ONCA 14, [2018] OJ No. 112; *Scotland v. Canada (AG)*, 2017 ONSC 4850, [2017] OJ No. 4242.

[106] *Steele*, *supra*. note 84.

[107] *Chhina* ABCA Reasons, AR Vol. 1, p. 19, para. 44.

[108] *IRPR*, s. 248.

must simply apply the provisions of the statute.[109]

39. The Alberta Court of Appeal was aware that Charter issues could be addressed by the Immigration Division and the Federal Court.[110] It was not a question of whether the detainee's interests could only be fully considered in a *habeas corpus* application as the AG asserts at paragraph 105 of her memorandum. Rather, the Court was cognizant of the fact Charter considerations before the Immigration Division would arise in the context of the application of the provisions of the statute, and not directly on application by the person to enforce them as in a *habeas corpus* application.[111] The Court of Appeal for Ontario in Chaudhary[112] stated:

> The ID and the Federal Court on judicial review are not tasked with the question of determining whether the immigration detention no longer reasonably furthers the machinery of immigration control and is or has become illegal based on *Charter* or human rights principles.

Onus

40. The onus rests with the Minister to justify the lawfulness of a detention on an *habeas corpus* application once a showing of illegality is made out. This means that the onus is on the Minister to justify the length and uncertain duration of the detention where this is raised in a challenge to the lawfulness of the detention before provincial superior court on a *habeas corpus* application. However, before the ID official, the Minister's onus is met upon establishing that there is a ground to detain under s. 58 of the Act. It can be met in reliance on prior reasons to detain, shifting the onus to the person to establish that release is warranted.[113] While the ID official must consider the

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[109] This is similar to the circumstances in *Steele*, note 84 supra. at para. 83; he was detained under valid legislation with the parole board applying the provisions of its home statute to continue the detention, notwithstanding that it had become cruel over time to continue it.

[110] *Chhina* ABCA Reasons, AR Vol. 1, p. 19, para. 45, 48

[111] *Chhina* ABCA Reasons, AR Vol. 1, supra. p. 18-19, at para. 37, 43; *Chaudhary, supra*. note 6, at para. 81.

[112] *Chaudhary, supra*. note 6, at para. 82.

[113] *Chaudhary, supra*. note 6, para. 85-91; s. 57, IRPA; *Thanabalasingham, supra.*, note 42 at para 10, 14-16. An ID official must give "clear and compelling reasons" for departing from prior decisions to detain.

length of a detention and the likely length of its continuation in the future, these are statutory factors, among a number of others that the official must balance, not grounds for release.[114] Even though the IRPA may make release presumptive, as the AG notes at paragraph 88 of her memorandum, it is not a simple determination of where the initial onus lies; rather consideration must be given to the nature of the statutory scheme and how it impacts on the onus which the detainee bears in the proceeding in relation to the rights asserted.

Federal Court

41. The Courts of Appeal for Alberta and Ontario engaged in a consideration of the factors which this Court had found to be relevant in *May* and *Khela* when looking to the Federal Court as an appropriate remedy to replace *habeas corpus*. These include (1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.

Choice of Remedies and Forum[115]

42. A *habeas corpus* application proceeds in three stages:

a. First, the applicant must establish that they have been deprived of liberty.

b. Second, once deprivation is established, the applicant must raise a legitimate ground upon which to question its legality.

c. Third, if such a ground is raised, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.[116]

43. Legitimate grounds of review include jurisdictional error, including for example, where there was no jurisdiction to detain the person; jurisdiction has been lost because its purpose is no

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[114] *Chaudhary*, *supra*., note 6, at para. 86.

[115] *Chaudhary*, *supra.*, note 6, at paras.81-84.

[116] *Khela*, *supra*. note 4, at para. 30; *May, supra.*, note 3, at para. 71, 74.

longer served[117]its continuation is in breach of the Charter;[118] the conditions under which the person is detained render it unlawful and inhumane;[119] there is a breach of procedural fairness, such as a failure to disclose relevant documents or provide a process for verifying evidence adduced against a detainee;[120] and or it is unreasonable, such as that contemplated by this Court in *Khela*[121]- where a detainee's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or on evidence that cannot support the conclusion.

44. Both the Courts of Appeal for Alberta and Ontario identified lengthy detentions of uncertain duration as giving rise to a legitimate concern that the detention may be unlawful, but contrary to the AG's submission at paragraphs 58 and 59 of her memorandum, those courts were not identifying this as the only ground upon which an immigration detention could be challenged by way of *habeas corpus*. The Court of Appeal for Ontario was clear that the it was addressing the issue raised in the appeals before it.[122] It clarified this in *Ogiamien*. Justice Sharpe noted:[123]

> 41 I do not accept the AG's contention that *habeas corpus* will only be available in immigration matters in the case of lengthy detentions of uncertain duration and that the reach of Chaudhary is restricted to its precise facts. That submission ignores the more general principle upon which Chaudhary rests. The general rule is that the provincial Superior Courts retain residual jurisdiction to entertain *habeas corpus* applications in the case of wrongful imprisonment. *Habeas corpus* "has never been a discretionary remedy" but "is issued as of right" and "as a matter of general principle, *habeas corpus* jurisdiction should not be declined merely because of the

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[117] This was the ground raised in *Chaudhary, supra.,* note 6, at para. 72 and the Court of Appeal in this case, *Chhina* ABCA, AR Vol. 1, p. 12, para. 6.

[118] This was recognized in *Steele, supra.,* note 84, at para. 1, 67, 79: This Court determined his continued detention was in breach of s. 12 of the *Charter*.

[119] *Chhina* ABCA Reasons, AR Vol. 1, p. 20, para. 53; see also *Ogiamien v. Ontario (MCSCS),* [2017] ONCA 667; [2017] O.J. No. 4401 *[Ogiamien 2]*.

[120] *Khela, supra.*, note 4, at para. 79

[121] *Khela, supra.*, note 4, at para. 72, 74.

[122] *Chaudhary, note 6,* supra., at para. 72.

[123] *Ogiamien 1, supra.* note 6, at para. 41. At para. 42, Justice Sharpe also rejected the Amicus' submission that it could encompass a challenge to the validity of the removal order raised on the facts of that case along with the challenge by Mr. Ogiamien to the lawfulness of his detention.

> existence of an alternative remedy": May, at paras. 33-34. However, where there is an appeal or other more appropriate route to the court, collateral methods of attack are discouraged. This applies to immigration matters, where "courts have a limited discretion to refuse to entertain applications for prerogative relief": May, at para. 39. *Habeas corpus* will be excluded, but only where "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": May, at para. 40. It follows that Chaudhary rests on the general principle that the Superior Court retains its residual jurisdiction to entertain habeas corpus applications where the IRPA process of review under the supervision of the Federal Court is less advantageous than *habeas corpus*, and where releasing the applicant would not alter the immigration status of the applicant or amount to a collateral attack on an immigration decision. The principle applied by this court in Chaudhary is not restricted to the specific facts considered in that case.

45. Similarly, the Court of Appeal for Alberta addressed the issue before it: Chhina was only claiming that his detention was lengthy and of uncertain duration such that it was in breach of ss. 7 and 9 of the Charter.[124]

46. A claim that a detention is lengthy and of uncertain duration is not a threshold "subset" for access to *habeas corpus*, but a ground of unlawfulness raised on the facts before the Court.

47. A *habeas corpus* application to determine the lawfulness of the detention pending a final determination of status is a broader remedy than judicial review with leave in the Federal Court. The detainee wants to be released.[125] The Federal Court cannot order this: A provincial superior court can. As noted above, the Federal Court is constrained in the scope of its review to determine if the decision subject to review is reasonable and if it is remand it back for reconsideration by another administrative decision maker.[126]

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[124] *Chhina* ABCA Reasons, p. 12, para. 6-7; p. 17, para. 33;

[125] *Federal Courts Act*, note 45, s. 18, 18.1, 18.2; *IRPA*, s. 72

[126] *Chaudhary*, *supra.*, note 6, at para. 81-84; *IRPA*, s. 72. The standard of review for factual/legal determinations made by administrative decision makers is reasonableness. *Dunsmuir v NB,* 2008 SCC 9, para. 47-50; *Bruzzese*, *supra.*, note 46, at para. 43 ".... The standard of review, therefore, is that of reasonableness. On such a standard, the ID panel's decisions should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible,

48. The AG is in error in maintaining at paragraphs 75, 79, 80 and 84 of her memorandum that a determination of lawfulness on *habeas corpus* is a reasonableness determination of an administrative decision, equivalent to the reasonableness standard of review[127] applicable in the Federal Court on judicial review. The Federal Court, as a statutory court, is constrained by the standards of review which it must apply – it is sitting in review of a decision made by a tribunal. It is not making a fresh determination on the lawfulness of a detention.[128]

49. A superior court judge on a *habeas corpus* application is giving effect to the rights under s. 10(c) of the Charter. While this may involve the review of a single decision to determine if it is reasonable, particularly in respect of factual conclusions,[129] *habeas corpus* is not limited to this as the AG posits. In the case at bar, Chhina was not challenging the validity of any provision of the IRPA. His challenge was not to the substance of any underlying decision. Rather it was the length of the detention and its uncertain duration which were said to have made it unlawful as breaching his rights under ss. 7 and 9 of the Charter. As such, the Court was being asked to give effect to Chhina's rights under s. 10(c) of the Charter through a direct consideration of his rights under s. 7 and 9 of the Charter. The Court was not required to show deference, other than factual findings where relevant to the determination of unlawfulness.

50. While the Respondent maintains that the remedy in *habeas corpus* is more favourable to him, ultimately as this Court noted in *Gamble*, "*[H]abeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient

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acceptable outcomes which are defensible in respect of the facts and the law." And at para. 84 "... I have not been persuaded that the decisions rendered by the ID members on the detention reviews are unreasonable. Considering the high degree of deference that such determinations must be accorded by this Court, I am unable to find that the decisions fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

[127] *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 *[Trinity]*, at para. 79; *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12; [2012] 1 S.C.R. 395 *[Doré]*, at para. 3, 6-7, 54, 57.

[128] *Chhina* ABCA Reasons, AR Vol. 1, p. 19-20, para. 48, p. 211, para. 56.

[129] *Khela, supra.* note 4, at para. 66-72.

in the eyes of the court. The option belongs to the applicant."[130]

Expertise of Provincial Superior Courts

51. Federal Court has greater expertise in immigration matters, but where a person is detained, even though it may arise in the immigration context, such expertise is not required to determine the lawfulness of the detention. The Courts of Appeal for Ontario and Alberta did not err in this respect.

52. At paragraph 114 of her memorandum, the AG inflates the complexity of the *IRPA* scheme as it relates to detention. While there are many statutory provisions, rules and regulations governing the admission to and removal of persons from Canada, the provisions which address detention are not complex and provide for the kinds of considerations one would expect when a person is deprived of liberty and seeking release. [131] It is recognized that an immigration hold is not connected to the criminal justice system, but the loss of liberty in both contexts has the same impact on the person and the principles governing a loss of liberty do not differ. Provincial superior courts are well versed in the Charter rights that apply when there is a loss of liberty.[132] Judges of that court deal with detention as part of their daily fare. And while the Federal Court judges have expertise in the immigration matters and the Charter, they do not frequently deal with detention.[133]

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[130] *R. v. Gamble*, [1988] 2 S.C.R. 595; [1988] S.C.J. No. 87, at para. 52.

[131] *IRPA*, ss 54 to 61; *IRPR*, ss. 244 to 250.

[132] *Chhina* ABCA Reasons, AR Vol. 1, p. 19, para. 48 ; *Chaudhary, supra.,* note 6, at para. 102; citing *Khela, supra*, note 4, at para. 57.

[133] At paragraph 116 of her memorandum, the AG references the court's use of the wrong style of cause for the Minister as indicating a lack of understanding of immigration on the part of superior court judges. The use of such a trivial example, given the history of frequent name changes of the responsible Minister(s), is a tenuous foundation for legal argument. The AG uses as a further example of this lack of understanding the Alberta Court of Appeal's suggestion that it would be reasonable to think that ID officers might not be independent of the Minister. The Court actually said at *Chhina* ABCA Reasons, AR Vol. 1, p. 20, at para.53: "An applicant might reasonably perceive …. that a provincial superior court judge might be a more independent decision-maker since the party opposing release is the Minister of Immigration and the decision-maker would

53. In the case at bar, decision on the *habeas corpus* application would not have impacted at all on the Respondent's immigration matters; he was only challenging his continued detention, not his status in Canada.[134]

Timeliness of the Remedy

54. A hearing on a *habeas corpus* application has no filing fee and can be obtained more rapidly than a judicial review hearing in the Federal Court, where leave is first required.[135] There are cases that prove the exception, but this does not negate the general availability of the remedy in a timelier fashion than an application for leave and subsequent to this an application for judicial review. The time frame to follow the rules for filing exceeds that for a *habeas corpus* application to be set down for hearing as such applications are to be heard promptly. [136]

Local Access to the Remedy

55. Immigration detainees, like other federal and provincial inmates, benefit from local access to provincial superior courts. The Federal Court has offices in major centres across the country, while the superior courts are in numerous communities: they are local courts. In fairness, therefore, they should have the same ability to access the *habeas corpus* remedy locally. [137]

56. There is a benefit to letting detainees appear before a judge to explain their claim, which is

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otherwise be an ID official." The Court was not alleging a lack of independence but what a detainee might come to believe. This is not unreasonable.

[134] *Chaudhary, supra.,* note 6, at para. 99-101; citing *May v. Ferndale, supra,* note 3, at para. 44, 50, 67.

[135] *IRPA* s 72(1), 15 days to file the originating notice seeking leave, which is required for all judicial review applications under the *IRPA.* See also *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, *[FC Immigration Rules],* s. 10 (30 days from the date of filing the notice for leave for the Applicant to file the application record in support of the leave application); s. 11 (30 days for the Respondent to file the reply record); s. 13 (10 days for Applicant to file a reply). *Federal Courts Act*, s. 57.1 requires payment of fees; s. 19 Federal Courts Rules, SOR/98-106; Tariff A s. 1(1)(d).

[136] *Chaudhary, supra.*, note 6, at para. 103-104; *Habeas Corpus Act* R.S.O. 1990, Ch H.1, s. 1(2).

[137] *Chaudhary, supra*., note 6, at para. 105; citing *May, supra*, note 3, at para. 70.

a normal practice on *habeas corpus* applications, where the detainee is not represented. The Federal Court leave process is a written application, arguably a more daunting process for a non-citizen whose English or French skills may be limited, particularly in writing.

Nature of the Remedy and Burden of Proof[138]

57. The Court of Appeal for Ontario noted that a review of the ID official's decision would be by way of leave in the Federal Court to judicially review it. It concluded that *habeas corpus* was a more advantageous remedy than review before the Federal Court for two reasons. First, *habeas corpus* is non-discretionary – the writ issues as of right once the detainee establishes a deprivation of liberty and a legitimate ground to question the legality of the deprivation – while in the Federal Court, judicial review is discretionary[139] and under the IRPA, the detainee must raise a fairly arguable case to be granted leave.[140] The Court further noted that the decision being reviewed would invariably be overtaken by a later detention decision before it was reviewed, as the detention reviews occur every 30 days. Second, the onus rested with the Minister on the *habeas corpus* application to establish that the detention was lawful, while the applicant on judicial review was required to establish that the ID decision was unreasonable.[141]

58. The Alberta Court of Appeal agreed.[142] It noted that the scope of judicial review in the

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[138] *May, supra.,* note 3, at para. 39-40, 65; *Khela, supra.* note 4, at para. 38; *Chaudhary, supra.,* note 6, at para. 97.

[139] One of the grounds upon which the Federal Court exercises a discretion not to decide an application on the merits is 'clean hands.' Applications which may be otherwise meritorious, have been refused because of this: See *Johnston v. Canada (AG),* [2018] F.C.J. No. 52, at paras. 12-13; *Raslan v. Canada (MCI),* [2010] F.C.J. No. 215, at paras. 18-19; *Thanabalasingham v Canada (MCI),* 2006 FCA 14, at paras. 9-10; *Wu v. Canada (MCI),* [2018] F.C.J. No. 794, 2018 FC 779, at paras. 18-19; *Cox v. Canada (MPSEP),* [2016] F.C.J. No. 1384, 2016 FC 1268, at paras. 4-6.

[140] *Chaudhary, supra.* note 6, at para. 94. A leave provision has been seen to be, not just a means of weeding out unfounded claims, but also a means of docket control. See *Ernewein v. Canada (MEI)* (1979), 30 N.R. 316, per Pigeon J.; *Montreal v. MacDonald* (1986), 67 N.R. 1, at para. 140.

[141] *Chaudhary, supra.* note 6, at para. 95.

[142] *Chhina* ABCA Reasons, AR Vol. 1, p. 20, para. 51

Federal Court is limited in scope by the ID decision – it reviews the reasonableness of the decision.[143]

59. Additional factors make the judicial review process in the Federal Court less advantageous.

a. While applications for leave and judicial review are to be dealt with summarily, unless the time is radically shortened by way of motion to the court – itself a matter of discretion - it takes 85 days to perfect an application for leave.[144]

b. ID Officials render decisions on detention reviews every 30 days, such that the decision for which review is sought is invariably moot by the time the Court considers the application.[145] A challenge to the lawfulness of a detention by way of *habeas corpus* is to the detention *per se*, not the reasonableness of any single decision of an ID official. It is not a judicial review application, although there are instances where a single decision might be the basis of the challenge, as in *Khela*.[146]

c. No reasons are given for granting or refusing leave, such that the process lacks transparency and consistency in the application of the leave provision by judges of the Federal Court. The leave process is unpredictable given the wide inexplicable variation in the grant rates among members of the court.[147]

60. On a *habeas corpus* application, the matter is heard afresh with the onus on the Minister to justify the detention, once the person has shown that there are reasonable and probable grounds

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[143] *Chhina* ABCA Reasons, AR Vol. 1, p. 19-20, para. 48

[144] *IRPA* s 72(1), *FC Immigration Rules*, *supra*, note 135, Rules 10, 11, 13.

[145] Multiple leave/judicial review applications are common when leave and judicial review is sought in the Federal Court, as noted in the outline of the statutory process above. Eg. *Bruzzese*, *supra.*, note 46; *Lunyamila, supra.* note 46, at para. 20-29.

[146] *Khela, supra*. note 4, at para. 1.

[147] Green & Shaffer, *supra*, note 48, at 79-81; Rehaag (1), *supra.* note 48; Gould et al., *supra.;* Rehaag (2), *supra*. note 48. Absent a requirement to provide reasons, the leave process leads to arbitrary and inconsistent decision making

that the detention is unlawful.[148] In the Federal Court the applicant before the Court bears the onus of establishing that the decision is unreasonable.[149] Judicial review is only heard by the Federal Court where leave is granted. The Court has discretion not to proceed with the hearing and can deny relief on discretionary grounds. [150]

PART IV – COSTS

61. Given the agreement on costs between the parties, costs should not be awarded to or against the parties.

PART V – ORDER SOUGHT

62. The Respondent requests an order dismissing the Appellant's appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 23rd day of September, 2018.

Nico Breed Counsel for the Respondent	Barbara Jackman Counsel for the Respondent

[148] See *Ex parte Johnston*, [1959] O.R. 322; [1959] O.R. 322 (CA) citing *Cox v Hakes* (1890) where the court noted that where release was refused, relying on *Ex p. Partington* (1845), 13 M. & W. 679, 684, the person could make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge.

[149] *Chaudhary*, *supra.*, note 6, para. 81-84 ; *IRPA*, s. 72 ; *Dunsmuir, supra.*, note 126, at para. 47-50; *Bruzzese, supra.* note 46, at para. 43.

[150] *Chaudhary*, *supra.*, note 6, at para. 106; citing *May, supra*, note 3, at para. 71. A further point, not mentioned by this Court in *Chaudhary*, is that appeals in the Federal Court of Appeal are limited to cases where the judge who has refused the judicial review application certifies that a serious question of general importance is raised for appeal. See s. 74(d) IPRA.

PART VI - TABLE OF AUTHORITIES

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