COURT OF APPEAL FOR ONTARIO

CITATION: Chaudhary v. Canada (Public Safety and Emergency Preparedness), 2015 ONCA 700
DATE: 20151020
DOCKET: C60222, C60223, C60224 and C60225

Juriansz, Rouleau and Hourigan JJ.A.

BETWEEN

Amina Chaudhary, Michael Mvogo, Carmelo Bruzzese and Glory Anawa

Appellants

and

Minister of Public Safety & Emergency Preparedness, Minister of Citizenship & Immigration, Attorney General of Canada, Attorney General of Ontario, and Superintendent of the Central East Correctional Centre

Respondents

Jean Marie Vecina, for the appellants Michael Mvogo and Amina Chaudhary

Barbara Jackman, for the appellant Carmelo Bruzzese

Swathi Sekhar, for the appellant Glory Anawa

Martin Anderson, Jocelyn Espejo-Clarke, Nicholas Dodokin, and Sophia Karantonis, for the respondents

Heard: May 6, 2015

On appeal from the final judgment of Justice Kenneth L. Campbell of the Superior Court of Justice, dated March 6, 2015, with reasons reported at 2015 ONSC 1503.

Rouleau J.A.:

OVERVIEW

[1] The appellants have been in detention awaiting deportation for periods ranging from just over two years to in excess of eight years. Their continued detentions have been confirmed at each 30-day review conducted by the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB"). The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") provides that a detainee can seek judicial review of ID decisions in the Federal Court, with leave. On a very few occasions, some of the appellants did seek such review. None but one of the reviews were successful. All remained detained when this appeal was heard.

[2] The issue raised in this appeal is whether the appellants can, instead of seeking judicial review in the Federal Court, apply to the Superior Court of Justice for *habeas corpus* to challenge their continued detentions.

[3] *Habeas corpus* is an essential remedy in Canadian law and access to it is enshrined in s. 10(c) of the *Canadian Charter of Rights and Freedoms*. However, it is well established that in immigration matters, where a complete, comprehensive and expert statutory scheme provides for a review that is at least as broad as and no less advantageous than *habeas corpus*, *habeas corpus* is precluded. This is commonly known as the "*Peiroo* exception", so named for this

court's decision in *Peiroo v. Minister of Employment and Immigration* (1989), 69 O.R. (2d) 253 (C.A.), leave to appeal refused, [1989] S.C.C.A. No. 322.

[4] On the agreement of the parties, the sole issue addressed by the applications judge was the court's jurisdiction to consider the *habeas corpus* applications. The applications judge concluded that the court should decline to exercise its *habeas corpus* jurisdiction. In his view, the *IRPA* put into place a comprehensive statutory review mechanism as broad and advantageous as *habeas corpus*.

[5] The appellants maintain that where, as here, a detainee argues that the detention has become illegal because of its length and the uncertainty of its continued duration, the *Peiroo* exception does not apply. This is because the challenge is not to the immigration matters themselves, but rather to the continued detention beyond what can be justified for immigration-related purposes under the *IRPA.* In such circumstances, the appellants argue that continued detention contravenes the detainee's ss. 7 and 9 *Charter* rights and *habeas corpus* should be available as its ambit of review is broader and more advantageous to the detainee than the scheme established by the *IRPA*.

[6] The respondents submit that the *Peiroo* exception applies and that it removes all immigration matters from the ambit of the courts' *habeas corpus* jurisdiction. They argue that the applications judge's decision should stand.

[7] Upon a careful review of *Peiroo* and the cases that followed, I reject the respondents' submission that the *Peiroo* exception is as broad as they submit. I conclude that *Peiroo* does not create a blanket exclusion for all immigration matters, and further, that the exception does not apply in the circumstances of the cases under appeal. For the reasons that follow, I have concluded that the appeals should be allowed.

BACKGROUND

A. The appellants

(1) Carmelo Bruzzese

[8] Carmelo Bruzzese is a citizen of Italy and has been a permanent resident of Canada since 1974. He was 65 years-old at the time of the appeal hearing in this court. He had been in immigration detention since his arrest by the Canada Border Services Agency ("CBSA") on August 23, 2013. At the time of the hearing of this appeal, Bruzzese had been detained for one year, eight months. He was reported under s. 37(1)(a) of the *IRPA* for inadmissibility on grounds of his membership in a criminal organization. There is no evidence he has been convicted of any crime in Canada or abroad. Bruzzese has strong ties to Canada: his wife and his five adult children are Canadian citizens. He also owns property in Canada.

[9] It is alleged that Bruzzese is a high-ranking member of the ‘Ndrangheta, a powerful Mafia-type organization based in Italy’s Calabria region. ‘Ndrangheta operates across the globe and is involved in drug trafficking, money laundering, economic and financial crimes, extortion, corrupt tendering, weapons trafficking and prostitution. Bruzzese is the subject of an Interpol warrant for Mafia association. There was also an Italian warrant issued for his arrest for Mafia-type unlawful association pursuant to the Italian Criminal Code; however, as there is no equivalent offence in Canada’s *Criminal Code*, he could not be extradited to Italy to face those charges.

[10] There are 15 ID detention review decisions included in the record. Each of the decisions concluded that Bruzzese’s detention should continue, based on two grounds: that he was unlikely to appear for removal from Canada if he was found inadmissible after his admissibility hearing (*IRPA*, s. 58(1)(b)); and that he was a danger to the public (*IRPA*, s. 58(1)(a)) due to his association with a criminal organization (*Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 246(b) (“*IRP Regulations*”)).

[11] Bruzzese obtained leave to seek judicial review in the Federal Court of two ID’s decisions. Justice de Montigny heard and dismissed Bruzzese’s judicial review application: *Bruzzese v. Canada (Public Safety and Emergency Preparedness),* 2014 FC 230, 24 Imm. L.R. (4th) 97. The judicial review was of

the two above-mentioned decisions, but the application judge considered three later decisions that also continued Bruzzese's detention.

[12] The application judge concluded that considering the high degree of deference that the Federal Court must accord to the ID's determinations, he was unable to find that the decisions fell "outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (para. 84).

(2) Glory Anawa

[13] Glory Anawa is believed to be a citizen of Cameroon, but Cameroon will not recognize her documents or identity. She was 29 years old at the time of this appeal hearing. She has been detained since the beginning of February 2013, about two years, three months by the time of the appeal hearing. She is being detained pending the issuance of a travel document by Cameroon. The basis for her detention is that she is unlikely to appear for removal.

[14] Anawa says she was born in Cameroon, but she never had a birth certificate or national identity document from Cameroon. In 2006, she fled from Cameroon to Finland and claimed asylum. She then went to Nigeria. On February 6, 2013, Anawa entered Canada from Nigeria alone on a false British passport and claimed asylum. She was detained and taken to an immigration holding centre in Toronto. She was two months pregnant at the time. She soon withdrew her asylum claim, and the Minister commenced removal proceedings

against her. She was flown to the High Commission of Cameroon in Ottawa to obtain a travel document, but Cameroonian authorities refused to recognize her identification documents. In August 2013, Anawa gave birth to her son, while in detention. Her son remains in detention with her.

[15] In March 2014, Anawa filed a pre-removal risk application. Upon filing this application, she provided a different story about her travel history, stating that her documents from Finland were forged and that she had never been to Finland. Her application was refused. Anawa then reverted to her original story. In June 2014, Anawa filed a permanent residence application on humanitarian and compassionate grounds. This application was refused, and judicial review is in process.

[16] At the last review contained in the record, Anawa's counsel submitted that Anawa's detention had effectively become indefinite because the prospects of obtaining a travel document from Finland were essentially non-existent. Minister's counsel responded that Finnish authorities were still in the process of getting a travel document for Anawa, and that her detention was not indefinite as Finnish officials had not provided a definitive response on the matter.

[17] The ID member ordered her continued detention, saying: "I have no new evidence or arguments today that would leave me to make a different finding in respect to you being a flight concern." The member also addressed the length of

detention, and stated that it did not weigh in favour of release here because Anawa had been the cause of much of its lengthiness. Although the member agreed that some timelines should be in place with respect to a response from Finnish officials, the Minister had been diligent. Anawa’s detention was not indefinite because the process was moving forward and Finland had not stated that it would not issue a travel document.

(3) Amina Chaudhary

[18] Amina Chaudhary is either a citizen of India or the United Kingdom. At the time of the appeal hearing, she was 53 years old. She immigrated to Canada in 1977. In 1984, Chaudhary was convicted of first-degree murder for strangling a nine-year old boy and sentenced to life in prison, with no parole eligibility for 25 years. She lost her permanent resident status as a result, and was ordered deported in January 1987. In early 2006, when Chaudhary became eligible for day parole, the ID detained her on the basis that she was unlikely to appear for removal. She was released by the ID in February 2006, on a bond. However, in May 2010, Chaudhary’s day parole was revoked for suspicious behaviour, of which she was later cleared. She became eligible for day parole again in August 2012.

[19] Chaudhary has been detained pending removal under the *IRPA* since September 2012, two years, eight months at the time of the appeal hearing.

However, she is only detained for immigration purposes for a maximum of 82 hours every time she is scheduled for an unescorted temporary absence from prison, which can occur once per month, by order of the parole board. The impediment to her removal is her lack of a travel document. She applied for travel documents from both the United Kingdom and India, but both countries have refused to issue these documents. Chaudhary states that officials from the consulates of these two countries told her that neither a passport nor a travel document would issue in the future.

[20] On a review in October 2014, the ID member stated that there was “no indication before [him] that [Chaudhary had] been obstructing the process to obtain a travel document and so because of this [he was] a little concerned about length of future detention.” Despite the prospect of a lengthy detention, there was no alternative to consider, let alone one that would offset the concerns in her case. The ID member ordered Chaudhary’s continued detention.

[21] On her subsequent detention review, the ID member concluded that Chaudhary’s detention should continue on the basis that she is unlikely to appear for removal, “essentially for the same reasons that [she had] been given … at previous detention reviews.” The member noted that Chaudhary had attempted to frustrate the travel document process by lying to both Indian and British authorities about her citizenship, and rejected the argument that she was stateless. With respect to the length of detention, the member noted that the

majority of time Chaudhary was detained was not technically immigration detention. Ultimately, the length of her detention was due to delays Chaudhary herself caused by not being forthright with immigration officials. With respect to future length of detention, the member noted again that it did not outweigh all the other factors.

(4) Michael Mvogo

[22] Michael Mvogo is originally from Cameroon. He came to Canada from the United States as a visitor under the false identity of a US citizen. He was arrested by the CBSA in September 2006, after a criminal conviction brought him to the attention of immigration authorities. He had thus been in immigration detention for about eight years, eight months at the time of the appeal hearing.

[23] After confirmation that he was not a US citizen, Mvogo said he was from Haiti. In January 2011, Mvogo gave his true identity. At the time of the appeal hearing, Cameroon officials had not issued a travel document.

[24] On April 20, 2014, the Working Group on Arbitrary Detention of the UN Human Rights Council opined that Mvogo's detention violated article 9 of the *Universal Declaration of Human Rights* and articles 9 and 12 of the *International Covenant on Civil and Political Rights*, and that his continued detention was unjustified. It made this determination without the benefit of information from

Canadian authorities, who had not responded to the Working Group's request for details.

[25] Mvogo underwent many detention reviews. On a detention review in July 2013, the ID member accepted that Mvogo was being more cooperative than he had been in the past, which lent some weight in his favour. However, the member still deemed him a flight risk. The member ordered Mvogo's continued detention. Although the member was very concerned about the number of years that Mvogo had spent in detention already, he noted that the situation was created largely by things outside of the CBSA's control. Up until 2011, it was created by Mvogo. The CBSA was investigating and trying to obtain a travel document for Mvogo, and there was no lack of diligence on its part in that respect.

[26] Mvogo challenged three detention review decisions in Federal Court. However, his applications for leave and judicial review were dismissed for two of them. He was successful in quashing one of his earlier reviews, while he was still claiming to be an American citizen, for reviewable error.

B. The statutory framework under the *IRPA*

[27] Before discussing the applications judge's decision and the issues in this appeal, it is important to outline the statutory scheme for detention review under *IRPA*, as it is deeply connected to what the parties argue. I will also briefly

review, in the subsequent section, the importance and broad application of the writ of *habeas corpus*.

[28] The scheme of immigration detention and its reviews is set out in Division 6 of the *IRPA*. Detentions are initially ordered by immigration officers or the ID, a division of the IRB. Detentions are then automatically reviewed by the ID based on timelines and criteria set out in the legislation and regulations. The detainee or government can seek judicial review of the ID's review decision in the Federal Court.

(1) Initial detention (s. 55 of the *IRPA*)

[29] An immigration detention must be for an immigration-related purpose: to detain someone under the *IRPA*, an immigration officer must have reasonable grounds to believe the individual is inadmissible to Canada and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal or a proceeding that could lead to the making of a removal order. Also, a foreign national can be detained if an immigration officer is not satisfied of his or her identity in the course of any procedure under the *IRPA*. Additionally, a permanent resident or foreign national can be detained on entry into Canada if an immigration officer considers it necessary for an examination to be completed, or has reasonable grounds to suspect the individual is inadmissible on grounds of

security, violation of human or international rights, serious criminality, criminality or organized criminality.

[30] Designated foreign nationals, being those who come to Canada as part of a group and whose arrival the Minister has designated as irregular (often in the case of human smuggling), must be detained.

[31] Finally, the ID itself may, pursuant to s. 58(2), order the detention of a permanent resident or foreign national if it is satisfied that the person is the subject of an examination, an admissibility hearing, or a removal order, and that he or she is a danger to the public or is unlikely to appear for the examination, admissibility hearing or removal from Canada.

(2) Review of continued detention

(a) Timelines for review

[32] When a permanent resident or foreign national is detained under the *IRPA*, the ID must be notified. The ID must then conduct reviews of the detention at periodic intervals. It must hold the first review within 48 hours after the individual is detained, or without delay afterward (s. 57(1)). It must conduct the second review of the reasons for the continued detention within seven days of the first review. From that point forward, it must review the reasons for continued detention at least once during each 30-day period following each previous review (s. 57(2)).

(b) The review – the hearing and review criteria

[33] In a review, the ID must, where practicable, hold a hearing, and hear the matter without delay (s. 173(a)). The detainee has the right to be represented by legal or other counsel, at his or her own expense (s. 167(1)). The ID must release the detainee unless it is satisfied, taking into account prescribed factors, that he or she meets one of the criteria in s. 58(1). The statutory criteria that would justify continued detention generally touch on the necessity of detention:

> 58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that
>
> > (*a*) they are a danger to the public;
> >
> > (*b*) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
> >
> > (*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
> >
> > (*d*) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or
> >
> > (*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the

> subject of the designation in question has not been established.

[34] The prescribed factors, referred to in s. 58(1), that the ID must take into account are outlined in detail in the *IRP Regulations.* The most relevant factors for the instant appeals appear in s. 248 of the *IRP Regulations*:

> 248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:
>
> (*a*) the reason for detention;
>
> (*b*) the length of time in detention;
>
> (*c*) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
>
> (*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
>
> (*e*) the existence of alternatives to detention. [Emphasis added.]

[35] If the ID orders the detainee's release, it may impose any conditions it considers necessary or that are prescribed (ss. 58(3) and (4)).

(c) The review panel – composition and powers of the ID

[36] Each review is conducted by a single member of the ID. Members of the ID are not Governor in Council appointees and they need not be lawyers. They are public servants appointed in accordance with the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13. The ID has, in respect of proceedings brought before it under the *IRPA*, sole and exclusive jurisdiction to hear and determine all

questions of law and fact, including questions of jurisdiction (s. 162(1)). It has the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11, and may do any other thing it considers necessary to provide a full and proper hearing (s. 165 of the *IRPA*). It must deal with proceedings as informally and as quickly as the circumstances and considerations of fairness and natural justice permit (s. 162(2)).

(3) Judicial review of ID's decisions

[37] Pursuant to s. 72(1) of the *IRPA*, a detainee can apply for leave to the Federal Court for judicial review of the ID's decisions on continued detention. The detainee must file the application within 15 days after he or she is notified or becomes aware of the decision. The leave application must be disposed of without delay and in a summary way. If leave is granted, the judicial review hearing takes place no sooner than 30 days and no later than 90 days after leave is granted, unless the parties agree to an earlier day. The judicial review application must also be disposed of without delay and in a summary way. A detainee can appeal the decision of the Federal Court on judicial review to the Federal Court of Appeal only if the Federal Court judge certifies that a serious question of general importance is involved, and states the question.

C. The writ of *habeas corpus*

[38] The prerogative writ of *habeas corpus* is “a cornerstone of liberty” and “a means of judicial control over the arbitrary behaviour of the executive government”. It is “one of the most important safeguards of the liberty of the subject”: M. Groves, “*Habeas corpus*, Justiciability and Foreign Affairs” (2013) 11:3 N.Z. J. Pub. & Int’l L. 587, at p. 588. It is also “the most significant means of protecting individual liberty”: R.J. Sharpe, J. Farbey & S. Atrill, *The Law of Habeas Corpus*, 3rd ed. (New York: Oxford University Press, 2011), at p. 1. The writ is thus often referred to as the “Great Writ of Liberty”: see *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 19; *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 645. It has also been described as “the great and efficacious writ, in all manner of illegal confinement”: D. Parkes, “The ‘Great Writ’ Reinvigorated? *Habeas corpus* in Contemporary Canada” (2012) 36 Man. L.J. 351, at p. 352.

[39] Most significantly in Canada, it is guaranteed by s. 10(c) of the *Charter,* which reads as follows: “Everyone has the right on arrest or detention … to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.” As explained by the Supreme Court of Canada in *May,* at para. 22:

> *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter*

> *of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*).

[40] Sharpe at p. 21 described the traditional form of review available on *habeas corpus* as follows:

> The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given by the party who is exercising restraint over the applicant.

[41] It is well established that *habeas corpus* jurisdiction lies almost exclusively in the superior courts of the provinces. Included in this broad jurisdiction is the authority to hear *habeas corpus* applications with *certiorari* in aid "to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal" as defined by s. 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7: *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 626.

[42] *Habeas corpus* is issued as of right and as a matter of principle should "not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant" (*May,* at para. 44). The Supreme Court has outlined two areas where a

superior court should exercise its discretion to decline *habeas corpus* jurisdiction. The first exception is in the criminal context. *Habeas corpus* cannot be used to challenge the legality of a conviction. The appeal processes must be followed.

[43] The second exception is pertinent to these appeals. The Court, citing *Peiroo,* explained that a second limitation "gradually developed in the field of immigration law" and is a "limited discretion to refuse to entertain applications for prerogative relief in immigration matters" (*May*, at para. 39). In those matters, where there is a "complete, comprehensive and expert statutory scheme [in place] which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded" (*May,* at para. 40).

[44] With this legal context in mind, I will now discuss the applications judge's decision.

D. The decision of the applications judge

[45] The four appellants brought applications for *habeas corpus* with *certiorari* in aid to the Ontario Superior Court of Justice, claiming their continued detentions were unlawful and seeking immediate release.

[46] The applications judge determined that the court should decline to exercise its *habeas corpus* jurisdiction to determine the applications. He found, relying on *Peiroo*, that the comprehensive statutory mechanism in place for the review of

detentions in connection with pending immigration matters was the appropriate vehicle for prompt review of the lawfulness of detentions in immigration matters. He concluded that the legislative scheme permitted an ambit of review at least as broad and advantageous as the traditional scope of review by means of *habeas corpus*.

[47] The applications judge noted the legislative scheme's automatic and regular reviews, as well as the fact that the onus rests on the Minister to demonstrate that continued detention is justified. The applications judge also noted that the ID must consider various factors on review, including the reason for detention, the length of detention and alternatives to detention. He referenced the speedy and informal nature of immigration detention hearings, the availability of expeditious and summary judicial review by the Federal Court, as well as the possibility of appeal to the Federal Court of Appeal.

[48] The applications judge noted that leave applications for judicial review could be expedited, and that Catzman J.A. in *Peiroo* had expressly considered and rejected the argument that the leave requirement rendered judicial review less advantageous as compared to *habeas corpus*. Furthermore, he found that the ID and the Federal Court have expertise in dealing with the lawfulness of continued detention in the context of ongoing immigration matters. The fact that the appellants might not be successful there did not render the Federal Court either inappropriate or ineffective.

[49] The applications judge agreed with the Crown's submission that a line of cases following *Peiroo* held that a decision to detain is an immigration-related matter and the scheme put in place by Parliament for review of these decisions is "complete, comprehensive and expert" (see also *May*, at para. 50). As a result, the applications judge agreed that there were "obvious policy reasons" (*May*, at para. 35) supporting the exercise of discretion to decline *habeas corpus* jurisdiction: *habeas corpus* would simply amount to a collateral attack on decisions made where the "legislation has created a complete, comprehensive and expert procedure for the judicial review of administrative decisions impacting upon individual liberty".

ISSUES

[50] The issue raised by these cases is whether *habeas corpus* with *certiorari* in aid is available to persons claiming that, because of the length and the uncertainty of continued duration, their continued detentions pursuant to decisions of the ID have become illegal.

[51] The appellants maintain that the applications judge erred in two ways. First, the applications judge gave an overly broad interpretation to the line of cases interpreting and applying *Peiroo*. Second, the applications judge erred in focusing on the process created by the legislation, which provides for periodic reviews by the ID of the reasons for detention, rather than on the appellants'

claim that their continued detentions were illegal and in breach of their *Charter* rights. In the appellants' submission, had the court's analysis focused on determining the legality of the detentions, the court would have concluded that judicial review of the decisions of the ID by the Federal Court, with leave, was not as broad as that available by way of *habeas corpus* with *certiorari* in aid, and was less advantageous.

[52] The appellant Carmelo Bruzzese also argues that his removal for immigration purposes is a disguised extradition, and that it is an improper use of the *IRPA* scheme and an abuse of process.

[53] The respondents argue that the applications judge correctly found that the *Peiroo* exception properly applied to these cases, because Parliament has put in place a complete, comprehensive, and expert scheme for the review of immigration detention. As a result, they submit that the appeals should be dismissed.

[54] For the reasons that follow, I have concluded that the *Peiroo* exception is not a blanket exclusion of *habeas corpus* in immigration-related matters. Further, after reviewing the legislative scheme for review of immigration detention, I consider that where, as in the current appeals, the issue is the legality of a continuing lengthy detention of uncertain duration, the review process created by the *IRPA* is not as broad and is less advantageous than *habeas corpus*.

ANALYSIS

A. Does *Peiroo* exclude the writ of *habeas corpus* in all matters related to immigration law?

[55] The appellants argue that *Peiroo* and the Supreme Court of Canada cases that have confirmed the *Peiroo* exception do not go as far as the respondents suggest. The cases do not stand for the proposition that anyone involved with the immigration system is deprived of *habeas corpus*. I agree.

(1) *Peiroo*

[56] *Peiroo* involved an Iranian citizen who, upon arrival in Canada, made a refugee claim. Following an inquiry, the Convention Refugee Determination Division of the Immigration and Refugee Board determined that Peiroo did not have a credible basis for her claim. A removal order issued pursuant to the provisions of then-relevant legislation, the *Immigration Act*, R.S.C. 1985, c. I-2.

[57] The claimant contested this finding and the removal order's issuance. She applied to the Supreme Court of Ontario for the issuance of a writ of *habeas corpus* with *certiorari* in aid. Her application was dismissed, and she appealed to this court. Pending the hearing of the appeal, the execution of her removal order was stayed and she was released from detention on strict terms.

[58] Catzman J.A., writing for the court, framed the sole issue on appeal as whether the court should exercise its discretion to decline to grant relief upon the

habeas corpus application, because alternative remedies were available to impugn the proceedings taken against the claimant.

[59] Catzman J.A. determined that the court should exercise its discretion and declined to grant *habeas corpus* relief. He came to this conclusion based on his finding that the available remedies under the *Immigration Act* were not less expeditious or advantageous than *habeas corpus* because:

- the grounds and scope for review were as broad or broader than those available on *habeas corpus*;
- the requirement for leave to appeal or to seek judicial review did not make the alternative remedy less advantageous; and
- any alleged disadvantage with respect to the availability or timeliness of a stay under the alternative remedy was not made out.

[60] The ratio in *Peiroo*, therefore, is that a comprehensive alternative remedy to *habeas corpus* was in place within the administrative structure created to regulate immigration matters, and this alternative remedy was as broad and as advantageous to the detainee as would be *habeas corpus*. In those circumstances, a provincial superior court should exercise its discretion and decline to grant relief upon the application for *habeas corpus*.

[61] It is important to consider the context for this holding. The *habeas corpus* application was brought to challenge the finding that Peiroo had no credible basis

for her refugee claim, and her removal order. The *habeas corpus* application was clearly a collateral attack on core immigration decisions: that she did not qualify as a refugee and that she should be deported. It fell squarely within the expertise of the immigration authorities and of the Federal Court that routinely deal with such issues. There were strong policy reasons for declining jurisdiction.

[62] In *Peiroo*, the *habeas corpus* application was not directed to whether detention was warranted pending disposition of the immigration issues. In fact, by the time the matter reached this court, the claimant had applied for and been released on conditions.

[63] It is apparent, therefore, that the *habeas corpus* applications in the instant appeals are quite different. They do not seek a determination of the ongoing immigration matters. They seek a determination as to whether the continued detentions of the appellants are illegal.

(2) Other cases that followed *Peiroo*

[64] As mentioned above, the Supreme Court of Canada confirmed the *Peiroo* exception to *habeas corpus* in other cases. The respondents argue that these authorities have broad application and constitute binding authorities that are dispositive of these appeals. I disagree.

[65] The 2005 case of *May* dealt with an application for *habeas corpus* in the context of a transfer of detainees from a minimum-security institution to a

medium-security institution. The Supreme Court was asked to decide whether the appellant detainees could bring an application for *habeas corpus* in provincial superior courts to review the prison's decision on their detentions. The government argued that the proper proceeding was by way of judicial review to the Federal Court. The Court ruled that *habeas corpus* jurisdiction should not be declined merely because an alternative remedy exists. Jurisdiction should only be declined in limited circumstances, where one of the two established exceptions applies. Where neither exception applies, the existence of an alternative remedy means that the applicant may choose whether to proceed through the alternative remedy (i.e. judicial review) or by way of *habeas corpus.* The option belongs to the applicant (para. 44).

[66] Most recently, the Supreme Court was again asked to decide on the issue of *habeas corpus* in the context of a prison transfer. In *Khela v. Mission Institution,* 2014 SCC 24, [2014] 1 S.C.R. 502, the Court reiterated the concurrent jurisdiction of the superior courts and the Federal Court in considering the lawfulness of a transfer of a detainee between institutions.

[67] The respondents also refer to the cases *Reza v. Canada*, [1994] 2 S.C.R. 394 and *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631. In *Reza,* the Supreme Court confirmed the motions judge's decision to decline to grant declaratory and injunctive relief to restrain a removal order. The second case, *Idziak,* involved an appellant who the United States wanted extradited and who

had sought *habeas corpus* with *certiorari* in aid in the Supreme Court of Ontario to set aside the warrant of surrender.

[68] In my view, none of those cases go as far as suggested by the respondents. Although *Reza* was an immigration case, it did not involve *habeas corpus*. It concerned declaratory and injunctive relief in the context of a constitutional challenge to immigration legislation. This distinction is noteworthy because the remedies sought were both discretionary and were available in both the provincial courts and the Federal Court. This is in contrast to *habeas corpus*, which is a non-discretionary remedy and is available only in the provincial superior courts. The Federal Court has no jurisdiction to grant it. *Reza*, therefore, is of no assistance in resolving the issue herein.

[69] The three other cases were not immigration cases. *Idziak* was an extradition case, and the *May* and *Mission* decisions involved a challenge of the legality of the transfer of prisoners to higher security facilities. The relevance of these cases is that all refer to and confirm the *Peiroo* exception. They confirm that *Peiroo* is good law and, together with *Reza* and *Pringle v. Fraser* [1972] S.C.R. 821, stand for the proposition that "in matters of immigration law, because Parliament has put in place a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded" (*May,* at para. 40).

[70] The court was careful, however, to explain that:

> Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited (*May, at* para. 50).

[71] I do not interpret these decisions as having created, as the respondents suggest, a wholesale exclusion of *habeas corpus* in any case where an applicant is subject to immigration procedures. The Supreme Court, using *Peiroo* as an example, held that *habeas corpus* cannot be used to mount a collateral attack of immigration decisions, where a complete, comprehensive and expert procedure for review of these decisions exists. In *Peiroo,* the challenge was to a core immigration matter, a removal order. It is therefore only in cases where the procedure set out in the statute to challenge such orders is as broad as and no less advantageous than *habeas corpus* that the conditions for declining jurisdiction will be met, and the court will exercise “a *limited* discretion to refuse to entertain applications for prerogative relief in immigration matters” (*May*, at para. 39) (emphasis added).

[72] The appellants’ challenge in the present case is to the legality of the continued lengthy detentions. Where, as here, the issue raised is not, strictly speaking, an immigration law matter as in *Peiroo*, the court needs to consider

whether the issue raised falls within the category of exceptions as defined in *May*. The question a *habeas corpus* application would answer is whether the detentions, because of their length and their uncertain duration, have become illegal and in violation of the appellants' ss. 7 and 9 *Charter* rights. As such, the immigration status of the appellants will not be affected. They will still be subject to removal. All that will be decided is whether there continues to be a constitutionally valid basis for their detentions pending those immigration decisions and dispositions.

[73] This court has previously held that, although immigration matters will generally be best dealt with under the comprehensive scheme established under the immigration legislation, "there will be situations in which the Federal Court is not an effective and appropriate forum in which to seek the relief claimed. In those rare cases, the Superior Court can properly exercise its jurisdiction": *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* (1999), 49 O.R. (3d) 136 (C.A.), leave to appeal granted, [1999] S.C.C.A. No. 558, at para. 12. Although the relief sought in *Francis* was declaratory and injunctive relief, the principle expressed therein is all the more relevant when *habeas corpus* is the relief sought because that remedy, unlike declaratory and injunctive relief, is non-discretionary. It also falls squarely within the superior courts' jurisdiction.

[74] I conclude that the *Peiroo* exception is not a blanket exclusion of *habeas corpus* in all matters related to immigration law. Therefore, because the issue raised by the appellants is not a core immigration issue as was *Peiroo* and seeks only the determination of the legality of the appellants' continued detentions, these are cases that warrant a "careful evaluation" as prescribed in *May*. This careful evaluation will focus on whether the appellants' remedies for unlawful detention under the *IRPA*, including judicial review, with leave, of ID detention decisions, are at least as broad as, and no less advantageous than that available by way of *habeas corpus*.

B. Is the statutory scheme for detention review under the *IRPA* as broad as and no less advantageous than *habeas corpus*?

[75] At the outset, it is important that the issue be properly framed. The issue being raised by the appellants in their *habeas corpus* applications is not whether grounds for a period of detention under the *IRPA* exist nor the factual findings of the ID that support those grounds. Rather, it is whether they can exercise their constitutionally protected right to *habeas corpus* and to have a court rule on whether their detentions, when viewed through the lens of ss. 7 and 9 of the *Charter* and international instruments such as the *International Covenant on Civil and Political Rights*, to which Canada is a signatory, have become illegal because of their length and uncertain duration. In other words, in those exceptional cases where persons are detained for lengthy periods on immigration

matters with no end to the detention in sight, the issue is whether detainees can be deprived of their constitutional right to challenge, through *habeas corpus*, the continued detentions pending resolution of the immigration matters.

[76] Administrative tribunals do, of course, have the authority to resolve constitutional questions linked to matters properly before them if the legislator gave the tribunal the power to decide questions of law and has not clearly withdrawn the tribunal's constitutional jurisdiction. Further, the tribunal must act consistently with the *Charter* and its values when exercising its statutory functions: see *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 78. The ID of the IRB has that authority.

[77] I acknowledge, therefore, that an ID official, on a 30-day review, or a judge of the Federal court could, after taking into account the factors listed in s. 248 of the *IRP Regulations,* reach the conclusion that a continued detention violated a detainee's *Charter* rights and could no longer be justified because of its length and the uncertainty of duration. That said, the respondents only referred us to one case where a finding of indeterminate detention was made. In that case, the ID, because of the length of the detention and the availability of an alternative to

continued detention under the Ontario *Mental Health Act*, R.S.O. 1990, c. M.7, ordered release.[1]

[78] As noted earlier, however, the existence of an alternative remedy to *habeas corpus* does not mean that the court should automatically decline its jurisdiction. If, as alleged by the respondents, the review process put in place by the *IRPA* to rule on the legality of continued detentions in the appellants' circumstances is as broad as and no less advantageous than on *habeas corpus*, *habeas corpus* should be declined. If it is not as broad and is less advantageous, *habeas corpus* should be available to the appellants, who will then have the choice of proceeding through the *IRPA* scheme or through *habeas corpus* (*May*, at para. 44). I have concluded that the process of detention review under *IRPA* is not as broad and is less advantageous than *habeas corpus.*

[79] There are three critical differences between the *IRPA* process and *habeas corpus* that, taken together, make *habeas corpus* broader and more advantageous to the appellants when the issue is whether continued detentions

---

[1] The respondents cited *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435, 44 Imm. L.R. (3d) 165. In that case, the Federal Court upheld the ID's decision to release Romans, a chronic paranoid schizophrenic man held in immigration detention for more than five years, with no end to his detention in sight. However, he was not released simply because of the detention's length and uncertain duration. The ID also took into account that there was an alternative to immigration detention under the Ontario *Mental Health Act*, which would have ensured that Romans obtained the treatment he needed until he ceased to be a danger to himself and to the public. In fact, within 48 hours of the ID decision, all that changed was that Romans' detention at the Penetanguishene Mental Health Centre went from being under the *IRPA* to being under the Ontario *Mental Health Act.*

have become illegal due to their length and the uncertainty of their continued duration. Those three differences are:

- The question the court is to answer;
- The onus; and
- The review process.

[80] I will deal with each of these in turn. Subsequently, I will apply the five factors used by the Supreme Court in *May*, as they militate, in my view, in favour of concurrent jurisdiction between the superior courts and the Federal Court in immigration detention matters of the nature of those raised by the appellants.

(a) The question the court is to answer

[81] On their *habeas corpus* applications, the appellants would have to show that reasonable and probable grounds exist for their complaints. The grounds will be the exceptional length of their detentions and their uncertain continued duration. The question the court will then have to address is whether, because of their length and the uncertainty as to their continued duration, the detentions have become illegal, in violation of the detainees' ss. 7 and 9 *Charter* rights and international instruments to which Canada is a signatory. A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control. Where there is no reasonable prospect that the detention's immigration-related purposes will be achieved within a reasonable time (with

what is reasonable depending on the circumstances), a continued detention will violate the detainee's ss. 7 and 9 *Charter* rights and no longer be legal. In responding to the application, the Minister must satisfy a court that, despite its length and uncertain duration, the continued detention is still justified.

[82] This is to be contrasted with the detention review carried out by the ID where the question posed is whether *one* of the five grounds for detention listed in s. 58 of the *IRPA* has been established. According to the *IRPA,* if one of those grounds is shown to exist, the current and future length of detention are but "factors" to be taken into account in making the decision to continue detention. The ID and the Federal Court on judicial review are not tasked with the question of determining whether the immigration detention no longer reasonably furthers the machinery of immigration control and is or has become illegal based on *Charter* or human rights principles.

[83] As explained in *Canada (Minister of Citizenship and Immigration) v. B046*, 2011 FC 877, 100 Imm. L.R. (3d) 139, at paras. 54-55, the "factors" listed in s. 248 of the *IRP Regulations* were inserted to address *Charter* concerns. However, "provided that the Immigration Division addresses all of the factors and has regard to the evidence before it in assessing the factors in s. 248", the Federal Court is reluctant to intervene.

[84] The way the question is framed makes a difference. In cases such as those under appeal, the question that the court is to answer on a *habeas corpus* application is clearly more favourable to the appellants than the question to be answered on judicial review under *IRPA*.

(b) The onus

[85] The *IRPA* appropriately provides that the onus is always on the Minister to demonstrate, on a balance of probabilities, that a detention or continued detention is warranted. Once the Minister makes out a *prima facie* case for continued detention, the evidentiary burden then shifts to the detainee.

[86] When, however, the issue is whether, because of its length and uncertain duration, the detention has become illegal, the *IRPA* scheme does not place the onus on the Minister. This is because the Minister needs only satisfy one of the listed criteria in s. 58 to shift the onus to the detainee. The Minister need not explain or justify the length of the detention and its uncertain duration.

[87] In addition, the Minister can satisfy the onus simply by relying on the reasons given at prior detention hearings: see *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, 236 D.L.R. (4th) 329, at paras. 14-16. Although the *IRPA* provides that each detention review requires a fresh determination as to whether the detention should continue, and that prior decisions are not binding, it is apparent that, in practice, each hearing is not truly

a *de novo* hearing. This is because each detention review must take into consideration all existing factors related to custody, which include the reasons for previous detention orders.

[88] As explained in *Thanabalasingham*, even though prior detention decisions are not binding at subsequent reviews, the reviewing members must set out "clear and compelling reasons" for departing from them (at para. 10). Such reasons can include, for example, relevant new evidence or a reassessment of prior evidence based on new arguments (at paras. 6-10). However, given the requirement for new evidence or new arguments and given that the Minister can rely on previous decisions to establish a *prima facie* case for detention, previous decisions become highly persuasive at the very least.

[89] In theory, a detainee, who bares an evidentiary burden in the detention review after the Minister establishes a *prima facie* case, could potentially succeed in obtaining a release by showing the facts of those prior decisions are wrong or at least that they have changed since that time, warranting a different decision. However, as the length of detention increases, it becomes more and more difficult to argue that an additional 30 days spent in detention since the last review constitutes a "clear and compelling reason" to depart from the earlier disposition.

[90] Further, statistics suggest that release becomes less likely as the number of detention reviews undergone increases. In response to a request under the *Access to Information Act,* R.S.C. 1985, c. A-1, the IRB released various statistics from 2013 indicating that out of 1848 detained immigrants released that year, 1698 had undergone six or less detention reviews. This suggests that they were released within five months of the original decision to detain. Another 125 had undergone from seven to 18 reviews, suggesting that they had been detained from five to 17 months before release. The remaining 25 detainees who were released in 2013 had undergone as many as 53 reviews, suggesting that after 18 months of detention, release becomes less likely at each successive review.

[91] In contrast, on a *habeas corpus* application*,* the matter will be heard afresh with the Minister bearing the onus. *Habeas corpus* allows the court to take a step back and look at the evidence without the burden of previous ID decisions. The appellants will not be required to show that there has been a change from prior dispositions. Further, the onus on the Minister will be to show that the detention, despite its length and uncertain duration, is nonetheless legal. Simply showing that one of the listed grounds in s. 58 of the *IRPA* is present will not satisfy the onus.

(c) The review process

[92] Pursuant to the *IRPA*, the appellants can seek to have a court review the ID's decisions to continue the detention. The application for judicial review is to the Federal Court with leave.

[93] From the perspective of the appellants, there are at least two major differences between the judicial review process and *habeas corpus* that contribute to making *habeas corpus* more advantageous to the detainee.

[94] First, *habeas corpus* is non-discretionary. *Habeas corpus* issues as of right once a detainee proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of that deprivation. In contrast, under the process established by the *IRPA*, leave must be obtained. To succeed on a leave application to the Federal Court, the detainee must raise a fairly arguable case for the relief proposed to be sought: *Bains v. Canada (Minister of Employment and Immigration)* (1990), 109 N.R. 239 (F.C.A.) Further, judicial review is an inherently discretionary remedy and the court has the authority to determine at the beginning of the hearing whether the case should proceed (*Mission*, at para. 41). In that regard, the ID decision the detainee seeks to have judicially reviewed will invariably have been overtaken by subsequent 30-day reviews heard and decided before the judicial review application is heard, which will be taken into account by the Federal Court in exercising their discretion.

[95] Second, assuming the detainee obtains leave for judicial review, he or she then bears the onus of showing that the ID's decision was unreasonable, incorrect, or procedurally unfair, depending on the issue raised.

[96] This is less favourable to the detainee than *habeas corpus,* where the Minister bears the onus on the application. As explained in *Mission,* at para. 40:

> on an application for judicial review, it is the applicant who must show that the federal decision maker made an error, whereas, on an application for *habeas corpus*, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality. This particular shift in onus is unique to the writ of *habeas corpus*. Shifting the legal burden on the detaining authorities is compatible with the very foundation of the law of *habeas corpus*, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. [Citations omitted.]

(d) Additional factors militating in favour of allowing detainees to exercise their *Charter* right to access *habeas corpus*

[97] In *May*, the Supreme Court, after having identified the weaknesses in the statutory process for the review of prisoner transfer decisions, went on to assess the differences between the statutory scheme and *habeas corpus* purposively. According to the Court, a purposive approach to the question requires that we look at the entire context. In *May,* this involved consideration of five factors that the Court found militated in favour of concurrent jurisdiction and provided

additional support for allowing federal prisoners access to *habeas corpus* (para. 65). I will consider the same five factors:

- The choice of remedies and forum;
- The expertise of provincial superior courts;
- The timeliness of the remedy;
- Local access to the remedy; and
- The nature of the remedy and the burden of proof.

[98] As I will explain, each of these five factors further supports the conclusion that the appellants ought to be allowed to exercise their *Charter* right to access *habeas corpus*.

(i) Choice of remedies and forum

[99] As stated in *May,* at para. 44, "*habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant."

[100] The detainee's right to *habeas corpus* is guaranteed by s. 10(c) of the *Charter* and, as explained earlier, limits to it should be carefully evaluated. The Federal Court does not have *habeas corpus* jurisdiction, except with respect to a *habeas corpus* application by a member of the Canadian Forces serving outside Canada (*Federal Court Act,* s. 17(5)). *Habeas corpus* is vested in provincial superior courts and, in principle, because of the importance of that remedy, the

governing rule is that superior courts should exercise their jurisdiction (*May,* at paras. 50 and 67).

[101] Significantly, allowing detainees access to *habeas corpus* in the limited circumstances raised by these appeals will not interfere with the central purpose of the *IRPA*. The court's *habeas corpus* decisions will not affect the ultimate disposition of the immigration matters that underlie the detentions. The *habeas corpus* applications will deal only with whether detentions, when they have been very lengthy and are of uncertain duration, can be continued pending disposition of those immigration matters: see also *Idziak,* at pp. 652-653.

(ii) The expertise of provincial superior courts

[102] I acknowledge that the Federal Court has greater expertise in immigration matters than the superior courts and that in such matters, a superior court should, as explained in *Peiroo*, defer to the Federal Court. The issues raised by the appellants, however, are fundamentally detention decisions. Although they arise in the immigration context, the issues raised do not require the court to have expertise in immigration law. The *habeas corpus* decisions will be made weighing various factors, as well as *Charter* rights and values. These are by and large the same factors that make up the daily fare of the superior courts. The superior courts are closely connected with the administration of criminal justice, and as noted in *Mission,* at para. 57, "when a loss of liberty is involved, the

superior courts are well versed in the *Charter* rights that apply". Their expertise in this regard is well-established.

(iii) The timeliness of the remedy

[103] A hearing on a *habeas corpus* application in a superior court can be obtained more rapidly than a hearing on a judicial review application in the Federal Court. In the Federal Court, before a hearing can even be scheduled, leave must be obtained. Although leave application are to be disposed of without delay and in a summary way (*IRPA,* s. 72(2)(d)), the leave process, when added to the time required to hold the judicial review (somewhere between 30 and 90 days following the granting of leave unless the parties agree to an earlier date, *IRPA* s. 74(b)) will exceed the time required for a *habeas corpus* application.

[104] The procedure for scheduling *habeas corpus* applications varies from province to province. They will, however, be heard promptly. Although this factor favours *habeas corpus*, I acknowledge that, given the lengthy detentions already experienced by the appellants, there is not the same urgency as in other matters where *habeas corpus* is sought.

(iv) Local access to the remedy

[105] The Supreme Court of Canada has recognized the importance of local access to *habeas corpus* for inmates of both provincial and federal institutions because of the traditional role of the court as a safeguard of the liberty of the

subject: *R. v. Gamble*, at p. 635; *May*, at para. 70. Detainees in immigration matters who have been detained for a long period with no end to their detention in sight are in similarly disadvantaged positions as provincial and federal inmates, and they too have greater local access to a provincial superior court (*Mission*, at para. 47). In fairness, therefore, they should have the same ability to access the *habeas corpus* remedy locally.

(v) Nature of the remedy and the burden of proof

[106] As outlined earlier, in *habeas corpus* applications, once a legitimate ground is raised by the detainee, the onus is placed on the Minister to justify the lawfulness of the continued detention. This is the most significant advantage favouring *habeas corpus*. Also, as explained earlier, a writ of *habeas corpus* is issued as of right where the applicant shows that there is cause to doubt the legality of the detention (Sharpe, at p. 58) but a judicial review will only be heard if leave is granted by the Federal Court. The Federal Court also has the discretion not to proceed with the hearing. Finally, as noted in *May* at para. 71, the Federal Court can deny relief on discretionary grounds.

POST-HEARING SUBMISSIONS

[107] On August 25, 2015, this court was advised that Mvogo was removed to Cameroon and was therefore no longer in detention.

[108] On September 30, 2015, counsel for Bruzzese brought a motion in this court to stay Bruzzese’s deportation order pending the decision in this appeal. Juriansz J.A. dismissed the motion: see *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 678. The motion judge was not persuaded that there was a serious issue to be tried, because the decision to remove Bruzzese to Italy was independent of the issues raised on appeal. Success on appeal would confirm the jurisdiction of the Superior Court of Justice to decide on the legality of Bruzzese’s continued detention, but would not affect the validity of the deportation order. Bruzzese has since been deported.

[109] The respondents took the position that Mvogo’s and Bruzzese’s appeals were moot and should therefore be dismissed. Counsel for Mvogo and Bruzzese argued that while Mvogo and Bruzzese were no longer detained, the court should use its discretion to hear the appeals.

[110] Having regard to the factors identified in *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, I have concluded that it is appropriate to decide Mvogo’s and Bruzzese’s appeals. Both appeals were argued prior to the deportation orders in a full adversarial context. The interests of judicial economy would be better served by rendering a decision on their appeals. The appeals were limited to a determination of the jurisdiction of the court to hear the *habeas corpus* applications. This determination falls squarely within the competence of the courts to decide.

CONCLUSION

[111] In conclusion, I do not consider *Peiroo* and the other cases confirming the *Peiroo* exception to stand for the principle that *habeas corpus* is always precluded in immigration-related matters. Nor do I view the *IRPA* as having put in place “a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous” (*May*, at para. 40) where, as here, the decision sought to be reviewed is the continuation of a lengthy detention of uncertain duration.

[112] In *R. v. Gamble*, at p. 641, the Supreme Court emphasized that in matters of liberty:

> [a] purposive approach should … be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights, and in particular should be adopted when *habeas corpus* is the requested remedy, since that remedy has traditionally been used for, and is admirably suited to, the protection of the citizens' fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. The superior courts in Canada have, I believe, with the advent of the *Charter* and in accordance with the sentiments expressed in the *habeas corpus* trilogy of *Miller*, *Cardinal* and *Morin* displayed both creativity and flexibility in adapting the traditional remedy of *habeas corpus* to its new role.

[113] The applicants, who have been in immigration detentions for lengthy periods and whose detentions are to continue for an uncertain duration, should not be deprived of their *Charter* right to *habeas corpus*. They have the right to

choose whether to have their detention-related issues heard in the Federal Court through judicial review of the ID decisions, or in the Superior Court through *habeas corpus* applications.

[114] With respect to the “disguised extradition” issue raised by Bruzzese, this issue was fully litigated in the Federal Court: *Bruzzese v. Canada,* 2015 FC 922. This question is, in my view, a core immigration matter which comes within the *Peiroo* exception.

[115] As a result, I would allow the appeals, set aside the order and remit the applications of Anawa and Chaudhary to the Ontario Superior Court of Justice for consideration on the merits. I would not remit Bruzzese’s and Mvogo’s applications as they are no longer detained.

[116] I would make no order as to costs as none were sought by the appellants.

Released: October 20, 2015

“Paul S. Rouleau J.A.”
“I agree R.G. Juriansz J.A.”
“I agree C.W. Hourigan J.A.”