S.C.C. 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 and Canadian Prison Law Association,

Interveners

FACTUM OF THE INTERVENER

Canadian Association of Refugee Lawyers/
Association canadienne des avocats et avocates en droit des réfugiés

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PART I – OVERVIEW AND FACTS

A. Overview of CARL's position and relevant facts

1. The Canadian Association of Refugee Lawyers [CARL] was granted leave in this matter to make submissions on the constitutional limits of a superior court's discretion to decline to hear an immigration detainee's *habeas corpus* application.[1] CARL's position is that section 10(c) of the *Charter* is infringed whenever a superior court declines *habeas corpus* jurisdiction over a detainee. As such, an exercise of judicial discretion that limits a detainee's access to *habeas corpus* must be justified under the essential elements of section 1 of the *Charter*.

2. CARL proposes that a modified version of the *Dagenais/Mentuck* test is the appropriate framework for assessing when, if ever, *habeas corpus* jurisdiction can be justifiably declined in respect of a detainee.[2] CARL also seeks to highlight the salient elements of the Ontario experience with immigration detention *habeas corpus* litigation in the three years since the Ontario Court of Appeal's decision in *Chaudhary*.[3] This experience demonstrates that the blanket denial of *habeas corpus* to immigration detainees would be a disproportionate and unjustifiable infringement of s. 10(c) of the *Charter.*

PART II – OVERVIEW OF CARL'S POSITION ON APPELLANT'S QUESTIONS

3. CARL's position is that the Court below did not err in finding that jurisdiction should not have been declined, and that the Appellants' question (a) and (b) should be answered in the

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[1] The question in this appeal is whether and under what conditions provincial superior courts can exercise their discretion to decline jurisdiction over the *habeas corpus* application of a person detained under the *Immigration and Refugee Protection Act* [IRPA]: see the Reasons for Judgment of the Alberta Court of Queen's Bench [ACQB], September 2, 2016, Action No. 160576914X1: Appellant's Record [AR], Vol I, p. 6, lines 29-30, citing *Peiroo v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 184 (ON CA); *Graham,* 2011 ONCA 138 at para 19, where the Court of Appeal for Ontario confirmed that a decision to decline jurisdiction is discretionary, and *May v. Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82 at paras 44 and 50 [*May*] and *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para 42 [*Khela*], where principles governing the exercise of that discretion were enunciated in permissive terms. See also *Chhina v. Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at paras 8 and 62 at AB, Vol I, p. 12 and 22

[2] CARL's submissions relate to the principles governing the exercise of judicial *discretion* to decline jurisdiction, and thus do not place in issue the constitutionality or constitutional applicability of any common law rule. The *Dagenais/Mentuck* test applies *only* to exercises of judicial discretion, and does not apply to judicial applications of non-discretionary rules: *Named Person v. Vancouver Sun*, [2007] 3 SCR 253, 2007 SCC 43 at paras 38-43; *Canadian Broadcasting Corp. v. Canada (Attorney General),* [2011] 1 SCR 19, 2011 SCC 2 at paras 56-57).

[3] *Chaudhary v. Canada (Public Safety and Emergency Preparedness),* 2015 ONCA 700.

negative.[4] CARL takes no position on questions (c) and (d), but submits that they are not dispositive. On question (e), CARL's position is that the principle articulated in *May v. Ferndale* does not apply in relation to the legality of an actual detention, and the Court below therefore did not depart from this principle and thus did not err in that respect.

PART III – ARGUMENT

1. A Court's Discretion to Deny Access to *Habeas Corpus* Cannot Unjustifiably Infringe Section 10(c) of the *Charter* and Must Therefore be Rational and Proportionate

a. Declining jurisdiction to hear a detainee's *habeas corpus* application infringes section 10(c)

4. The language of section 10(c) in both English and French is very explicit. The section is operative "on arrest or detention" and grants two distinct rights to a detainee: (i) to have the legality of detention "determined by way of *habeas corpus*" and (ii) "to be released if the detention is not lawful" (*de faire contrôler, par* habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa liberation*).

5. Section 10(c) is to be interpreted purposively and guarantees access to the specific remedy of *habeas corpus*.[5] *Habeas corpus* is a mechanism for judicial control over the conduct of the executive branch of government.[6] To have the legality of detention determined by way of *habeas corpus* requires a judicial determination of the legality of detention by a court with jurisdiction to order release upon a finding that the detention is unlawful.[7]

6. It is CARL's submission that there is no defensible reading of section 10(c) that allows for substitution of recourse to an administrative regime within the executive branch for the writ of *habeas corpus* in cases where the applicant is detained. Denial of a judicial determination of the legality of detention by way of the writ of *habeas corpus* is a violation of s. 10(c) of the *Charter*.

b. The "immigration matters" exception does not apply to immigration detention

7. The issue on this appeal therefore engages the rights specifically and expressly protected under section 10(c) of the *Charter.* As this case is about detainees seeking release from detention, it is therefore easily distinguishable from the cases in which courts developed and endorsed the

[4] Appellant's Factum, para 46.
[5] *R. v. Gamble,* [1988] 2 S.C.R. 595 at para 66.
[6] *Chaudhary*, *supra* note 3*,* at para 38; and *Khela*, supra note 1, at para 37.
[7] *May*, supra note 1, at para 21.

'*Peiroo* exception',[8] where *habeas corpus* was found to be unavailable in "immigration matters" that were wholly unrelated to the legality of a detention. When this Court endorsed the generic "immigration matters" exception in *May* and *Khela,* it did so without any consideration of section 10(c) of the *Charter*.[9] As such, the phrase "immigration matters" in these judgments could not have been understood to include immigration detention. If it had, the Court would have been required to address the breach of section 10(c) that would flow from its application to detainees who challenge only the legality of their detention. This Court's finding in *May* that "judicial barrier[s] to the venerable right to *habeas corpus*, now constitutionalized in Canada" must have a solid jurisprudential foundation is directly applicable in the circumstances at bar.[10]

c. Judicial discretion to decline *habeas corpus* jurisdiction over detainees is subject to the *Dagenais/Mentuck* framework

8. It is CARL's submissions that to decide the appeal before the Court, the common law discretion to deny access to *habeas corpus* to any detainee must be reconciled with section 10(c) of the *Charter*. This Court has repeatedly held that judges must exercise the discretion afforded under common law rules in a manner that is consistent with the *Charter*.[11] Therefore, while the existence of a common law discretion to decline to hear a *habeas corpus* application is not in issue, the question remains whether the exercise of that discretion in the case of a detainee constitutes a justifiable infringement of section 10(c) of the *Charter*. The analytical framework adopted for determining whether an exercise of judicial discretion is consistent with the *Charter* must ensure that it "incorporates the essence of s.1 of the *Charter* and the *Oakes* test" and is "subject to no lower a standard of compliance with the *Charter* than legislative enactment".[12]

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[8] *Peiroo, supra* note 1, as discussed in *May, ibid*.
[9] See *May,* supra note 1, which contains only a passing reference to s. 10(c) at para 70; and *Khela, supra* note 1, which contains no reference to section 10(c). See also *Peiroo, supra* note 1, and *Reza v. Canada,* [1994] 2 SCR 394*,* neither of which so much as mention section 10(c) of the *Charter*.
[10] *May*, supra note 1, at para 42.
[11] *Dagenais, v. Canadian Broadcasting Corp*., [1994] 3 SCR 835 at p 865 and 875 (per Lamer C.J.) [*Dagenais*][" the common law rule does not authorize publication bans that limit *Charter* rights in an unjustifiable manner"]; *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 SCR 65 at para 13; and *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para 56.
[12] *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 at para 27 [*Mentuck*]; and *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 at para 45 ff; see also: *Canadian Broadcasting Corp. v. Canada (Attorney General),* [2011] 1 SCR 19, 2011 SCC 2 at para 56 ("The *Dagenais*/*Mentuck* rule requires neither more nor less than the one from *Oakes*") and *R. v.*

9. At the core of this analysis are the questions of rationality and proportionality: is the measure necessary to achieve some important objective, and, if so, do its salutary effects outweigh the infringement of a *Charter* right?[13] In some cases, the courts must weigh competing *Charter* rights.[14] In others, such as the case at bar, there are no competing *Charter* rights, and courts are to weigh other public interests, such as the public interest in the effective administration of justice or the social value of the protection of the vulnerable, against the *Charter* infringement.[15]

10. Thus, adopting and adapting what has become known as the *Dagenais/Mentuck* test, CARL submits that in deciding whether to decline jurisdiction to hear a *habeas corpus* application from an immigration detainee, courts must determine that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of declining jurisdiction outweigh the deleterious effects on the rights and interests of the detainee.[16]

11. The framework is applicable in a variety of contexts because it was developed precisely in order to provide the necessary flexibility to apply the substantive requirements of s. 1 of the *Charter* to discretionary judicial infringements on *Charter* rights. The first prong captures the "pressing and substantial objective", "rational connection" and "minimal impairment" components of the *Oakes* test without imposing undue formalism; and the second prong captures the ultimate "proportionality test" as articulated in *Oakes*.[17] While the test was initially developed in the context of limitations on freedom of expression under s. 2(b) of the *Charter*, this Court has already

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Bernard, [1988] 2 S.C.R. 833 (La Forest J. concurring): "[W]hen a common law rule is found to infringe upon a right or freedom guaranteed by the *Charter* , it must be justified in the same way as legislative rules."

[13] *Mentuck, supra* note 12, at paras 22-39.

[14] See, for example, *Dagenais, supra* note 11 and *Mentuck*, *supra* note 12, where the issues included the right to a fair and public trial versus the freedom of expression of the press.

[15] See, for example, *B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 SCR 214 at paras 67 ff; *Mentuck*, *supra* note 12 at paras 31-32; and *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671.

[16] *Mentuck*, *supra* note 12 at paras 32

[17] *R. v. Oakes,* [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at para 71. See further *R. v. K.R.J.,* [2016] 1 SCR 906, 2016 SCC 31 at paras 79 and 83 on the residual yet critical role of the proportionality assessment.

recognized that "its principles have broader application".[18] The framework is, in CARL's submission, sufficiently flexible for the justification analysis required in the present context.

d. The *Dagenais/Mentuck* framework appropriately establishes a stringent standard

12. This Court and other courts have affirmed that the standard for a "serious risk" under the first prong of the *Dagenais/Mentuck* test is to be applied stringently, and that reasonable and less-impairing alternatives must be meaningfully explored before discretion is exercised in a manner contrary to the *Charter* rights of the person concerned. [19] Where this Court grappled with balancing the open courts principles as enshrined in section 2(b) of the *Charter* against other rights and interests, it held that the *Dagenais/Mentuck* test is stringent precisely because the open court principle is a "hallmark of democratic society" and a "cornerstone of the common law".[20] The same is true of the right to *habeas corpus*, and a similar degree of stringency is appropriate.[21]

13. Further, in recognizing the more generalized applicability of the *Dagenais/Mentuck* framework outside of the freedom of expression context, this Court affirmed that the starting point remains a cogent and concrete demonstration of the *necessity* of curtailing a *Charter* right in order to protect a competing *Charter*-protected interest or to protect the administration of justice.[22] To this end, if a court finds that hearing a *habeas corpus* application poses a serious risk to the proper administration of justice, it would then have to consider whether there are alternatives to an outright refusal to exercise its jurisdiction that would prevent the risk. It is only in cases where there is no reasonable alternative to a refusal to exercise jurisdiction that a court would have to then consider whether the salutary effects of such an exercise of discretion (the benefits to the proper

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[18] *R. v. N.S.,* [2012] 3 SCR 726, 2012 SCC 72 at para 7 [*N.S.*].
[19] *Mentuck*, *supra* note 12 at paras 34. See further *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41 at paras 10 and 39-41; *R. v. O.N.E.*, [2001] 3 SCR 478, 2001 SCC 77 at paras 9-11; *N.S, supra* note 18, at para 32. See also *M.E.H. v. Williams*, 2012 ONCA 35 at paras 57-62
[20] *Vancouver Sun (Re),* [2004] 2 SCR 332, 2004 SCC 43 at paras 23-24.
[21] See again *May*, supra note 1, at para 42: "No judicial barrier to the venerable right to *habeas corpus*, now constitutionalized in Canada, can be made to rest on so fragile a jurisprudential foundation". It is also well-established that it is inappropriate to attempt to rank *Charter* rights: *Dagenais, supra* note 11 at p. 877
[22] *N.S, supra* note 18, at paras 9, 12-13 and 20-27.

administration of justice) would outweigh the deleterious effects on the detainee's *Charter* rights to liberty and to review by way of *habeas corpus*.[23]

e. The relevance of the *Dagenais/Mentuck* framework within this appeal

14. The narrow issue on this appeal is whether the ACQB properly exercised its discretion in declining jurisdiction. The Appellants are however effectively asking this Court to endorse a blanket prohibition on *habeas corpus* for all immigration detainees and to extend the "immigration matters" exception to matters of immigration detention.[24] CARL's submission is that such an approach would be fundamentally inconsistent with the Court's jurisprudence requiring a case-specific assessment whenever a judicial order would infringe a *Charter* right.[25]

15. Accordingly, CARL submits that the most appropriate manner in which to address this issue is to clarify the law and articulate the framework to be applied in cases where courts are asked to exercise their discretion to decline to hear *habeas corpus* applications from detainees. However, if this Court were to consider a blanket pronouncement on the availability of *habeas corpus* for immigration detainees, it is CARL's submission that the *Dagenais/Mentuck* test would apply *a fortiori* and that even greater stringency would be appropriate, as the effect would be the abrogation of the s. 10(c) *Charter* rights of not just one but of countless detainees.

16. Whether each of the discrete issues that arise under the *Dagenais/Mentuck* test are assessed on a case-specific basis or in the context of the Appellants' submissions in favour of a blanket prohibition, it is CARL's submission that it would be relevant to consider the Ontario experience of immigration detention *habeas corpus* litigation post-*Chaudhary*. The Ontario experience demonstrates both the absence of a risk to the administration of justice and the significant deleterious effects of denying access to *habeas corpus* for immigration detainees.

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[23] *N.S, supra* note 18*,* at para 34, citing *Dagenais*, *supra* note 11 at p. 878; *Mentuck*, *supra* note 12 at para 32.
[24] Appellants' Factum, paras 2 and 118.
[25] See, for example, *Mentuck, supra,* at para 37; *N.S., supra,* at paras 8, 52.

2. The Ontario Experience Demonstrates that Denial of *Habeas Corpus* Would Be a Disproportionate and Unjustifiable Infringement of Section 10(c) of the *Charter*

17. The Appellants have not alleged that permitting immigration detainees access to *habeas corpus* – i.e., granting access to the right guaranteed to them under s.10(c) of the *Charter* –poses any serious risk to the administration of justice. Moreover, none have emerged since the Court of Appeal for Ontario opened the door to *habeas corpus* for immigration detainees in 2015.

18. In post-*Chaudhary* Ontario, there has been no unmanageable flood of applications—there have been only a handful of cases litigated, as compared to the 3,000-4,000 immigration detainees held in Ontario per year.[26] The small volume of cases has persisted despite the fact that decisions of the Ontario Superior Court[27] and Court of Appeal[28] have explicitly provided for *habeas* jurisdiction beyond the specific parameters of lengthy detentions of uncertain duration set out in *Chaudhary.* All of the applications that have been brought have related to what can fairly be qualified as exceptional cases—due either to the sheer length of detention, or cases where there had been a complete breakdown of the administrative review process.[29]

19. Mechanisms for inter-jurisdictional cooperation have already been developed by Ontario courts, preventing the prospect of a clash between complementary forums for relief. For example, the Court of Appeal for Ontario has established clear guidelines for avoiding jurisdictional conflict with the Immigration Division ["ID"] where the superior court grants release on conditions".[30]

20. Thus, there is no serious risk to the proper administration of justice that would justify a

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[26] Detention statistics are published by the CBSA at: https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2017-eng.html. See also *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710 at para 100, which provides the regional breakdown for detentions in 2016, showing that 3,145 individuals were held in immigration detention in Ontario in 2016.

[27] *Scotland v. Canada (Attorney General*), 2017 ONSC 4850 at paras 53-54

[28] *Ogiamien v. Ontario (Community Safety and Correctional Services),* 2017 ONCA 839 at para 41 [*Ogiamien II]*; see also: *Toure v. Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 at para 23, application for leave to appeal pending in S.C.C. file 38355.

[29] The decisions in *R. v Ogiamien*, 2016 ONSC 4126; *Canada v Dadzie*, 2016 ONSC 6045; *Ali v Canada (Attorney General),* 2017 ONSC 2660; *Alvin Brown v. Canada (Public Safety),* 2016 ONSC 7760; and *Ebrahim Toure v. Minister of Public Safety*, 2017 ONSC 5878 [*Toure* ONSC] concern detentions of between two to seven years. The application at issue in *Wang et al. v Canada (Attorney General),* 2017 ONSC 2841 and *Wang v. Canada*, 2018 ONCA 798 was about exceptionally stringent release conditions and the decision in *Scotland, supra* note 25, concerned a total breakdown in the IRPA detention review system where detention was maintained even though the Minister had argued in favour of release.

[30] *Ogiamien II, supra*, at paras 56ff

general rule that superior courts should decline *habeas corpus* applications brought by immigration detainees. CARL submits that this is also true in cases of shorter detentions that are arbitrary from the moment detention is imposed.[31] In the event that an extraordinary individual case did raise such risk, superior courts have at their disposal alternative measures short of a blanket rule – e.g. the doctrines of abuse of process and costs.

21. CARL also notes that the Appellants have not identified any salutary effects of declining jurisdiction that outweigh the deleterious effects on the rights and interests of the detainee by doing so. As noted above, *habeas corpus* and detention review proceedings have proceeded in tandem in Ontario without duplication or jurisdictional conflict. Moreover, unlike the publication ban and confidentiality order cases cited above, there are no countervailing *Charter* rights that are better protected by denying access to *habeas corpus*.

22. By contrast, in CARL's submission, declining *habeas corpus* jurisdiction has considerable deleterious effects on the rights and interests of the detainees. CARL agrees with the reasons of the Alberta Court of Appeal as to why *habeas corpus* is a more favourable mechanism for an immigration detainee than the IRPA regime,[32] and submits that this is a critically important deleterious effect of denying access to *habeas corpus*. Further, significant salutary benefits of granting access to *habeas corpus* for immigration detainees – both for immigration detainees and for the rule of law – have come to light in Ontario post-*Chaudhary*.

23. First and foremost, access to *habeas corpus* in Ontario has been an essential avenue to protect the right to liberty of persons detained under the IRPA by providing an effective remedy to bring an end to unlawful detentions that were being maintained by the ID review process.[33] One striking example is the case of *Ali,* where the applicant was detained on an immigration hold in a maximum-security jail for over seven years. In his over 80 monthly detention reviews, the ID had repeatedly found that the detention was indefinite but nevertheless continued the detention. This result issued in part because, under the IRPA regime, a detention's indefinite nature is only one

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[31] *Scotland, supra* note 27. CARL submits that limiting access to *habeas corpus* to lengthy detentions is not justifiable, especially since the nature and costs of *habeas corpus* litigation as compared to the IRPA process are such that *habeas corpus* is not likely to become the remedy of choice in short-term detention cases. Indeed, it is unsurprising that all of the post-*Chaudhary habeas corpus* litigation in Ontario has involved detentions in excess of 10 months.

[32] *Chhina*, *supra* note 1, at paras 37-59

[33] See *Ali, supra* note 29*; Scotland, supra* note 27*; and Ogiamien* II, *supra* note 26.

factor to be considered and is not on its own a basis for release.[34]

24. The Ontario Superior Court, on *habeas corpus*, found the detention's indefinite nature to violate the *Charter* and brought Mr. Ali's detention to an end.[35] On *habeas corpus*, unlike the IRPA detention regime, a finding that a detention has become indefinite necessitates its termination.[36] It is in this light that the Court must assess the Appellants' submission that "s. 248 of the *Regulations* sets out *Charter*-driven factors designed to make sure that the Board makes decisions that are *Charter* compliant."[37] The reality is that ID officials have been prescribed a set of *Charter*-driven factors to weigh, but are afforded substantial discretion in the relative weight given to each. As a result, the IRPA regime is less protective of *Charter* rights.

25. Further, *habeas corpus* proceedings provide procedural advantages to the detainee not mentioned by the Alberta Court of Appeal. For instance, in *habeas corpus* hearings, the Minister is required to formally tender evidence subject to cross-examination to meet its burden of proof. This has provided an important mechanism for revealing deficiencies and weaknesses in the detention review processes before the ID, which often proceeds solely by way of hearsay submissions by hearings officers with no personal knowledge of the facts in issue.[38] The procedure on a *habeas corpus* application also stands in stark contrast to judicial review in Federal Court, where the issue before the judge is limited to whether the ID's findings were reasonable in light of the largely hearsay evidence already in the ID record.

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[34] See *Ahmed v Canada (Citizenship and Immigration*), 2015 FC 876 at para 26 and authorities cited therein where the Federal Court has held that indefinite detention can be maintained as long as the ID has reasonably weighed this factor. In fact, when Mr. Ali sought judicial review of an ID decision continuing his detention, he was not even granted leave to have his case heard by the Federal Court (Federal Court File: IMM-5580-13).

[35] The Report of the 2017/2018 External Audit (Detention Review) that is, at the time of writing, the subject of the Respondent's pending Motion to Vary the Record, contains an extended discussion of the ways in which the IRPA detention review scheme failed to protect Mr. Ali's liberty interest. Should the motion be denied, CARL withdraws its submissions in relation thereto.

[36] *Ali, supra* note 29*,* at para 27, applying *Chaudhary, supra* note 3, at para 81. Such an outcome is to be contrasted with the application of the IRPA by the Immigration Division, where the indefinite nature of detention is but one factor for consideration: See *Ahmed v. Canada (Citizenship and Immigration)*, 2015 FC 876 at para 26 and the case cited therein; see also the 20 July and 21 August 2018 detention review decision of the Immigration Division in *Canada (Minister of Public Safety) v. Ebrahim Toure,* file 003-B3-00505 [Tabs 1-2 of CARL's Book of Authorities], where detention was maintained notwithstanding findings that there was no reasonable prospect of removal within a reasonable time.

[37] Appellant's Factum, para 108.

[38] *Ali, supra* note 29, at paras 30-32 and 39; *Scotland*, *supra* note 25, at paras 62-63 and 74.

26. There have also been clear benefits to the development of the law and the administration of justice. A dialogue on the constitutional limits of immigration detention has been opened between the provincial courts, the Federal Court and the Immigration and Refugee Board, advancing and enriching the applicable law.[39] Indeed, the recently-released report of an audit of the ID's detention review practices relies heavily on the findings of the Ontario courts in *habeas corpus* cases.[40]

27. Finally, in assessing the IRPA regime and the emergent *habeas corpus* jurisprudence in Ontario, the Federal Court has held that the "availability and effectiveness" of access to *habeas corpus* is a necessary compliment to the IRPA regime to ensure that immigration detainees are adequately protected against arbitrary or indefinite detentions.[41]

28. Ultimately the benefits of extending *habeas corpus* to even a circumscribed class of immigration detainees have been profound. There is no principled reason to limit the s. 10(c) rights of *any* immigration detainee. In the context of immigration detainees who seek only release from detention, no prohibition on *habeas corpus* can be rationally or proportionally justified.

PART IV – SUBMISSION ON COSTS

29. CARL does not seek costs and requests that no costs be ordered against it.

PART V – ORDER SOUGHT

30. Nil.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th day of October, 2018

Jared Will **Joshua Blum**

Counsel for the Canadian Association of Refugee Lawyers

[39] See *Ali, supra* note 29, at paragraph 26 commenting on *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016 FC 1199; *Chaudhary, supra* note 3, at paras 87-91 and *Scotland, supra* note 27, at paras 72-76 commenting on *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4; *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710 at para 4, 144, 146 on *habeas corpus* and responding to *Chaudhary.*

[40] As noted above at footnote 35, the Report of the 2017/2018 External Audit (Detention Review) is the subject of the Respondent's pending Motion to Vary the Record.

[41] *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710 at 113(d), 137, 152, 159(i). Appeal pending in Federal Court of Appeal file A-274-17.

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S.C.C. File No. 37770

SUPREME COURT OF CANADA

-Between-

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

-and-

TUSIF UR REHMAN CHHINA,
Respondent

-and-

End Immigration Detention Network, Canadian Association of Refugee Lawyers, Defence for Children International-Canada, Amnesty International Canada, Community & Legal 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 and Canadian Prison Law Association,

Interveners

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