May 17, 2019

Canada v Chhina: Supreme Court Makes *Habeas Corpus* Available to Immigration Detainees

By: Amy Matychuk

Case Commented On: *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29

On May 10, 2019, the Supreme Court of Canada released its judgment in *Canada v Chhina* (*Chhina* SCC). It held that *habeas corpus* is available to immigration detainees where the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) does not provide a complete, comprehensive and expert statutory scheme equally as broad and advantageous as *habeas corpus*. Justice Andromache Karakatsanis, for the 6-1 majority, found that the IRPA's procedures for reviewing the legality of immigration detention are not broad enough to preclude detainees from seeking *habeas corpus* as an alternative remedy. Justice Rosalie Abella, dissenting, would have held that the IRPA should be interpreted in such a way as to guarantee the fullest possible range of scrutiny for the legality of immigration detention.

Facts

Mr. Chhina, who was originally from Pakistan, entered Canada as a refugee using a false name in 2006. In 2012, Mr. Chhina's refugee status was vacated and he was declared inadmissible to Canada due to both misrepresentations in his refugee application and his involvement in criminal activity. A deportation order was issued against him. However, the Canadian government encountered difficulties obtaining the necessary travel documents from the government of Pakistan, and Mr. Chhina's deportation was delayed. He spent seven months in immigration detention beginning in April 2013, was released and disappeared for a year, and was taken into immigration detention at Calgary Remand Centre for a second time in November 2015. He made the *habeas corpus* application that is the subject of this appeal at Alberta Court of Queen's Bench (ABQB) in May 2016. It appears he remained in detention, on lockdown for 22.5 hours per day like all inmates at Calgary Remand, until his deportation occurred nearly two years later in September 2017 (*Chhina* SCC at paras 8-15).

In a September 2016 unreported decision, the ABQB denied Mr. Chhina's application on the grounds that the IRPA provides a complete, comprehensive and expert statutory scheme for resolution of immigration detention issues. The Alberta Court of Appeal (ABCA) overturned that ruling in July 2017, sending Mr. Chhina's *habeas corpus* application back to the ABQB to be heard on the merits (*Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at para 69). Because Mr. Chhina has already been deported, resolution of his case before the SCC is moot with respect to his specific situation. However, the *Chhina* case provided the Court with an opportunity to "clarify when a complete, comprehensive and expert statutory

scheme provides for review that is as broad and advantageous as *habeas corpus* such that an applicant will be precluded from bringing an application for *habeas corpus*" (*Chhina* SCC at para 16).

Habeas Corpus

As I have discussed in previous posts, *habeas corpus* (which roughly translates to "produce the body", *Chhina* SCC at para 19) is a constitutional right enshrined in s 10(c) of the *Charter*. The purpose of *habeas corpus* is targeted and specific: it provides a prompt mechanism for challenging a state decision unlawfully depriving an individual of liberty. It requires the defendant of an action (the state) to be physically brought before a court to justify an individual's deprivation of liberty. A deprivation of liberty may relate to any of the following:

(1) an initial decision requiring the detention of an individual;
(2) a further deprivation of liberty based on a change in the conditions of the detention; or
(3) a further deprivation of liberty based on the continuation of the detention. (*Chhina* SCC at para 22)

Mr. Chhina's challenge came under the third category, the duration of his detention (*Chhina* SCC at para 45). Specifically, he argued that there was no reasonable prospect that the immigration-related purposes justifying his detention would be achieved within a reasonable time. Therefore, the length and indeterminacy of his detention violated his rights under ss 7 and 9 of the *Charter* (respectively, the right to life, liberty, and security, and the right not to be arbitrarily detained or imprisoned).

There are only two situations where a provincial superior court should decline to hear a *habeas corpus* application (*Chhina* SCC at paras 2, 25), as the ABQB did with Mr. Chhina in September 2016. The first is a situation where a detainee challenges the legality of their conviction or sentence, because such challenges are more appropriately brought via the appeal mechanisms in the *Criminal Code*. The second arose in the field of immigration law and is known as the *Peiroo* exception, after *Peiroo v Canada (Minister of Employment and Immigration)*, 1989 CanLII 184 (ON CA), 69 OR (2d) 253. This second exception allows a provincial superior court to decline to hear a *habeas corpus* application where applicable legislation allows for "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" (*Chhina* SCC at para 2).

The main issue in the *Chhina* SCC decision involves the second exception: does the IRPA provide for a sufficiently broad and advantageous review of the legality of a detention such as Mr. Chhina's? Justice Karakatsanis, for the majority, answered this question in the negative; Justice Abella, dissenting, would have answered in the affirmative.

The Majority: The Modified *Peiroo* Exception

In *Peiroo*, the case establishing the second exception, the Ontario Court of Appeal found, "the *Immigration Act*, R.S.C. 1985, c. I-2, then in force established a comprehensive scheme regulating the determination and review of immigration claims" (*Chhina* SCC at para 25). Further, the SCC in *May v Ferndale Institution*, 2005 SCC 82, a subsequent case discussing the *Peiroo* exception (in the context of the *Corrections and Conditional Release Act*, SC 1992, c 20, not the IRPA), commented "in matters of immigration law . . . *habeas corpus* is precluded" (*May* at para 40). However, Mr. Chhina argued (and ultimately, the SCC agreed) that the *Peiroo* exception does not preclude *habeas corpus* for all determinations made under immigration legislation (*Chhina* SCC at para 30), only those for which the IRPA's statutory mechanisms are sufficiently broad.

Justice Karakatsanis for the majority came to this conclusion for three reasons. First, the IRPA had not yet come into force and thus was not before the court in *May*, meaning that the SCC's comments did not contemplate the current legislation (*Chhina* SCC at para 32). Second, "the jurisprudence relied on by the Court in *May* . . . did not stand for the broad proposition that *habeas corpus* will never be available where the detention is related to immigration matters" (*Chhina* SCC at para 33). Third, *May* itself advocates for an approach that "[interprets] exceptions to the availability of habeas corpus restrictively" (*Chhina* SCC at para 34). Accordingly, the majority in *Chhina* modified the *Peiroo* exception as follows: "an application for *habeas corpus* will be precluded only when a complete, comprehensive and expert scheme provides for review that is at least as broad and advantageous as *habeas corpus* with respect to the challenges raised by the *habeas corpus* application" (*Chhina* SCC at para 40, emphasis added).

The majority proceeded to analyze whether, in Mr. Chhina's situation, the IRPA "provides for review as broad and advantageous as *habeas corpus*" in situations "where the applicant alleges their immigration detention is unlawful on the grounds that it is lengthy and of uncertain duration" (*Chhina* SCC at paras 47, 59). For three reasons, the IRPA's review scheme fell short of *habeas corpus*:

1) The onus in detention review proceedings under the IRPA is less advantageous to detainees than in *habeas corpus* proceedings;
2) the scope of review before the Federal Courts is narrower than that of a provincial superior court's consideration of a *habeas corpus* application; and
3) *habeas corpus* provides a more timely remedy than that afforded by judicial review (*Chhina* SCC at para 59).

On the first point, the onus in *habeas corpus* proceedings is particularly significant because it requires the state to prove the legality of an individual's detention rather than requiring an individual to prove a breach of their rights. As the *Chhina* majority discussed, the IRPA does not require the state to explain or justify the length and uncertain duration of a detention (*Chhina* SCC at para 60). Indeed, all that is required of the state under the IRPA to justify ongoing detention is to establish that one of the grounds in s 58 of the IRPA applies to the detainee:

- they are a danger to the public (s 58(1)(a));
- they are unlikely to appear for further hearings if released (s 58(1)(b));
- the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, human rights violations, or criminality (s 58(1)(c)) ; or
- their identity is uncertain or at issue (s 58(1)(d) and (e)).

If the state can establish that one of these grounds applies, the onus shifts to the detainee to prove that release is justified. In contrast, on a *habeas corpus* application, it is the state who must establish that detention is justified, not the detainee who must establish its illegality. The IRPA therefore provides a much less advantageous process for detainees in terms of onus. In addition, while the IRPA requires immigration officials to review continued detentions every 30 days, these reviews are not a "fresh and independent" look at a detainee's circumstances (*Chhina* SCC at para 62). The SCC noted with disapproval that immigration officials frequently "rely entirely on reasons given by previous officials to order continued detention" rather than "approaching each detention review afresh" (*Chhina* SCC at paras 62-63). Very little is required of immigration officials to justify decisions to keep detainees in custody; indeed, Prof. Jamie Chai Yun Liew at the University of Ottawa Faculty of Law referred to the process as "rubber-stamping" continued unnecessary detention in an interview on CBC Power Play (at 14:15).

On the second point, the only way for a detainee to challenge their detention under the IRPA is to seek judicial review of an immigration official's decision on continued detention. Even on a successful judicial review, a detainee will generally not receive an order for their release: instead, the court will send the matter back to an immigration official for redetermination. While federal courts do have the jurisdiction to make *mandamus* orders requiring immigration officials to release detainees, the majority judgment noted that such orders are extremely rare (*Chhina* SCC at para 65). Again, considering courts have the power to order a detainee's immediate release on a *habeas corpus* application, the IRPA and the federal courts provide a much less advantageous process to detainees.

On the third point, *habeas corpus* is a "swift and imperative remedy" and courts across the country prioritize the hearing of *habeas corpus* applications. Indeed, inmates in Alberta institutions recently discovered that *habeas corpus* applications are heard much more quickly than other applications dealing with possible breaches of their rights. As a result, they brought so many applications that in early 2018 the ABQB introduced a special document review procedure to prevent vexatious *habeas corpus* applications from wasting court resources. In contrast, the judicial review process available to immigration detainees under the IRPA is much slower, which creates strange absurdities when combined with the requirement that immigration officials review detentions every 30 days. As Justice Karakatsanis explains:

> Leave is required for judicial review of a detention decision made under the IRPA, and perfecting an application for leave on judicial review can take up to 85 days [citations omitted]. As the Federal Court has acknowledged, even in the best of circumstances, it is thus impracticable for judicial review to occur before the next 30-day detention review has been held, rendering the outcome of the judicial review moot [citations omitted]. The remedy of a rehearing restarts the review process, leading to further delays. This cycle of

> mootness at the judicial review stage acts as a barrier to timely and effective relief. (*Chhina* SCC at para 66)

For these reasons, the majority dismissed Canada's appeal and upheld the ABCA's decision remitting Mr. Chhina's *habeas corpus* application back to the ABQB for a hearing on the merits.

The Dissent: A Broad and Advantageous Interpretation of the IRPA

Justice Abella, the lone dissenter, would have held that instead of making *habeas corpus* available to immigration detainees, the IRPA should be interpreted in a way that gives immigration detainees "as fulsome a package of protections as does *habeas corpus*" (*Chhina* SCC at para 88). She came to this conclusion because the scheme of the IRPA already requires respect for detainees' *Charter* rights (*Chhina* SCC at para 91) and because allowing detainees to access *habeas corpus* "creates a two-tier process of detention review whereby those who choose the [IRPA's] menu are deemed to be consigned to a lesser remedial buffet" (*Chhina* SCC at para 73). In support of her position, she quoted s 3(3)(d) of the IRPA, which requires decisions made under the IRPA to be consistent with the *Charter*. She wrote, "It is far more consistent with the purposes of the scheme to breathe the fullest possible remedial life into the [IRPA] than to essentially invite detainees to avoid the exclusive scheme and pursue their analogous remedies elsewhere" (*Chhina* SCC at para 74). This approach would also have the advantage of being consistent with existing case law. As Justice Abella commented:

> This Court has repeatedly held that the IRPA scheme for the review of immigration detention decisions is a complete, comprehensive and expert scheme that is at least as broad as, and no less advantageous than, review by way of *habeas corpus*. I see no reason to depart from it now. If anything, this case presents an opportunity to confirm that the process and substance of detention reviews under IRPA should be as advantageous as *habeas corpus*, so that detainees get expeditious access to the fullest possible review of the terms and conditions of their detention. (*Chhina* SCC at para 85)

Justice Abella also discussed the administrative advantages of upholding the *Peiroo* exception's blanket exclusion on raising immigration matters in *habeas corpus* applications. She pointed out that the Immigration Division of the Immigration and Refugee Board is "an independent, quasi-judicial administrative tribunal with specialized knowledge of immigration matters, including immigration detention" (*Chhina* SCC at para 90). She would have found that allowing immigration detainees to access habeas corpus as a remedy "unnecessarily fetters the comprehensive review of the lawfulness of detention provided in the [IRPA]" (*Chhina* SCC at para 93).

Justice Abella did not discuss resourcing concerns over allowing broad access to *habeas corpus* as a remedy, as exemplified by the recent flood of *habeas corpus* applications from Alberta inmates. However, this portion of her decision demonstrates a strong preference for deference to the expertise of an administrative tribunal, and this preference may be motivated partially by concern for under-resourced and overburdened provincial superior courts. In this sense, her dissent in *Chhina* is consistent with her dissent in last year's *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 decision, in which she commented, "Access to justice demands that courts and tribunals

be encouraged to, not restrained from, developing screening methods to ensure that access to justice will be available to those who need it most in a timely way" (at para 62).

In addition, she interpreted the IRPA as precluding detainees from seeking non-IRPA remedies for unlawful detention when compared with other similar legislation. Section 162(1) of the IRPA gives the Immigration and Refugee Board "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction." Justice Abella read this section as a grant of "exclusive statutory authority" to the Immigration and Refugee Board (*Chhina* SCC at para 113). She contrasted IRPA s 162(1) with s 81(1) of the *Corrections and Conditional Release Act* (CCRA), another piece of legislation often at issue when courts perform the *Peiroo* analysis. The CCRA explicitly discusses the availability of alternative remedies such as *habeas corpus*, providing that where an inmate seeks an alternative remedy, "the review of the complaint or grievance pursuant to [the CCRA mechanism] shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy." Justice Abella reasoned, "The language [in the CCRA] reflected a legislative intent that the statutory scheme operate in conjunction with the superior courts' *habeas corpus* jurisdiction" (*Chhina* SCC at para 111). Because the IRPA contains no similar explicit recognition for alternative remedies, she concluded that Parliament had not intended detainees to have the option of seeking remedies outside the ambit of the IRPA.

Justice Abella also disagreed with the majority's assessment of the IRPA procedure as less advantageous to detainees. She explained, "Unlike *habeas corpus* applications, where the detainee must raise a legitimate ground upon which to question the lawfulness of his or her detention, the Minister bears the onus throughout of justifying the detention before the Immigration Division" (*Chhina* SCC at para 125). Indeed, there is a statutory presumption in favour of release unless the Minister can do so (*Chhina* SCC at para 124). The Minister must first establish that one of the factors set out in s 58 (discussed above) applies, and further must consider the reason for detention, the length of time in detention, factors that may assist in determining how long detention is likely to continue, delays or lack of diligence on the detainee or the government's part; and alternatives to detention (*Immigration and Refugee Protection Regulations*, SOR/2002-227, s 248). She agreed that it is not enough for immigration officials to rely on previous decisions to continue "rubber-stamping" a detention, but would have held that the IRPA already contains provisions that mandate a "fulsome review of the lawfulness of detention" (*Chhina* SCC at para 127), including provisions that require immigration officials to comply with the *Charter*.

The majority judgment dealt with the realities of "maladministration" and "[cycles] of long-term detention" under the existing IRPA scheme by allowing detainees access to a remedy external to the IRPA. In contrast, Justice Abella would have dealt with these concerns by taking the *Chhina* decision as an opportunity to strengthen the administrative immigration scheme, emphasizing immigration officials' obligation to weigh detainees' constitutional rights. If immigration officials fail to consider detainees' constitutional rights, she seems to be saying, it is not because they were fettered by their enabling legislation.

Conclusion

The scope of the *Peiroo* exception as modified by the majority in *Chhina* may be narrow enough that provincial superior courts will not experience extra strain on limited resources, such as the extreme increase in *habeas corpus* applications that took place in Alberta between 2017 and 2018. To the extent that Justice Abella's dissent may be read as expressing concern over this possibility or the spectre of "forum shopping, inconsistent decision making, and multiplicity of proceedings" (*Chhina* SCC at para 114), her misgivings may be unwarranted. Importantly, the rephrased *Peiroo* exception extends the remedy of *habeas corpus* to immigration detainees only where the IRPA does not provide for a comprehensive enough review of the specific concerns raised in the *habeas corpus* application. It will still be open for provincial superior courts to find that on the specific facts of a *habeas corpus* application from an immigration detainee, the IRPA provides a sufficiently broad and advantageous scheme.

However, nothing in either the majority or the dissent should be read as discouraging immigration officials from considering detainees' *Charter* rights at every stage of the IRPA process. If expanding *habeas corpus* to immigration detainees, as the majority in *Chhina* did, provides the impetus needed to make an opaque and oppressive immigration scheme more responsive to *Charter* concerns, then it is the right decision. However correct Justice Abella may be that the current legislation already empowers immigration officials to consider detainees' *Charter* rights, it seems clear, and concerning, that they do not consistently exercise that power.

This post may be cited as: Amy Matychuk, "Canada v Chhina: Supreme Court Makes Habeas Corpus Available to Immigration Detainees" (May 17, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/05/BLOG_AM_CHHINA.pdf