Court File No. 37770

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

B E T W E E N:

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

APPELLANTS
(Respondents)

- and -

TUSIF UR REHMAN CHHINA

RESPONDENT
(Appellant)

- and -

END IMMIGRATION DETENTION NETWORK; CANADIAN ASSOCIATION OF REFUGEE LAWYERS; DEFENCE FOR CHILDREN INTERNATIONAL – CANADA; AMNESTY INTERNATIONAL CANADA; COMMUNITY & LEGAL AID SERVICES PROGRAMME; CANADIAN COUNCIL FOR REFUGEES; QUEEN'S PRISON LAW CLINIC; EGALE CANADA HUMAN RIGHTS TRUST; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; CANADIAN CIVIL LIBERTIES ASSOCIATION; CANADIAN PRISON LAW ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH)

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

Counsel for the Intervener

Michael Bossin
Community Legal Services of Ottawa
1 Nicholas Street, Suite 422
Ottawa, ON K1N 7B7
Tel: (613) 241-7008, ext. 5224
Fax: (613) 241-8680
Email: bossinm@lao.on.ca

Laïla Demirdache
Community Legal Services of Ottawa
1 Nicholas Street, Suite 422

Ottawa Agent for the Intervener

Sarah Sproule
Community Legal Services of Ottawa
1 Nicholas Street, Suite 422
Ottawa, ON K1N 7B7
Tel: (613) 241-7008
Fax: (613) 241-8680
Email: sprouls@lao.on.ca

Ottawa, ON K1N 7B7
Tel: (613) 241-7008, ext. 5228
Fax: (613) 241-8680
Email: demirdl@lao.on.ca

Jamie Liew
Barrister and Solicitor
39 Fern Avenue, Ottawa, ON K1Y 3S2
Tel: (613) 808-5592
Fax: 1-888-843-3413
Email: jamie.liew@uottawa.ca

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Counsel for the Appellants (Respondents)
ATTORNEY GENERAL OF CANADA

Department of Justice Canada
900, 840 Howe Street
Vancouver, BC V6Z 2S9
Fax: 604-666-2639
Per: Donnaree Nygard
Tel: 604-666-2054
Email: donnaree.nygard@justice.gc.ca

Ottawa Agent for the Appellants (Respondents)
DEPUTY ATTORNEY GENERAL OF CANADA

Department of Justice Canada
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa ON K1A 0H8
Fax: 613-954-1920
Per: Christopher Rupar
Tel: 613-670-6290
Email: christopher.rupar@justice.gc.ca

Counsel for the Respondent (Appellant)
Nico Breed
Barrister & Solicitor
Nota Bene Law
Immigration & Business Law
First Canadian Centre
Barristers and Solicitors
Suite 800, 350 – 7th Avenue SW
Calgary, AB T2P 3N9
Fax: (403) 444-6485
Tel: (403) 444-6484
Email: nico@nblawgroup.ca

Barbara Jackman
Barrister & Solicitor
Jackman, Nazami & Associates

Ottawa Agent for the Respondent (Appellant)
Jean Lash
Barrister & Solicitor
Community Legal Services Ottawa
406 – 1355 Bank Street
Ottawa, ON K1S 0X2
Tel: (613) 733-0140
Fax: (613) 733-0401
Email: lashj@lao.on.ca

3-596 St. Clair Ave W
Toronto, Ontario M6C 1A6
Tel: (416) 653-9964
Fax: (416) 653-1036
Email: barb@bjackman.com

Counsel for the Intervener, British Columbia Civil Liberties Association
Frances Mahon Law
402 West Pender Street
Vancouver, BC V6B 1T6
Tel: (604) 910-8479
Fax: (604) 608-3319
Email: frances@francesmahonlaw.com

Ottawa Agent for the Intervener, British Columbia Civil Liberties Association
Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: (613) 235-5327
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Counsel for the Intervener, Canadian Association of Refugee Lawyers
Jared Will
Joshua Blum
Barristers and Solicitors
Jared Will & Associates
226 Bathurst Street, Suite 200
Toronto, ON M5T 2R9
Tel: (416) 657-1472
Fax: (416) 657-1511
Email: jared@jwlaw.ca

Ottawa Agent for the Intervener, Canadian Association of Refugee Lawyers
Michael Bossin
Community Legal Services of Ottawa
1 Nicholas Street
Suite 422
Ottawa, ON K1N 7B7
Tel: (613) 241-7008
Fax: (613) 241-8680
Email: bossinM@lao.on.ca

Counsel for the Intervener, Canadian Civil Liberties Association
Eva Krajewska
Pierre N Gemson
Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
3400 – 22 Adelaide St W
Toronto, ON M5H 4E3
Tel: (416) 367-6244
Fax: (416) 367-6749
Email: ekrajewska@blg.com

Ottawa Agent for the Intervener, Canadian Civil Liberties Association
Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen St
Ottawa, ON K1P 1J9
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Counsel for the Intervener, Canadian Council for Refugees
Erica Olmstead
Peter Edelmann
Molly Joeck
Edelmann & Company Law Corporation

Ottawa Agent for the Intervener, Canadian Council for Refugees
Martine Cétoute
Clinique juridique francophone de l'Est d'Ottawa
290 Dupuis Street

905 – 207 West Hastings Street
Vancouver, BC V6B 1H7
Tel: (604) 646-4684
Fax: (604) 648-8043
Email: office@edelmann.ca

Ottawa, ON K1L 1A2
Tel: 613-744-2892
Fax: 613-744-3960
Email: cetoutem@lao.on.ca

Counsel for the Intervener, Community & Legal Aid Services Programme
Subodh Bharati
Community & Legal Aid Services Programme
York University, Osgoode Hall Law School
Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3
Tel: (416) 736-5029
Fax: (416) 736-5564
Email: sbharati@osgoode.yorku.ca

Ottawa Agent for the Intervener, Community & Legal Aid Services Programme
Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Intervener, Canadian Prison Law Association
Simon Wallace
Barrister and Solicitor
1900 – 439 University Ave
Toronto, ON M5G 1Y8
Tel: (416) 363-1696
Fax: (416) 363-4089
Email: simon@mccartenwallace.com

Simon Borys
Barrister and Solicitor
106 – 348 Bagot Street
Kingston, ON K7K 3B7
Tel: (613) 777-6262
Fax: (613) 777-6263
Email: simon@boryslaw.ca

Ottawa Agent for the Intervener, Canadian Prison Law Association
Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Intervener, Defence for Children International Canada
Wilson Christen LLP
137 Church Street
Toronto, ON M5B 1Y4

Jeffery Wilson
Tel: (416) 360-5952
Email: jeffery@wilsonchristen.com

Ottawa Agent for the Intervener, Defence for Children International Canada
Matthew Estabrooks
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-0211
Fax: (613) 788-3509
Email:

matthew.estabrooks@gowlingwlg.com

Farrah Hudani
Tel: (416) 956-5623
Email: farrah@wilsonchristen.com

Christina Doris
Tel: (416) 956-5638
Email: christina@wilsonchristen.com

Counsel for the Intervener, Egale Canada Human Rights Trust
Michael Battista
Adrienne Smith
Battista Smith Migration Law Group
160 Bloor Street East
Suite 1000
Toronto, ON M5W 1B9
Tel: (416) 203-2899
Fax: (416) 203-7949
Email: battista@migrationlawgroup.com

Ottawa Agent for the Intervener, Egale Canada Human Rights Trust
Audrey Mayrand
Juristes Power Law
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4
Tel: (613) 706-1091
Fax: (613) 706-1091
Email: amayrand@powerlaw.ca

Counsel for the Intervener, End Immigration Detention Network
Swathi Sekhar
Barrister and Solicitor
1040 Eglinton Avenue West
2nd Floor
Toronto, ON M6C 2C5
Tel: (416) 885-8534
Fax: (416) 352-5830
Email: swathi@sekharlawoffice.com

Maija Martin
Barrister
130 Spadina Avenue
Suite 606
Toronto, ON M5V 2L4
Tel: (416) 361-9609
Fax: (416) 361-9443
Email: maija@martincriminaldefence.ca

Ottawa Agent for the Intervener, End Immigration Detention Network
Terry Semanyk
150 Isabella Street
Suite 305
Ottawa, ON K1S 1V7
Tel: (613) 238-6969
Fax: (613) 238-9916
Email: tsemanyk@sspclaw.ca

Counsel for the Intervener, Queen's Prison Law Clinic
Stockwoods LLP
TD North Tower

Ottawa Agent for the Intervener, Queen's Prison Law Clinic
Maxine Vincelette
Juristes Power Law

77 King Street West
Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Nader R Hasan
Tel: (416) 593-1668
Fax: (416) 593-9345
Email: naderh@stockwoods.ca

Lindsay Board
Tel: (416) 593-2494
Fax: (416) 593-9345
Email: lindsayb@stockwoods.ca

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

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PART I – OVERVIEW[1]

1. The core question in this appeal is whether *habeas corpus* is available for persons in immigration detention. The Appellants argue that the *Immigration and Refugee Protection Act* ("*IRPA*")[2] provides a review of immigration detention that is complete, comprehensive and expert.[3] As such, the appellants argue that there is no basis in law to find that *habeas corpus* is a route by which immigration detainees can, as of right, challenge the legality of their detention in a superior court.

2. Amnesty International Canada (AI Canada) takes no position on the facts of the case at bar in this intervention and does not make any submissions with respect to the immigration status of the Respondent. AI Canada's submissions are focused on Canada's obligations under international law regarding the right to *habeas corpus* in the context of immigration detention.

3. There are four arguments that AI Canada submits to underscore the importance of the right to *habeas corpus* in international law and how it should apply in Canada: (1) there is a right to *habeas corpus* in international law; (2) the entitlement to challenge detention extends to all contexts of detention, including administrative detention and therefore immigration detention; (3) the court responsible for *habeas corpus* reviews should be a different body from the one that initially ordered the detention; and (4) the right to *habeas corpus* is of particular relevance to stateless individuals due to their vulnerability to long-term administrative detention.

PART II – QUESTION IN ISSUE

4. Is *habeas corpus* available to persons in immigration detention?

PART III – ARGUMENT

A. There is a right to *habeas corpus* in international law

i. Canada has international law obligations to guarantee the right to habeas corpus

5. This appeal requires careful consideration of international legal principles that recognize *habeas corpus* as one of the greatest available protections against arbitrary detention.[4] Canada's

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[1] Counsel wish to acknowledge the work of Amnesty International Canada's Public Interest Articling Fellow, Aditya Rao (and the Law Foundation of Ontario for funding that position), in the preparation of these submissions.
[2] *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"].
[3] Appellant's factum, para 3.
[4] This Honourable Court expounded on the importance of the right to *habeas corpus* in *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809. To underscore its importance, in para 19, the court cites the *Magna Carta* noting

international obligations are clear on the question of the right to *habeas corpus* – individuals in detention, including in immigration-related detention, have a right to challenge the lawfulness of their detention, not just the reasonableness of it, in a court of law.

6. The *Vienna Convention on the Law of Treaties*, to which Canada is a signatory, states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[5] Canada voted to adopt the *Universal Declaration of Human Rights (UDHR)* in 1948, a document that remains fundamental to establishing international human rights norms.[6] The *International Covenant on Civil and Political Rights* (*ICCPR*)[7] is a legally binding international human rights instrument, which codifies aspects of the *UDHR*, that Canada has signed and ratified. These instruments explicitly provide that everyone has the right to life, liberty and security of the person and that no one shall be subject to arbitrary detention.[8]

7. The *ICCPR* obligates states to provide detained individuals with the ability to challenge their detention in Article 9(4):

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

8. Canada is also a member state of the Organization of American States (OAS), and as such, is bound by the *Inter-American Declaration on the Rights and Duties of Man*,[9] which states in Article XXV that "Every individual who has been deprived of his liberty has the right to have

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that "[the] writ of *habeas corpus* is also known as the 'Great Writ of Liberty.'" The court also acknowledges its importance internationally by citing the United States Supreme Court in para 21: "According to Black J. of the United States Supreme Court, *habeas corpus* is 'not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty': Jones v. Cunningham, 371 U.S. 236 (1962), at p. 243."

[5] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 26, 31-32 [*Vienna Convention*].

[6] UNGA, Report of the Working Group on Arbitrary Detention, 27th Sess, UN Doc A/HRC/27/47 (30 June 2014) at para 13 [Report of the WG on Arbitrary Detention].

[7] *International Covenant on Civil and Political Rights*, 19 December 1996, 99 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1975) [ICCPR].

[8] *Universal Declaration of Human Rights*, GA Res 271A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 ["UDHR"], articles 3 and 9; *ICCPR*, *supra* note 7, article 9(1). The *Canadian Charter of Rights and Freedoms* also includes the right to *habeas corpus* in section 10(c): *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, 10(c).

[9] *Inter-American Declaration on the Rights and Duties of Man*, OAS, 9th International Conference, 2 May 1948 ["*Declaration*"].

the legality of his detention ascertained without delay by a court."[10] Although Canada is not a party to the *American Convention on Human Rights*,[11] being a member State of the OAS means that the charter-based human rights system arising out of the *Declaration* is applicable to Canada.[12]

9. The right to *habeas corpus*, or the universal right to challenge the lawfulness of detention before a court, is therefore "a self-standing human right, the absence of which constitutes a human rights violation" that is non-derogable even in states of emergency.[13] Jurisprudence from the United Nations Human (UN) Rights Committee has held that the lack of access to *habeas*

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[10] *Ibid*, Article XXV.

[11] *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 ["*American Convention on Human Rights*"].

[12] See *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89, July 14 1989, IACtHR (Ser A) No 10 (1989), available online: http://hrlibrary.umn.edu/iachr/b_11_4j.htm. See para 42 in particular, which states: "the General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS." This view was also adopted by the Senate of Canada in a report on Canadian adherence to the *American Convention*. The report held that Canada is bound by the obligations imposed by the *Declaration* given that Canada joined the OAS after the issuance of the Court's advisory opinion on the legally binding nature of the *Declaration* and had not made any indications about contrary intentions explicit. See The Senate of Canada, Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights* (May 2003) (Chair: Hon. Shirley Maheu), at page 14.

[13] See international legal instruments: *ICCPR*, *supra*, note 7 art 9(4); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can TS, 1987 No. 36, art 2 ["*CAT*"]; *United Nations Convention Relating to the Status of Refugees*, 28 July1951, 189 UNTS 137 (entered into force 22 April 1954), arts 16 and 32(2) ["*Refugee Convention*"]; *Convention on the Rights of the Child*, 18 December 1990, UNTS 1477 (entered into force 1 July 2003), art 37(d); *Convention on the Rights of Persons with Disabilities*, 13 December 2006, UNTS 2515 (entered into force 3 May 2008), art 14; *UDHR*, *supra*, note 8, arts 8-9; UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 76th Sess, UNGA Res 43/173, (9 December 1988), [UN Body of Principles] principles 5, 11 and especially 32. See jurisprudence: *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (online: http://www.unhcr.org/refworld/docid/3ae6b71a0.html), at para 9.5 [*A v* Australia]; UNHRC, Communications No 1255/2004, *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 et al at para 7.3 [*Shams v Australia*]; UNHRC, Communication No 1460/2006, *Yklymova v Turkmenistan*, UN Doc CCPR/C/96/D/1460/2006 at para 7.4 [*Yklymova v Turkmenistan*]; UNHRC, Communication No 1751/2008, *Aboussedra v Libyan Arab Jamahiriya*, UN Doc CCPR/C/100/D/1751/2008 at para 7.6 [*Aboussedra v Libyan Arab Jamahiriya*]; UNHRC, Communication No 1090/2002, *Rameka v New Zealand*, UN Doc CCPR/C/79/D/1090/2002 at paras 7.3 and 7.4 [*Rameka v New Zealand*]. See also UNGA, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 30th Sess, UN Doc A/HRC/30/37 (6 July 2015) [UN Basic Principles and Guidelines on Detention], principles 1-4 and 16-17, guideline 3; UNCAT, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) at para 8; Report of the WG on Arbitrary Detention, *supra* note 6, paras 13, 26; UNHRC, *General Comment No 29: Article 4: Derogations during a State of Emergency*, 72nd Sess, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) at paras 11 and 16.

corpus for persons deprived of their liberty constitutes a violation of Article 9(4) of the *ICCPR* as it denies them an effective remedy to challenge their detention.[14]

ii. The prohibition against arbitrary detention is customary international law

10. *Habeas corpus* is a detainee's most immediate and effective remedy to address detention that is, or has become, arbitrary. The prohibition against arbitrary detention is absolute and is a "non-derogable norm of customary international law, or *jus cogens.*"[15] In emphasizing this, the Working Group on Arbitrary Detention notes that "arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers."[16]

11. This Court has recognized the doctrine of adoption in *R v Hape*, stating: "following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation."[17]

iii. Immigration detention as a measure of last resort in international law

12. Under international law, detention in the context of immigration should only be used as a measure of last resort[18] since it is an exceptional measure used for limited purposes.[19] Detention inherently infringes on an individual's right to liberty and can only be allowed if it is one for a justifiable purpose. According to a former UN Special Rapporteur on Migration, international law stands for the proposition that "freedom must be the default position and detention the

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[14] See UNHRC, Communication No 9/1977, *Santullo Valcada v Uruguay*, UN Doc CCPR/C/OP/1 at 43 (1984) at para 12 [*Valcada v Uruguay*]; UNHRC, Communication No R 1/4, *Torres Ramírez v Uruguay*, UN Doc A/35/40 at 121 (1980) at para 18 [*Torres Ramírez v Uruguay*].

[15] Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants* (7 February 2018) at para 8 online: http://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf [WGAD 2018].

[16] *Ibid*.

[17] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 2929 at para 39.

[18] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCR, 2012) (online: http://www.unhcr.org/refworld/docid/503489533b8.html) [UNHCR Detention Guidelines], guideline 3, para 17.

[19] *Ibid*, guideline 4.1.

exception."[20] Indeed, "no access to an effective remedy to contest [detention] could also call into question the legal validity of any detention."[21]

13. Where detention is used, under international law, it must be necessary and proportionate to the objective of identity and security checks or the prevention of absconding or compliance with a removal order.[22]

B. The entitlement to challenge detention extends to all contexts of detention, including administrative detention and therefore immigration detention

i. International law affords immigration detainees the right to habeas corpus

14. Under international law *all* persons, including those held under administrative detention for immigration purposes, have the right to challenge the lawfulness or arbitrariness of their detention, issues that are at the core of a *habeas corpus* application. The UN Human Rights Committee comments that the term "Everyone"[23] in Article 9(4) of the *ICCPR* includes "aliens, refugees and asylum seekers, stateless persons [and] migrant workers"[24]. Such persons, "in any situation of deprivation of liberty," have "the right to bring proceedings before a court to challenge the arbitrariness and lawfulness and the necessity and proportionality of their detention, and to receive without delay appropriate and accessible remedies".[25]

15. In its General Comment on Article 9(4), the UN Human Rights Committee stated in unequivocal terms that "laws that exclude a particular category of detainees from review required by paragraph 4 violate the [*ICCPR*.]"[26] In numerous cases, the UN Human Rights Committee has assumed jurisdiction in matters involving the detention of immigrants and asylum seekers where a State's compliance with Article 9(4) of the *ICCPR* is at issue.[27]

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[20] *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, UN Doc A/HRC/35/25 (28 April 2017), online: http://www.refworld.org/docid/593a6f504.html, at para 60 [Special Rapporteur on Migrants, 2017].
[21] UNHCR Detention Guidelines, *supra*, note 18 at para 17.
[22] UNHCR Detention Guidelines, *supra*, note 18, guideline 4, para 18 and guideline 4.2, para 34.
[23] The word in art 9(4) is actually "Anyone." See *ICCPR*, *supra* note 7, art 9(4). The committee mistakenly appears to have used the word "Everyone" in quoting the *ICCPR*. The point, however, still stands.
[24] UNHRC, *General Comment No 35, Article 9 (Liberty and Security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014) [General Comment 35], at para 3. See also UN Basic Principles and Guidelines on Detention, *supra*, note 13, principle 21, paras 42-45.
[25] UN Basic Principles and Guidelines on Detention, *supra*, note 13, principle 21, para 43.
[26] General Comment 35, *supra*, note 24 at para 46.
[27] See, for example: *A v Australia*, *supra*, note 13; *Shams et al v Australia*, *supra*, note 13; *Yklymova v Turkmenistan*, *supra*, note 13; *Aboussedra v Libyan Arab Jamahirya*, *supra* note 13; *Rameka v New Zealand*, *supra*, note 13; *Torres Ramirez v Uruguay*, *supra*, note 13; and *Umarov v Uzbekistan*, *supra*, note 13.

ii. Indefinite detention is arbitrary and unlawful, necessitating habeas corpus

16. According to the United Nations High Commissioner for Refugees (UNHCR), "[t]he length of detention can render an otherwise lawful detention disproportionate and, therefore, arbitrary.[28] Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law".[29] Indefinite detention is likely disproportionate and therefore arbitrary and unlawful.[30]

17. In 2015, the UN Committee on the Elimination of Racial Discrimination expressed concern about Canadian practices on immigration detention, noting that "there is no legal time limit on the detention of migrants"[31] – a matter at the root of what is at issue in the case at bar. Denying a detainee *habeas corpus* may amount to a failure to meet international obligations to provide a guarantee in law to protect against arbitrary detention.

C. The court responsible for *habeas corpus* reviews should be a different body from the one that initially ordered the detention

i. The detention review process in the IRPA does not provide an effective remedy for an immigration detainee

18. Under international law, an immigration detainee should have the right to challenge the lawfulness of the detention at any time.[32] To meet the requirements of *ICCPR* Article 9(4), "the court reviewing the arbitrariness and lawfulness of the detention must" (1) "be a different body from the one that ordered the detention"[33] and (2) "have the power to order release from the unlawful detention".[34]

19. In the Canadian context, neither the Immigration Division (ID) nor the Federal Court on judicial review of an ID decision (the two bodies that are involved in reviewing detention under

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[28] UNHCR Detention Guidelines, *supra* note 18 at guideline 6, para 44.
[29] *Ibid*.
[30] UNHCR Detention Guidelines, *ibid* at guideline 6, paras 44-46; UNHRC, Communication No 900/1999, *C v Australia*, UN Doc CCPR/C/76/D/900/1999, at para 8.2 [*C v Australia*]; see also *A v Australia*, *supra*, note 13 at para 9.4; UNHRC, Communication No 305/1988, *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (online: http://www.refworld.org/cases,HRC,525414304.html) [*Van Alphen v The Netherlands*] at para 5.8.
[31] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the combined twenty-first to twenty-third periodic reports of Canada*, UNCERD, 93rd Sess, UN Doc CERD/C/CAN/CO/21-23, 13 September 2017, paras 33 and 34, online: http://undocs.org/en/CERD/C/CAN/CO/21-23.
[32] UNHCR Detention Guidelines, *supra*, note 18, at guideline 7, para. 47(v).
[33] UN Basic Principles and Guidelines on Detention, *supra*, note 13 at guideline 4, para 51.
[34] General Comment 35, *supra*, note 24 at para. 41.

the *IRPA*), meet these two criteria and consequently do not provide an effective remedy to an immigration detainee seeking to challenge the lawfulness of their detention. While the ID can review an initial decision of an officer to detain an individual,[35] in subsequent reviews, the ID is in effect reviewing its own order of detention.

20. Under the *IRPA*, the ID must review an individual's detention at least once during the seven-day period following the initial review and at least once every thirty days thereafter.[36] Pursuant to s. 58(1) of the *IRPA*, the ID will consider a number of prescribed factors when deciding whether a person should be detained or should continue to be detained: (a) Are they a danger to the public? (b) Are they unlikely to appear for examination, a hearing/proceeding or removal from Canada? (c) Are they inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality? (d) Does their identity need to be established?[37] The *IRPA* does not include, among these factors, the lawfulness of the detention.

21. The "arbitrariness" of the detention, therefore, is not one of the factors the ID considers when deciding whether to order release.[38] As a result, although the ID might accommodate requests for an earlier detention review, the *IRPA* does not grant detainees the right to challenge their detention – at any time - on the grounds that it has become arbitrary.

ii. International law guarantees the right to challenge the lawfulness of immigration detention, not just the reasonableness of the decision to detain

22. In its General Comment on *ICCPR* Article 9(4), the UN Human Rights Committee emphasized that the right of a detainee to challenge the lawfulness or arbitrariness of detention involves "proceedings before 'a court'"[39] which "should ordinarily be a court within the judiciary."[40]

23. This right exists even if the detainee is entitled to a periodic review of the detention by an administrative body.[41] The UN Working Group on Arbitrary Detention notes that "Irrespective

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[35] *IRPA*, *supra* note 1 at s 57(1).
[36] *IRPA*, *ibid* at s 57(2).
[37] *Ibid* at s 58(1).
[38] *Ibid.*
[39] General Comment 35, *supra*, note 24 at para 45
[40] General Comment 35, *ibid.*
[41] UN Working Group on Arbitrary Detention, *Report to the Human Rights Council*, 18 January 2010, UN Doc A/HRC/13/30, available at: http://www.refworld.org/docid/502e0fa62.html, at para 61.

of the body responsible for their detention order, administrative or other, …non-nationals shall be guaranteed access to a court of law empowered to order immediate release or able to vary the conditions of release."[42] Regular review of one's detention "does not exclude the right [of detainees] to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention."[43]

24. The *Federal Courts Act* allows decisions made under the *IRPA* to be judicially reviewed by the Federal Court, including those made by the ID.[44] Although the Federal Court is a court within the judiciary, it does not have jurisdiction to examine the lawfulness of the detainee's detention. Rather, sitting on judicial review, the Federal Court is limited to reviewing the reasonableness or correctness of the ID's decision. The Federal Court in *Xie*[45] noted: "There is nothing [in subsection 18.1(3) of the *Federal Courts Act*] that indicates that the Court has the jurisdiction to substitute its opinion for that of the tribunal whose decision is under judicial review, and make the decision that the tribunal should have made".[46] Consequently, in overturning a decision of the ID, the Federal Court will typically return the matter to the tribunal for reconsideration rather than order immediate release of the detainee on the basis that the detention has become unlawful or arbitrary. The Federal Court of Appeal has held that while the Federal Court, on judicial review, can set aside a decision and refer it back for judgment in compliance with instructions it deems appropriate, it may do so only in exceptional circumstances.[47]

D. The right to *habeas corpus* is particularly relevant to stateless persons due to their vulnerability to long-term administrative detention

i. Stateless individuals are at higher risk of indefinite and unlawful detention

25. Stateless persons are not citizens of any state under operation of its law,[48] and may not have identity documents or any kind of valid temporary or permanent status in Canada. As a

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[42] UN Basic Principles and Guidelines on Detention, *supra*, note 13, principle 21, para 43.
[43] *Ibid.*
[44] *Federal Courts Act*, RSC 1985, c F-7 at s 18.1 [*Federal Courts Act*].
[45] *Xie v Canada (Minister of Employment and Immigration)*, (1994) 75 FTR 125 [*Xie*].
[46] *Xie v Canada*, *ibid* at para 17; followed in *Rafuse v Canada (Pensions Appeal Board)*, 2002 FCA 31 at paras 8-9 [*Rafuse v Canada*].
[47] *Yansané v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 48, at paragraphs 15-17, Montigny JA.
[48] *Convention relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960), art 1.

result, stateless persons are at high risk of arrest and repeated and prolonged immigration detention.[49] Stateless persons may be particularly at risk of prolonged detention where Canada is unable to return them to their country of origin if no state recognizes them as citizens or as temporary/permanent residents, and if it cannot secure valid travel documentation for them.[50]

ii. Statelessness is not a justification for continued detention

26. The UN Human Rights Committee has stated, "The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention."[51] International law obligates States to provide *habeas corpus* to persons in administrative detention, including stateless persons, who are at risk of lengthy detention that has become arbitrary and therefore unlawful.[52] Statelessness is not a justification for continuing an individual's detention.[53] The UNHCR has cautioned that, "prolonged detention beyond this initial period [of conducting initial identity checks] on the sole ground that an individual has an undetermined nationality or identity would run against international standards and should be considered arbitrary."[54]

27. The European Court of Human Rights, in *Kim v Russia* stated that the necessity of the "practical safeguard" of providing a "remedy by which to contest the lawfulness and length of his detention"[55] is heightened given the vulnerability of stateless persons in prolonged detention:

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[49] UNHCR, *Stateless Persons in Detention: A tool for their identification and enhanced protection*, (June 2017), (online: http://www.refworld.org/pdfid/598adacd4.pdf) [UNHCR Stateless in Detention] at page 4.
[50] *Ibid;* UNHCR, *Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons* (March 2014) (online: http://www.refworld.org/docid/4cad88292.html) at page 2. See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 241(1)-(2) which outline which country a foreign national may be removed to.
[51] General Comment 35, *supra*, note 24 at para 18; UN Human Rights Committee, *FKAG v Australia*, Communication No 2094/2011, UN Doc CCPR/C/108/D/2094/2011, available at: http://www.refworld.org/docid/52270fe44.html, at para 9.3.
[52] *Kim v Russia* (2010), ECtHR, App no 44260/13, 17 July 2014, available at http://www.refworld.org/cases,ECHR,53c7957e4.html [*Kim v Russia*].
[53] UNHCR Stateless in Detention, *supra* note 49.
[54] UNHCR, *Handbook on Protection of Stateless Persons*, (2014) (online: http://www.unhcr.org/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html) at para 112; In relation to stateless persons specifically, see UNHCR, *Executive Committee Conclusion 106 (LV1) of 2006 on identification, prevention and reduction of statelessness and protection of stateless persons*, 56th Sess, UN Doc A/AC.96/1035, available at: http://www.unhcr.org/453497302.html, at para (w), which "Calls on States not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law […]"; UNHCR Stateless in Detention, *ibid;* UNHCR Detention Guidelines, *supra* note 18 at guideline 6, para 46.
[55] *Kim v Russia, supra*, note 52 at para 53.

> The Court is concerned about the applicant's particularly vulnerable situation. As a stateless person, he was unable to benefit from consular assistance and advice, which would normally be extended by diplomatic staff of an incarcerated individual's country of nationality. Furthermore, he appears to have no financial resources or family connections in Russia and he must have experienced considerable difficulties in contacting and retaining a legal representative. The domestic authorities do not appear to have taken any initiative to accelerate the progress of the removal proceedings and to ensure the effective protection of his right to liberty…As a consequence, the applicant was simply left to languish for months and years…[56]

E. Conclusion

28. International law requires states to grant the right to *habeas corpus* to immigration detainees. Canada is party to international instruments that are unequivocal in their imposition of the obligation to ensure immigration detainees can challenge the legality of their detention. Immigration detention cannot be allowed to become indefinite and/or arbitrary and, therefore, unlawful. The prohibition against arbitrary and indefinite detention and the requirement to grant the right to *habeas corpus* to challenge the lawfulness of detention are non-derogable obligations under international law. A challenge to the legality of immigration detention cannot simply be a review of the decision to detain. Rather, the right under international law to *habeas corpus* requires courts to determine the legality of the detention itself. International law also requires challenges to detention to be heard by a court different from the body that issued the decision to detain. Since stateless individuals are at particular risk to be detained for long periods of time, access to *habeas corpus* is especially relevant in such circumstances.

PART IV – COSTS

29. AI Canada does not seek or expect to pay costs.

PART V – ORAL ARGUMENTS

30. AI Canada will make oral submissions lasting 5 minutes, per this Honourable Court's order granting AI Canada leave to intervene.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF OCTOBER 2018
BY:

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Counsel for the Intervener,
Amnesty International Canada

[56] *Ibid* at para 54.

PART VI – TABLE OF AUTHORITIES

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