Supreme Court of Canada Affirms Access to Habeas Corpus for Immigration Detainees

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The Supreme Court of Canada has breathed new life into the ancient writ of *habeas corpus* in a 6-1 decision1 affirming that detainees under the *Immigration and Refugee Protection Act*2 are not barred from seeking review of their detention by way of *habeas corpus*.

At issue in the appeal was whether an exception to the availability of *habeas corpus* in certain immigration contexts — known in the jurisprudence as the "*Peiroo* exception"3 — extended to circumstances where a person deprived of liberty under the *IRPA* seeks to challenge the legality of their detention by way of *habeas corpus*. According to the *Peiroo* exception case law, this depended on whether the immigration legislation "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.'"4 After a thorough examination of *habeas corpus* and the *IRPA* detention review scheme, a majority of the Supreme Court of Canada concluded that the *IRPA* scheme did not fall within the *Peiroo* exception. In so doing, the Supreme Court of Canada has affirmed a line of recent appellate jurisprudence5 which had opened the door to superior courts for immigration detainees seeking access to *habeas corpus* to challenge their detention.

The respondent Mr. Chhina had challenged his detention under the *IRPA* on the grounds that it was of a lengthy and uncertain duration.6 For the purpose of this challenge, the majority concluded that the *IRPA* detention review scheme was not "as broad and advantageous" as *habeas corpus* in at least three ways.

First, the majority concluded that the onus on review was more favourable to the detainee on *habeas corpus* than it is under the *IRPA*. This is because under the *IRPA* scheme the onus on the government is limited to demonstrating the presence of a statutory ground for detention,7 after which the onus shifts to the detainee to establish that continued detention would be unlawful by reason of its length and likely duration.8 By contrast, under *habeas corpus*, once the detainee establishes a legitimate ground to challenge detention, the onus shifts upon the government "to justify the legality of the detention in any respect."9 In addition, under the *IRPA* scheme the government could satisfy its onus by relying on reasons for ordering detention given at prior detention hearings.10 As a result, "the [*IRPA*] scheme fail[ed] to provide the

detainee with the fresh and focussed review provided by *habeas corpus*, where the [government] bears the onus".11

Second, the majority concluded that the *IRPA* scheme was less advantageous than *habeas corpus* when it comes to the scope of review available under the two mechanisms. The Court concluded that "a fresh review of each periodic detention" is not conducted under the *IRPA* scheme, while *habeas corpus* provides a "broad review" that "grapples with detention as a whole", including where appropriate "a holistic consideration of [the detainee's] *Charter* rights and how they may have been violated" in "the overall context of [the] detention".12 This differing scope of review, and the broader set of remedies available under *habeas corpus* — including a court's ability to order a detainee's release "immediately once the relevant authority has failed to justify the deprivation of liberty"13 — makes *habeas corpus* more advantageous to the detainee.

Finally, the Court concluded that *habeas corpus* offered an additional advantage for detainees by "provid[ing] a more timely remedy than those available through the *IRPA*."14 In this regard, the Court compared the longstanding recognition of *habeas corpus* as providing a "swift and imperative remedy"15 — as exemplified by the priority treatment of *habeas corpus* proceedings in many superior courts — to the lengthier process for judicial review available under the *IRPA*, in concluding that the timeliness of *habeas corpus* review offered an additional advantage that was not available under the immigration statute.16

Seemingly with an eye towards future cases, the majority decision also sets out a framework that courts will be able to employ to determine when the *Peiroo* exception should not be applied to decline *habeas corpus* jurisdiction in the immigration context. Reiterating that "exceptions to the availability of *habeas corpus* must be limited and carefully defined",17 the decision prescribes a context-specific approach which looks to "how the challenge to the unlawful detention is framed in the *habeas corpus* application" in determining whether an alternative scheme is as broad and advantageous.18 Specifically, the decision directs courts to look at both (i) the basis on which the legality of detention is being challenged,19 and (ii) "whether there is a complete, comprehensive and expert scheme that is as broad and advantageous as *habeas corpus* in relation to the specific grounds in the *habeas corpus* application" in determining whether to decline *habeas corpus* jurisdiction.20

The decision will extend across Canada the central holding from recent lower appellate court cases providing that the door to *habeas corpus* review of immigration detention remains open in appropriate circumstances, ensuring that some of the most vulnerable persons in Canada experiencing a deprivation of liberty have access to this ancient "swift and imperative" remedy.

Dissenting from the majority judgment, Justice Abella would have allowed the appeal, concluding that "the *IRPA* scheme should be interpreted in a way that guarantees the fullest possible range of scrutiny for detention"21 by "read[ing] the language of *IRPA* in a manner that is as broad and advantageous as *habeas corpus* and ensures the complete, comprehensive and expert review of immigration detention that it was intended to provide".22

Ewa Krajewska and Pierre N. Gemson of Borden Ladner Gervais LLP represented the Canadian Civil Liberties Association as an intervener in this appeal before the Supreme Court of Canada, with the assistance of articling student Aidan Fishman.

1 *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 [“*Chhina*”].

2 S.C. 2001, c.27.

3 See *Peiroo v. Canada (Minister of Employment and Immigration*) (1989), 69 O.R. (2d) 253 (C.A.) [“*Peiroo*”].

4 *Chhina*, at para. 2 quoting *May v. Ferndale Institution*, 2005 SCC 82, at para. 40.

5 *Chaudhary v Canada (Minister of Public Safety and Emergency Services)*, 2015 ONCA 700; *Chhina v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ABCA 248.

6 He had also challenged the conditions of his detention, but this basis for the challenge was not pursued on appeal.

7 *IRPA*, s. 58.

8 *Chhina*, at para. 60.

9 *Chhina*, at para. 60.

10 *Chhina*, at para. 62.

11 *Chhina*, at para. 63.

12 *Chhina*, at par. 64.

13 *China*, at para. 65.

14 *Chhina*, at para. 66.

15 *Chhina*, at para. 67

16 *Chhina*, at para. 67.

17 *Chhina*, at para. 24.

18 *Chhina*, at para. 40.

19 *Chhina*, at para. 42.

20 *Chhina*, at para. 43, emphasis added.

21 *Chhina*, at para. 72.

22 *Chhina*, at para. 74.

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