How long is too long? A brief analysis of lengthy and uncertain duration of immigration detention in *habeas corpus* application

by

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Table of Contents

Abstract 3
1.0. Introduction 4
1.1. Background 6
1.2. CBSA and the abuse of power 6
2.0. Conditions of Confinement in Provincial Prisons 8
2.1. Legal Responsibility for Immigration Detainees in Provincial Prisons 8
2.2. Conditions of Detention 9
2.2.1. Violence and Death 10
2.2.2. Detention and Mental Health 10
2.2.3. Detention of Children and People with pre-migration mental illness 11
2.2.4. Access to critical support 13
3.0. Discussion 13
3.1. Immigration Detainees' Rights to Habeas Corpus 13
3.2. Ogiamien v Ontario (Community Safety and Correctional Services) 15
3.3. Canada (Minister of Citizenship and Immigration) v Dadzie 16
3.4. Ali v Minister of Public Safety & Emergency Preparedness 17
3.5. Scotland v Canada (Attorney General) 18
3.6. So, how long is too long? 19
4.0. Conclusion 20

Abstract

This paper analyses relevant courts' decisions across Canada when determining whether the length of time an immigration detainee has become illegal by way of habeas corpus. Prison conditions are not suitable for immigration detainees, and violations of detainee's rights are rife – thus the lengthy detention of immigration detainees exposes them to horrific conditions of care in custody. Detainees have taken to Canadian courts to challenge, by way of habeas corpus, the length of their detention and the uncertainty regarding the date of release. The courts have held differently on the duration of detention considered to be too lengthy – in one case, 17 months was ruled as unduly lengthy, yet in another case, four and a half years was adjudged as being insufficient for a habeas corpus relief. This paper reviews the reasonings in Ontario Courts' decision in R v Ogiamen (2016), Canada v Dadzie (2016), Ali v Canada (2017), and Scotland v Canada (2017) regarding the length and uncertainty of detention that qualify for a habeas corpus relief.

Keywords: *Habeas corpus*, immigration detention, crimmigration, human rights

1.0.Introduction

This paper[1] analyses the decisions of relevant courts across Canada when determining whether the length of time an immigration detainee has become illegal by way of *habeas corpus.* Globally, immigration detention is intended as a civil procedure for holding persons awaiting confirmation of their immigration status (Silverman, 2014). Canadian immigration detention system has transitioned from a civil process to de facto criminal incarceration, with the most vulnerable persons being held in immigration holding facilities and provincial prisons across the country, even though irregular detention is a civil infraction under Canadian law (Abji, 2020). The Canada Border Services Agency typically detains irregular migrants at immigration holding centres (IHC); still, though, there is a trend now to use provincial correctional facilities instead of IHCs (Silverman & Molnar, 2016). According to the CBSA, the agency only detains high-risk detainees considered to be a danger to the public or flight risks in provincial correctional facilities (Abji, 2020). In reality, the CBSA often uses provincial jails to hold immigration detainees in places where there are no CBSA IHCs (Silverman, 2014). Even in areas where there are IHC facilities, CBSA routinely transfers immigration detainees to provincial maximum-security prisons. Canada houses one-third of immigration detainees in provincial jails, despite constituting low flight risks (Track & Paterson, 2017). Under a special arrangement with the CBSA, migrants are routinely transferred to provincial facilities and detained on behalf of the Federal Government. Worse still, these detainees are held without term limit, as there is no legislatively prescribed limit on the length of immigration detention (Silverman, 2014).

Prison conditions are not suitable for immigration detainees, and violations of detainee's rights are rife – thus the lengthy detention of immigration detainees exposes them to horrific conditions of care in custody. Detainees have taken to Canadian courts to challenge, by way of

[1] This research was conducted in the course of my practicum placement at the Ribbon Rouge Foundation Edmonton, as part of requirements for the Master of Human Rights at the University of Manitoba. I was managed the cases of three Black and Caribbean immigration detainees who had spent varying amount of time in detention without criminal charges and whose Immigration Detention Review remained unchanged after each hearing. I received calls almost daily from these detainees who had no reasonable access to the basic amenities while being locked up at the Edmonton Remand Centre, a maximum-security facility. While advocating for improvements in their conditions and attempting to get them the help they needed, I reflected on the fact that they ought not to be in a maximum-security facility nor should they have been held so long without any criminal charges. It motivated the research into immigration detainees' access to the writ of *habeas corpus*. In the course of reading on *habeas corpus*, I saw this question: *how long is too long?* I set about answering that question in this paper.

habeas corpus, the length of their detention and the uncertainty regarding the date of release (Mannu, 2020). The courts have held differently on the duration of detention considered to be too lengthy – in one case, 17 months was ruled as unduly lengthy, yet in another case, four and a half years was judged as being insufficient for a *habeas corpus* relief.

This paper reviews the reasonings in Ontario Courts' decision in *R v Ogiamen* (2016)*, Canada v Dadzie* (2016)*, Ali v Canada* (2017)*, and Scotland v Canada* (2017) regarding the length and uncertainty of detention that qualify for a *habeas corpus relief*. Some other cases, including *Ebrahim Toure v Minister of Public Safety* (2017)*,* highlight the different directions taken by the Ontario Supreme Court and the Ontario Court of Appeal. However, the paper focuses on the four cases because of the presiding justices' detailed review of the impact of the applicants' non-cooperation on what constitutes 'lengthy and uncertain duration.' Although noncooperation was not a major issue in *Scotland*, it is included in the final analysis because of certain keywords which the courts used in determining lengthy and uncertain duration. The decisions reviewed in this paper occurred before the Supreme Court of Canada's decision in *Canada v Chhina* (2019). Still, it is important to revisit them because the Supreme Court elected not to opine on the question of when detention becomes too lengthy to the point of becoming illegal or the factors to guide lower courts' determination of prolonged detention (Mannu, 2020).

This paper is divided into four parts. The first section introduces the subject and clarifies the intention and objectives of the article. The second section outlines the conditions of confinement[2], particularly in provincial jails where most detainees are housed and the legal framework on the location and length of detention and legal responsibility for the conditions of confinement in provincial prisons.[3] The third section then turns to address the grant of the writ of *habeas corpus,* its application to immigration detention and how the courts have resolved questions of lengthy and uncertain duration. In reviewing the courts' responses, the focus is on determining what the courts would consider as lengthy and indefinite duration. Section four concludes the paper

[2] The discussion on conditions of confinement has been included because the poor conditions of confinement especially transfer to provincial facilities with more restrictive conditions, can be argued to constitute substantial changes amounting to a further deprivation of liberty as laid down in the case of *Dumas v Leclerc Institute*, [1986] 2 SCR 459, 34 DLR.

[3] The discussion on the ultimate legal responsibility for the conditions of confinement has been included because most detainees would typically challenge the illegality of their detention before provincial superior courts to challenge the legality of their detention and whilst federal courts may have developed better expertise in immigration matters, immigration detention mostly occurs under provincial authorities.

by noting that whilst access to the writ of *habeas corpus* for immigration detainees is encouraging, the court's determination of lengthy detention needs to become more liberal.

1.1.Background

Canada prides itself in its open immigration policies and multiculturalism; and for years, has opened its doors to the displaced, the persecuted, the hunted, the starving and the politically oppressed (Scotti, 2017). The new norm, however, is to treat non-citizens as interlopers, illegals, threats to security, or criminals. Immigrants, migrants and asylum seekers arrive in Canada hoping to start afresh; instead, the Canadian immigration system is used to police immigrants considered as threats to the system (Scotti, 2017). The frequent use of detention and the co-mingling with the criminal populations has become the default approach to violations of Canadian immigration laws (Silverman, 2014).

Ordinarily, detention is an administrative procedure for holding non-citizens pending the determination of their visa status – the current regime of punitive and criminal incarceration runs contrary to the purposes of immigration detention (Grant, 2011). States are expected to, before imprisonment, consider alternative and less restrictive means of holding detainees, especially for asylum-seekers, children, victims of trafficking and stateless persons recognised as vulnerable groups under international law (Grant, 2011). Canada has three immigration holding Centres in Toronto, Laval, and Vancouver, with a combined bed capacity of fewer than 300 beds (Silverman, 2014). With the escalating number of immigrants, CBSA elected, instead of building new IHC facilities, hold migrants in provincial jails that host persons convicted of a crime. The conditions of confinement in provincial prisons are not ideal for most migrants, yet CBSA is unable to perform any significant oversight function in respect of provincial holds. Challenges include inadequate healthcare, hygienic maintenance, culturally insensitive services by private firms and violence by guards (Silverman, 2014).

1.2.CBSA and the abuse of power

The mandate of the Canada Border Services Agency as set out under the *Canada Border Services Agency Act* (2005) is the management of the movement of people and goods at Canadian borders. The CBSA is responsible for the direct policing of Canada's borders. The CBSA collects intelligence, detects, arrests and detains and removes foreign nationals, including asylum seekers from Canada (Track & Paterson 2017). CBSA officers have broad discretion in deciding whether

or not to detain a foreign national and the decision to detain an individual is based on four main reasons - danger to the public, inadmissibility for security reasons or violation of human rights, identity has not been established, and flight risk (Silverman & Molnar, 2016).

CBSA officers have powers similar to the police; they may carry firearms and are authorised to use reasonable force. They have powers of arrest, detention, and ability to initiate deportation proceedings (Track & Paterson, 2017). Research indicates that over the years, the CBSA has implemented policies and practices infringing on the security, safety and protection of the human rights of asylum-seekers and refugees leading to significant negative impacts on their wellbeing and, in some cases, results in death (Track & Paterson, 2017).

The discretionary nature of immigration detention violates human rights. More troubling is the administration of immigration detention by the CBSA, including the increased use of provincial prisons, as opposed to "immigration hold" facilities, and the lack of a time limit on detention (Silverman & Molnar, 2016). Many immigrants spend their time in maximum-security facilities rather than detention facilities, which prolongs their pursuit of justice and reduces their chances of attaining ideal living conditions (Abji, 2020). Most of these individuals possess no criminal record or past; instead, they are held solely based on their immigration status (Abji, 2020). It would seem that detention and deportation are tools used to police migrants deemed to be dangerous, undesirable and threatening the 'safety' of Canada. Detention facilities offer harsh living conditions, and individuals suffer through the stigma of incarceration. Since 2000, at least nine people held in provincial prisons have died while in custody and the majority of the deaths are shrouded in secrecy and not widely publicised (Gros & van Groll, 2015).

There is a marked absence of the rule of law in immigration detention decisions, including about the site of detention, transfer to provincial facilities, and decisions to continue detention (Molnar, 2016). There is no independent oversight of wrongdoing through which complaints may be registered in the event of human rights violations or death, and there is no procedure for an independent review of conducts of CBSA officers (Track & Paterson, 2017). Prison staff continuously abuse their power despite laws against unjustifiable use of force or violence; these excessive and inappropriate use of physical restraints violate the right to life, freedom from torture and other cruel, inhuman or degrading treatment (Track & Paterson, 2017).

2.0.Conditions of Confinement in Provincial Prisons

The conditions of confinement for immigration detainees in provincial prisons across Canada are disparate in details depending on the location of detention. However, these conditions have the same elements – co-mingling with inmates, violence, inadequate physical and mental care, restricted access to a lawyer, community and family support. In the ensuing paragraph, the discussion opens with a review of the legal framework for the care and custody of detainees in provincial prisons. Then it addresses in detail the conditions of detention that violate the rights of detainees.

2.1.Legal Responsibility for Immigration Detainees in Provincial Prisons

Immigration detention in Canada is governed by the provisions of the *Immigration and Refugee Protection Act* (2001) and the *Immigration and Refugee Protection Regulations* (2002), both of which are silent on the location and conditions of detention for persons held for immigration reasons (Anstis, 2016). The Minister of Public Safety and Emergency Preparedness is empowered to arrest, detain and remove persons in violation of IRPA (Anstis, 2017). The Minister delegates his powers to the CBSA. Ostensibly, the CBSA has historically taken advantage of the lacuna in the laws as "unfettered discretion to detain migrants wherever, and however, it sees fit" (Anstis, 2017, 29). Only three IHC facilities exist in Canada, meaning that in regions without a dedicated IHC, detainees are held in provincial correctional facilities (Anstis, 2017). The three IHCs are located in Toronto, Laval and Quebec, so migrants outside of these three cities are likely to be detained in provincial jails. Even where in provinces with a dedicated IHC, CBSA routinely transfers detainees to provincial jails. In the Greater Toronto Area, which accounts for 60% of all detention, half of the persons detained are held in provincial correctional facilities (Gros & van Groll, 2015). Unlike those held in IHCs, migrants housed in provincial jails are subject to an uncertain legal terrain – although the CBSA is the detaining authority, provincial regulations in prisons are applicable – meaning that detainees are subject to both federal and provincial jurisdiction. This uncertainty leads to unequal conditions and problems determining the party ultimately responsible for the conditions of confinement in provincial jails.

According to the CBSA, it retains control over the conditions of detention for detainees transferred and held under federal mandate – the CBSA insists that it has ultimate legal responsibility for the health and welfare of detainees held according to the IRPA (CBSA, 2020). In reality, from the moment a detainee is handed over to provincial jail, the CBSA relinquishes

control over the conditions of confinement (Anstis, 2017). Provincial regulations make no distinction between regular holds and immigration detainees; under the Ontario *Ministry of Correctional Services Act Regulation* (1990), the province is responsible for the care, health, discipline, safety and custody of all inmates. 'Inmate' is defined broadly as every person held in any Ontario Correctional facility. Thus, the day-to-day management of detainees in provincial jail is out of the purview of the CBSA – the agency cannot directly impact the conditions of confinement including issues of care, health, access to services, hygiene and diet. Provincial authority transfers detainees to other facilities or sends them into solitary confinement without informing the CBSA (Gros & van Groll, 2015). Provincial jails co-mingle immigration detainees with criminal holds and guards are mostly uninformed and unable to tell which inmates were immigration detainees and which were criminal holds (Abji, 2020). The Canadian Red Cross in its 2017-2018 annual report aptly summarised the treatment of immigration detainees housed in provincial prison:

> when housed in correctional facilities and remand centres, immigration detainees are receiving the same treatment and follow the same rules as remanded and sentenced individuals despite their detention being administrative. Policies which are designed to manage the behaviour of persons in the criminal justice system are being applied to persons in immigration detention, such as placement in administrative and disciplinary segregation, the use of restraints, and lockdowns (Canadian Red Cross, 2018:7)

2.2.Conditions of Detention

In some provincial facilities, detainees are locked up in their cells for approximately 17 hours every day in tiny cells with all doors, windows, and locks built to maximum security prisons standards (Office of the Correctional Investigator, 2017). The immigration detention wing at the Central East Correctional Centre is cold, so prison officials give detainees three blankets when they arrive. Moulds cover significant portions of the washrooms; a detainee said: "you can use the shower but have to be careful, your skin can't touch the wall" (Gros & van Groll, 2015:31) There is an apparent lack of programming – there are no educational, vocational or social programs, and these lead to boredom and frustration for detainees. Between six to twenty-one days per month, the facility goes into lockdown with limited access to the phone or the shower; often, detainees are not given any notice or reason before prison lockdowns and maintaining control appears to be the core reason for most lockdowns (Abji, 2020). Guards are poorly trained in cultural appropriateness

and are said to be rude by talking down to detainees as if they were criminals, to get anything done, detainees would usually have to ask the guards many times (Silverman, 2014).

In the following paragraphs, this paper discusses in detail the conditions of confinement and shows a pattern of abuse, mismanagement and violations of the rights of immigration detainees.

2.2.1. Violence and Death

Death is a common theme in provincial jails. Since 2000, at least nine people have died in detention in provincial prisons (Silverman & Molnar, 2016). The general concern is the alarmingly low quality of life (Canadian Red Cross, 2018). Most of the people who died had no criminal records (Canadian Red Cross, 2018) although having no criminal records does not matter in this instance as even those with criminal records deserve to be held under appropriate conditions. Detention exacerbated their mental wellbeing and so feeling helpless, they resorted to suicide; in other cases where death was not by suicide, it was due to mismanagement by provincial authorities (Gros & van Groll, 2015:82). A Jamaican, Shawn Dwight Cole died in Toronto East Detention Center after being held for 106 days. Cole had a history of having seizures, but he did not receive the care his condition required, and this eventually led to his death. The CBSA was not aware of his demise until a month later when the Minister's counsel visited the facility for a detention hearing (Gros & van Groll, 2015). His death depicts the lack of communication and coordination between provincial authorities and the CBSA and the complete absence of federal oversight on conditions of confinement.

2.2.2. Detention and Mental Health

Generally, the impact of immigration detention and co-mingling on mental health is well documented to include depression, suicidal ideation, post-traumatic stress disorder, anxiety, panic and physical health deterioration (Silverman, 2014). Long-term detention adversely impacts detainees mental and physical health even after release (Gros & van Groll, 2015:21). Even short-term detention results in high levels of depression and PTSD because incarceration is a "serious stressor involving severe disempowerment, loss of agency, and uncertainty, all of which are predictors of depression and PTSD, even in people with a lower trauma burden" (Gros & van Groll, 2015:21). Powerlessness, boredom, uncertainty about the length of detention, loneliness, fear of deportation and feelings of shock and humiliation for being treated like criminals are some

of the stressor points which lead to mental health deterioration (Vogel, 2017). The mental health of detainees in provincial facilities is much worse compared with those held in IHCs even though this cannot be accurately measured due to challenges accessing data in provincial prisons (Gros & van Groll, 2015). The reason detainees in provincial facilities are worse off mentally is not unconnected with the co-mingling with criminal holds that occurs in provincial facilities – this explains why the feelings of shame and humiliation at being treated like criminals is a severe stressor point for detainees. The uncertainty in the length of detention is another crucial stressor point for detainees.

A study on the impact of immigration detention on mental health in Australia found that uncertainty in the length of incarceration is a repeated theme echoed by immigration detainees and the fact that this stressor is medically untreatable further exacerbates the mental state of the detainees (Gros & van Groll, 2015). Given that Canada has no legislatively prescribed limit on the length of detention, it is not improbable that this uncertainty is also a core stressor point for most detainees held in provincial prisons in Canada. The absence of culturally appropriate support in provincial jails leaves detainees with no means of getting out of the mental state that these conditions create. And when their conditions worsen, rather than providing psychosocial support, provincial prisons deploy psychiatric interventions such as segregation or transfer to a more restrictive facility intended for criminal holds (Abji, 2020). The transfer of immigration detainees to maximum security facilities is an actual and ongoing policy of the CBSA. The CBSA argues that specialised care is available in provincial jails – a false argument (IHRP, 2018). Mental health care in provincial prisons is either unavailable or inadequate, and even where they exist, they lack cultural sensitivity and appropriateness (IHRP, 2018).

2.2.3. Detention of Children and People with pre-migration mental illness

Both the IRPA and IRPR contain no provisions on the detention of vulnerable persons. However, the CBSA Policy encourages avoiding the use of incarceration for persons who are physically and mentally disabled unless there are safety and security concerns (CBSA, 2020). As admirable as this sounds, the CBSA, in reality, has no screening policy to identify such vulnerable migrants before detention (Silverman, 2014). Contrary to this policy, where a person exhibits psychological symptoms, they are transferred to prisons. Vulnerable people who have been transferred to provincial prisons include survivors of trauma, persons with mental or physical disabilities, pregnant women or nursing mothers and minors (Silverman, 2014).

Children – section 60 of the IRPA discourages the incarceration of children (*IRPA,* 2001, s 60). However, children are held either as detainees or as 'guests' of their detained parents and are subject to constant surveillance, regular searches and restricted mobility (Gros & Yong, 2016). In some instances, provincial authorities place children in solitary confinement, the consequences of which are harmful to their development (Gros & Yong, 2016). In 2016, CBSA apprehended a 16-year-old Syrian asylum seeker at the Canada-United States border at Fort Erie, Ontario. His trajectory showed an arduous journey from Syria to Egypt and then to the United States in the hopes of crossing over to Canada. For three weeks, he had no access to his family (Gros & Yong, 2016).

People with pre-migration mental health conditions – as noted elsewhere in the paper, Canada has no screening procedure for identifying people with pre-existing mental health conditions. Even when such people are behaviourally identified, they are routinely transferred to maximum security provincial jails (IHRP, 2018). Despite the well-reported impact of detention on mental health, there are no indications that CBSA or provincial authorities fully consider the state of mental health of detainees, especially during immigration review hearings. If counsel obtains mental health assessments and presents the same to the CBSA as proof of the mental health condition of their clients, it is either ignored or deemed unobjective (Gros & van Groll, 2015). Mental health is not taken into account when deciding whether a detainee should be released; it is inconsequential in determining whether a person constitutes "flight risk" or a "danger to the public" nor is it used in choosing alternatives to detention (Gros & van Groll, 2015).

At the age of 20, Uday was diagnosed with schizophrenia which he was managing through medication. When he arrived in Canada, he was apprehended by CBSA before he could collect his bags (IHRP, 2018). CBSA held him because he was unable to confirm his identity and country of origin. He asked to be allowed access to his bags so he could take his medications but was rebuffed. Given his long flight, hunger and the denial to his medication, he became aggressive and later had a seizure (IHRP, 2018:57). Later, he was transferred to the Toronto IHC from where the CBSA transported him to the Greater Toronto Enforcement Centre. There he made his claim for asylum protection but again became aggressive (IHRP, 2018). He was taken to a hospital from where he was transferred to the Metro West Detention Centre (IHRP, 2018). He was detained there for 21 months and then spent another 11 months at the Central East Correctional Centre (IHRP, 2018). He spent a total of three years in detention despite having no criminal record or official charges

laid against him. In jail, he co-mingled with the criminal population and witnessed drug use and abuse, and constant fighting, all of which he found to be very scary (IHRP, 2018). He had minimal access to a doctor; usually, the doctor met him virtually once every six weeks and only ten minutes per appointment. He had no lawyer for more than 20 months until legal aid decided to fund his defence. The IRB eventually determined that he was a de facto stateless person and was released from prison (IHRP, 2018). After his release, he found it easier to deal with his mental health since the uncertainty of detention was no longer a problem (IHRP, 2018). Uday's incarceration shows the lack of culturally sensitive approach to managing detainees with mental health issues. The management of his condition worsened in provincial prison – further evidencing the terrible conditions of confinement in provincial jails.

2.2.4. Access to critical support

Immigration detainees are denied access to the critical support they need to redress their conditions. Getting access to a lawyer is challenging because most detainees cannot afford defence attorneys, and the approval process for legal aid takes months (IHRP, 2018). Absence of interpreters creates a further barrier to understanding their legal rights as immigration detainees. In most instances, detainees have to depend on other detainees with better language skills (IHRP, 2018). Access to family and community support is also noticeably absent, and although they may call their lawyers or family members, access to the telephone is not free. Requests have to be submitted to access the phone (IHRP, 2018). While there are medical doctors stationed at most provincial prisons, accessing them is extremely difficult with most visits lasting for 15 minutes (IHRP, 2018).

3.0.Discussion

In light of the condition of confinement in most provincial facilities, the length of time and the uncertainty regarding release are critical determinants of the physical and mental health of detainees. It becomes essential to ask when detention has gone on for too long.

3.1.Immigration Detainees' Rights to Habeas Corpus

Canada has no legislatively prescribed limit on detention for immigration detainees. Combined with the horrifying conditions in prison, Canada is violating detainee' sections 7, 9, and 12 rights under the *Canadian Charter of Rights and Freedoms* (1982). Section 7 of the Charter

guarantees the right to life, liberty and security of the person. The ruling in *Singh v. Canada* [1985] established that section 7 rights extend to "every human being who is physically present in Canada" and section 7 rights include the rights to life, the right to act without physical restrictions imposed by the Government and the freedom from psychological harm from the Government (Basok, Tanya & Carasco, 2010). Canada violates these rights by (i) detaining immigration detainees in provincial jails reserved for criminal holds even though most have no past criminal records and (ii) detaining them indefinitely without a limit on the length of detention. Section 12 of the *Charter* protects individuals from being "subjected to any cruel and unusual treatment or punishment" (*Canadian Charter*, 1982, s 12).

The writ of *habeas corpus* provides detainees with the opportunity to question the legality of and seek reliefs for deprivation of liberty (Parkes, 2012). The right to access the writ of *habeas corpus* is enshrined in section 10 of the *Charter* that 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" (*Canadian Charter*, 1982, s 10). Section 10 guarantees the right not to be deprived of one's liberty unless such deprivation accords with the principles of fundamental justice and the right not to be detained arbitrarily. The Supreme Court of Canada in *Khela v Mission Institution* (2014) laid down a test for *habeas corpus* applications. The test states that a) the applicant has to show that his liberty was deprived and there is a legitimate ground to question the legality of the deprivation, and b) when the applicant fulfils the first test, the respondent must establish that the denial was within lawful allowance (Parkes, 2012). The court must then look into the substance of the case to determine the lawfulness of the deprivation (Parkes, 2012). The court typically considers whether the detaining authority has jurisdiction, whether the decision aligns with the *Charter,* whether the rules of procedural fairness were breached, or the reasonableness of the conclusion of the detaining authority (*Khela v Mission Institution,* 2014).

For many years, *habeas corpus* was inapplicable in the immigration context because of the Peiroo exception. The Peiroo exception hinges on the decision of the Ontario Court of Appeal in *Peiroo v Canada* (1989). It provides that where there is 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 advantages" *Peiroo v Canada* (1989), that statutory framework should be used. In that sense, Superior Courts should reject applications for *habeas corpus* in the immigration context. In this instance, the relevant statutory framework is *IRPA*'s immigration detention review

hearing carried out monthly by the Immigration Division. These detention reviews are ineffectual and perfunctory rather than substantive (Molnar, 2016). The Peiroo exception continued to be applied until 2015 when the Ontario Court of Appeal held in *Chaudhary v Canada* (2015) that

> 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 detainees ss. 7and 9 *Charter* rights and no longer be legal *(Chaudhary v Canada,* 2015, para 81).

The case opened access for immigration detainees to challenge the legality of their detention using *habeas corpus.* Since *Chaudhary*, some cases challenging the legality of immigration detention have been heard by courts in Canada, with varying decisions on what constitutes lengthy detention. The paper will now proceed to review the cases, particularly concerning the question of *how long is too long?* Attention is paid mainly to the reasoning of the courts in determining the length of detention that is illegal, whether the length must be cumulative or continuous and uncertainty as to when detention would end.

3.2. Ogiamien v Ontario (Community Safety and Correctional Services)

Ogiamien was first arrested in 2002 for having entered Canada illegally from the United States a year earlier (*Ogiamien v Ontario*, 2016). He was then returned to the United States to face outstanding criminal charges against him. In 2005, the United States deported him back to Canada after his criminal proceedings and failed refugee claims. The CBSA detained him till January 2006 when he was ordered to be released by the Immigration Division until his removal timeline could be determinable (*Ogiamien v Ontario*, 2016). He had two criminal infractions in 2009 and 2012, but the CBSA did not attempt to detain him. The RCMP arrested him in 2013 as a result of which he was unable to report to the CBSA as stipulated by the Immigration Division. When he was released on bail for his criminal charges in May 2014, the CBSA proceeded to arrest him. He remained in detention for 25 months (*Ogiamien v Ontario*, 2016). While reviewing the decision of the Ontario Supreme Court, the Ontario Court of Appeal rejected the AG's argument that the lower court should only have discarded the time in detention before 2014 when he was re-detained. The ONCA rejected this argument and held that his entire history of detention should be taken into account (*Ogiamien v Ontario*, 2016, para 23). Concerning certainty on when detention would end,

the ONCA accepted the lower judge's decision that "there is no way to *reasonably estimate*, with *any degree of specificity* [emphasis added], an end date to his immigration detention" (*Ogiamien v Ontario*, 2016, para 24). Although the ONCA did not provide the reasoning behind its decision, it held that 25 months was lengthy and uncertain because judging by the steps taken by the CBSA, there seemed to be "no end in sight" for the resolution of Ogiamien's immigration status (*Ogiamien v Ontario*, 2016).

3.3.Canada (Minister of Citizenship and Immigration) v Dadzie

Dadzie arrived in Canada as a towaway on June 2, 2003; he applied for refugee status in November 2003, but because he was subject to an exclusion order, his application was unsuccessful. He was scheduled for removal and expected to appear for the same on March 13, 2004 (*Canada v Dadzie,*2016). However, he failed to appear and would not be seen for the next four years until he appeared in Hamilton in October 2008 to file a new claim for status under a variant of his name (*Canada v Dadzie,*2016, para 11). He was detained for eight months and was released on bail. In February 2014, he was arrested by the CBSA for breaching his bail conditions (*Canada v Dadzie,*2016. para 15). The Immigration Division heard his case and decided that he constituted a flight risk and therefore ordered his detainment, a decision which the Division continued to maintain when he filed his application for *habeas corpus* (*Canada v Dadzie,*2016, para 16). In determining the length of his detention, the ONSC insisted that only his present detention was relevant. The court also strangely opined that only time spent in maximum-security prison was of importance. The court then proceeded to deduct time from his detention for the period of his detention that he was "uncooperative" (*Canada v Dadzie,*2016, para 46). After making the deduction and excluding his first detention, the court concluded that Dadzie had only been detained for six months, a period insufficient to constitute lengthy. On uncertain duration, the applicant's counsel argued that his detention is uncertain because the applicant's country Cote d'Ivoire had refused to recognise him or issue him a travel document. In rejecting this argument, the court ruled that the indefinite length of detention can be hung solely on Dadzie's uncooperativeness as his claim of being an Ivorian appears to be true. His refusal to cooperate with the CBSA to determine his country of origin prevented the CBSA from obtaining the relevant travel document required for his removal. Justice Clark then held that "I find that his lack of cooperation with CBSA is the real and immediate cause of the indefinite nature of his detention…...I am of the view that the applicant has not shown that his detention has been very

lengthy or, looking to the future, that it is indefinite" (*Canada v Dadzie,*2016, para 55). This simplistic view by the court offered no help for a clear framework. It is problematic because the applicant's non-cooperation should have no impact on the length or the arbitrariness of his detention (*Ogiamien v Ontario*, 2016, para 26). Therefore, the deduction of time from his detention for non-cooperation was baffling, especially because Dadzie had been in detention for two and a half years.

3.4.Ali v Minister of Public Safety & Emergency Preparedness

Ali had been in Canada since 1986, and except for a brief ten months in 1996, he had lived in Canada continuously since he first arrived (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 2). His refugee claim was unsuccessful in 1986, but the CBSA could not deport him as his country of origin was not ascertainable. However, he was deported to Ghana in 1996. The Ghanaian authorities returned him to Canada on the ground that his travel documents were obtained using a fake birth certificate (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 4). In the course of living in Canada, Ali had several criminal infractions including possession of narcotics, assault and robbery (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017). All attempts by the CBSA to determine his nationality and facilitate his deportation to that country were unsuccessful (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 5). Ali claimed that his father was Ghanaian and mother Nigerian. He moved to Nigeria with his mother at a young age, then to Germany from where they crossed over to the United States. It was the United States that he crossed the border into Canada. In the circumstance, his root in either Ghana or Nigeria could not be ascertained. CBSA insisted that their efforts to obtain useful information regarding his nationality was frustrated by Ali, who on the other claimed that his limited childhood memory and drug use impacted on his ability to provide the information the CBSA sought (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 6). He was arrested and detained by the CBSA in February 2010 and remained in detention for over seven years (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017).

The AG argued that seven years is not exceptional, particularly in light of Ali's uncooperativeness. According to the AG, Ali is the "author of his misfortune because his lack of cooperation is the single most important factor in his continued detention" (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 18). In his ruling, Justice Nordheimer found that

seven years detention cannot, under any circumstance, be "usual" or "typical", instead it would be said to be "exceptional" (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 19). Justice Nordheimer went further to consider the AG's reliance on Dadzie to show that Ali is the author of his misfortune. He ruled that every case must be viewed and "*understood in relation to their own facts*" [emphasis added] (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 25). As such, Dadzie and Ali were incomparable, given the length of Ali's detention. On the issue of non-cooperation, Justice Nordheimer clarified that Ali cooperated by permitting his pictures to be circulated to the public and allowing his fingerprints to be shared with law enforcement agencies such as INTERPOL and to be interviewed by authorities in Ghana and Nigeria (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017). Given all of these, Justice Nordheimer believed that Ali had cooperated as best as he could (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017). Regarding uncertain duration, Justice Nordheimer held that given the difficulty in ascertaining Ali's nationality, there is no "*reasonable prospect"* of "*any breakthrough in the immediate future*." As such, he found that the applicant's detention was likely to continue for an indeterminate time – "indeed, based on the current circumstances…. Mr. Ali's detention could *literally continue forever*" [emphasis added] (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 20). Going a step further, he disagreed with the decision of Justice Clark in *Dadzie*, by noting that non-cooperation should be construed against detainees in justifying their continued detention because the purpose of the *IRPA* is not to punish uncooperative detainees:

> To authorise the Government to hold a person indefinitely, solely on the basis of non-cooperation, would be fundamentally inconsistent with the well-established principles underlying ss. 7 and 9 of the *Charter*. It would also be contrary to Canada's human rights obligations (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 27).

3.5.Scotland v Canada (Attorney General)

Scotland applied for protection as Convention refugee in Canada in 2010, pending the determination of the application, he was held in a maximum-security prison in Ontario. He was later released and rearrested for some criminal infractions (*Scotland v Canada*,2017, para 2). He had been detained for a cumulative period of 17 months when he applied for a *habeas corpus* relief – his Convention refugee application was still under review at this time (*Scotland v Canada*, 2017,

para 54). On whether the detention was lengthy, Justice Morgan ruled that detention which does not fulfil the purpose for which it was set out to accomplish in the first place is unlawful because "immigration detention must reflect and not exceed its purpose of immigration control." Even where it fulfils its purpose, Justice Morgan appears to hold that the detention must be "proportional" to the purpose of the immigration (*Scotland v Canada*, 2017). In this instance, the AG confirmed that the applicant was neither a flight risk nor a danger to the public. Justice Morgan found that the detention did not serve the purpose of immigration control as the applicant had always complied with the conditions of his bail. As such, even one day in custody would be too long. Concerning uncertain duration, Justice Morgan opined that whilst indefinite detention violates an applicant's rights, merely putting a finite number of months or years on the detention is also problematic. Thus, where the length of detention is "sufficiently long to be a miscarriage of justice, then a determinate term is no different than an indeterminate term of detention" (*Scotland v Canada*,2017, para 58).

3.6.So, how long is too long?

This question has not been unequivocally resolved even by the Supreme Court of Canada. Currently, there is no straightforward and satisfactory guideline for making this determination, and each case must be analysed within the confines of its facts and context. The fact that non-cooperation remains a consideration adopted by some Judges is troubling, whilst an applicant's non-cooperation may indicate bad faith, it is not the applicant's duty to cooperate with CBSA. Also, nothing in the *IRPA* can be interpreted to mean that an immigration detainee should be punished simply because of their refusal or failure to cooperate with immigration authorities. It is hoped that future decisions would ignore this approach.

Even among Justices that refused the non-cooperation approach, there is a variance in how they chose to approach the determination. Whilst Justice Morgan decided from a practical standpoint, about whether the detention served its purpose, the other decisions were more nuanced. For Justice Morgan, a day in custody is illegal if it does not serve the purpose of immigration control. For others, detention with no end in sight is problematic and should not be allowed to stand. Where there is no reasonable estimate or reasonable prospect of when immigration will end, it violates the rights of the detainee. If, based on the facts and context of the case, there is the possibility that there would be no breakthrough capable of determining the end date of detention, such detention would be illegal as it could go on forever. Although the use of terms such as

'exceptional', 'proportional', 'reasonable estimate', or 'reasonable prospect' leaves too much room for varied decisions, there is at least hope that immigration detainees can mount a successful legal challenge to their continued detention.

4.0. Conclusion

From the moment an immigration detainee is apprehended, their path to freedom is riddled with uncertainty. The CBSA can transfer them at any time, to any location and for an indeterminate period. As previously stated in this paper, the length and uncertainty of detention is a core stressor which exacerbates the mental state of the detainees. It is worrisome that the uncertainty continues at the stage of mounting a challenge to the legality of their detention. The varied approach adopted by the court means there is no predictable outcome and leaves detainees uncertain when applying for *habeas corpus.*

However, it is encouraging to see Judges questioning the decision to locate immigration detainees in provincial facilities; this is especially relevant as detention in such facilities tends to prolong their detention and restrict their access to justice. Since it is an administrative procedure, immigration detention should ordinarily be for a brief period. In most cases, the contrary is the reality, and it is puzzling why the CBSA continues to maintain the policy of holding detainees in provincial facilities reserved for criminal holds.

> I will make one other observation. It is not clear to me why persons, in the situation of Mr. Ali, are housed in provincial detention facilities rather than in federal correctional institutions. Immigration is, after all, a matter of federal jurisdiction. I assume that this is done because it is believed that, in the vast majority of cases, the length of detention will be of short duration and, thus, provincial detention facilities are the proper place to house such persons. However, as Mr. Ali's case amply demonstrates, immigration detentions are not always short (*Ali v Minister of Public Safety & Emergency Preparedness,* 2017, para 35)

The opportunity for Immigration detainees to challenge their lengthy detention is a door that recently opened and whilst this is encouraging, a more liberal yet definite approach for determining lengthy detention is essential, going forward.

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