SCC File Number: 41132

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

FRANK DORSEY and GHASSAN SALAH

APPELLANTS

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

and

JOHN HOWARD SOCIETY OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN COUNCIL FOR REFUGEES, ALBERTA PRISON JUSTICE SOCIETY, ABORIGINAL LEGAL SERVICES, WEST COAST PRISON JUSTICE SOCIETY, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, BLACK LEGAL ACTION CENTRE, PIVOT LEGAL SOCIETY, MARGARET LEE COLE, CANADIAN CIVIL LIBERTIES ASSOCIATION and CANADIAN PRISON LAW ASSOCIATION

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PART I - CONCISE OVERVIEW OF POSITION AND CONCISE STATEMENT OF FACTS

A. OVERVIEW

1. Since *Magna Carta*, *habeas corpus* has guaranteed an "individual's protection from unlawful detention" by the state.[1] This fundamental right to individual liberty is part of the bedrock of the rule of law. It applies to "everyone in Canada, including those serving prison sentences."[2] Indeed, this Honourable Court has held that *habeas corpus* is "the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful," and consistently expanded its availability to ensure that "the rule of law continues to run within penitentiary walls."[3]

2. This appeal asks this Court to reverse course and limit the circumstances in which a prisoner can challenge the lawfulness of their incarceration. It asks this Court to categorically bar prisoners from seeking *habeas corpus* review where the state decides to refuse an application to be transferred to a lower security institution. As such, this appeal effectively seeks to insulate the state from having to explain "whether the detention is justified in law"[4] where it decides to deny a prisoner access to a form of confinement that provides greater liberty than their current conditions.

3. As held in the court below, this new limit on the availability of *habeas corpus* rests on the premise that a deprivation of a prisoner's residual liberty will only occur where the restrictions imposed by the "nature" of their confinement has increased. "Where an inmate is simply kept at the same security level, the requisite change in conditions will only occur if the inmate becomes entitled to greater liberty than that afforded by their current confinement."[5] Put differently, a prisoner will not suffer a deprivation of liberty sufficient to trigger *habeas corpus* where the state maintains their existing form of confinement, regardless of whether that decision is lawful.

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[1] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 1.
[2] *Mission Institution v Khela*, 2014 SCC 24, at para 29.
[3] *Mission Institution v Khela*, 2014 SCC 24, at para 29.
[4] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 1.
[5] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 48.

4. This is precisely the kind of narrow and formalistic approach to *habeas corpus* that this Honourable Court has warned against, so as "to ensure that it is rarely subject to restrictions."[6] The CCLA submits that what constitutes a deprivation of liberty sufficient to engage *habeas corpus* must be construed broadly, so that the focus of the inquiry can remain on the "grand purpose" of the writ—"the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[7] As a result, the CCLA submits that a deprivation of liberty will occur whenever the state chooses a form of confinement that is fundamentally more restrictive than the reasonably available alternative.

B. BACKGROUND FACTS

5. The CCLA takes no position on the facts of this appeal, although it notes the following findings in the court below and evidence set out in the appeal record.

6. In 2019, the Appellants, Frank Dorsey and Ghassan Salah, each applied to be transferred from the medium security institutions where they were serving their sentences—Warkworth Institution and Bath Institution, respectively—to a minimum security institution.[8]

7. Mr. Dorsey's transfer application was supported by his case management team, his Manager of Assessment and Intervention ("**MAI**"), and the Warden at Warkworth Institution, who all agreed that Mr. Dorsey met the criteria for reclassification to minimum security, pursuant to s. 18(c) of the *Corrections and Conditional Release Regulations*.[9] In recommending that Mr. Dorsey be granted a minimum security classification, his case management team, MAI, and Warden noted that he had completed all programs outlined in his Correctional Plan, had involved himself in education programs, had maintained employment within the Institution, had participated in biweekly counselling sessions, and had demonstrated the ability to comply with the rules and regulations of the Institution.[10] The Warden further noted that the progress Mr. Dorsey had made

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[6] *Mission Institution v Khela*, 2014 SCC 24, at para 55.
[7] *May v Ferndale Institution*, 2005 SCC 82, at para 21.
[8] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 1.
[9] *Corrections and Conditional Release Regulations*, SOR/92-620, at s 18(c).
[10] Affidavit of Frank Dorsey, affirmed August 13, 2021 ("**Dorsey Affidavit**"), Ex "C", Appellant's Record ("**AR**"), Vol II, Tab 14(C), at p 216.

in addressing his "dynamic factors" rendered any concerns regarding public safety low.[11] However, despite Mr. Dorsey's transfer application being endorsed by those who had most closely observed his progress since being incarcerated, the Regional Deputy Commissioner rejected the application,[12] indicating that further reduction in risk was required before Mr. Dorsey could be reclassified to minimum security.[13]

8. Mr. Salah's transfer application was similarly supported by his case management team, his parole officer, and his MAI, who all recommended that that he be granted minimum security classification.[14] They noted that Mr. Salah had completed his program modules, increased his level of accountability for the actions that led to his conviction, gained additional insight into his offence cycle, and demonstrated an increased empathy for his victims.[15] While the Warden of Bath Institute acknowledge that Mr. Salah had demonstrated positive institutional behaviour and improvements in his level of insight, accountability and victim empathy, the Warden denied Mr. Salah's transfer application on the basis that he was subject to a deportation order and was still 10 years from full parole eligibility.[16]

9. On consent of the parties, Mr. Dorsey's and Mr. Salah's applications for *habeas corpus* were joined for the purpose of determining the following threshold issue of law: "whether the [appellants] may resort to *habeas corpus* to challenge the denials of their applications to transfer to lower-security prisons."[17] As the Court of Appeal for Ontario explained below, this "threshold question turned on whether the denials of the appellants' request for reclassification constituted a deprivation of liberty."[18] Both at first instance and on appeal, the court held that it did not.

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[11] Dorsey Affidavit, Exhibit "C", AR, Vol II, Tab 14(C), at p 216.
[12] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 2.
[13] Dorsey Affidavit, Exhibit "D", AR, Vol II, Tab 14(D), at p 224.
[14] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 3.
[15] Affidavit of Ghassan Salah, affirmed May 27, 2021 ("**Salah Affidavit**"), Ex "F", AR, Vol II, Tab 13(F), at p 169.
[16] Salah Affidavit, Exhibit "H", AR, Vol II, Tab 13(H), at p 186.
[17] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 6.
[18] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 7.

PART II - QUESTIONS IN ISSUE AND RESPONDENT'S POSITIONS WITH RESPECT TO THE APPELLANT'S QUESTIONS

10. The issue in this appeal is whether the refusal of a prisoner's application for a transfer to a lower security institution is a deprivation of liberty that permits a prisoner to challenge the lawfulness of that decision pursuant to the writ of *habeas corpus*.

PART III - STATEMENT OF ARGUMENT

A. DEPRIVATIONS OF LIBERTY ENGAGING *HABEAS CORPUS* SHOULD BE CONSTRUED BROADLY

11. Despite its ancient roots, the writ of *habeas corpus* "remains fundamental to individual liberty and the rule of law today," as it "guarantees the individual's protection from unlawful deprivations of liberty."[19] It is not now and has never been "a static, narrow, formalistic remedy," but instead has developed "over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority."[20] As a result, this Court has repeatedly cautioned that "exceptions to the availability of *habeas corpus* must be limited and carefully defined."[21]

12. The determination of an application for *habeas corpus* proceeds in three steps:

> First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty is lawful.[22]

13. This appeal concerns only the first step of the analysis: whether the appellants have established that they have been deprived of liberty by the refusal of their applications to be transferred from a medium security institution to a minimum security one. However, more broadly, this appeal asks this Court to determine the extent to which the requirement establish a deprivation

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[19] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 1.
[20] *Mission Institution v Khela*, 2014 SCC 24, at para 54.
[21] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 24.
[22] *Mission Institution v Khela*, 2014 SCC 24, at para 30.

of liberty should act as a limit on a prisoner's ability to access what this Court has described as the "the object of the remedy": the "release [of] a person from an unlawful detention."[23]

14. In *Dumas v. Leclerc Institute of Laval*, Lamer J. (as he then was) held that "[i]n the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty."[24] However, this Court has since clarified that this list is "not exhaustive," but merely "helpfully illustrates different circumstances in which a deprivation of liberty may arise."[25]

15. As such, *Dumas* should not be interpreted as imposing a bright line test that limits the kinds of deprivations of liberty that will entitle a prisoner to challenge the lawfulness of their detention. Rather, as Wilson J. held in *R. v. Gamble*, courts ought to display "both creativity and flexibility in adapting the traditional remedy of *habeas corpus*" to address current realities.[26] As this Honourable Court held in *Mission Institution v. Khela*, ultimately, "on an application for *habeas corpus*, the basic question before the court is whether or not the decision was lawful."[27] To achieve the purpose of the "Great Writ of Liberty,"[28] the focus must remain on this "basic question" throughout the *habeas corpus* analysis. As a result, courts ought to take a broad and liberal approach to what constitutes a deprivation of liberty, so as to best ensure that *habeas corpus* "achieve[s] its grand purpose – the protection of individuals against the erosion of their right to be free from wrongful restraints upon their liberty."[29]

16. Here, the majority of the Court of Appeal for Ontario embraced the opposite approach, turning the kinds of deprivations of liberty articulated in *Dumas* into narrow and rigid categories that limit the broad availability of *habeas corpus* review. This is contrary to this Court's repeated

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[23] *R v Miller*, [1985] 2 SCR 613, at 638.
[24] *Dumas v Leclerc Institute*, [1986] 2 SCR 459, at para 12.
[25] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at paras 22-23.
[26] *R v Gamble*, [1988] 2 SCR 595, at para 66, citing *Swan v British Columbia (Attorney General)* (1983), 150 DLR (3d) 626, at p 148.
[27] *Mission Institution v Khela*, 2014 SCC 24, at para 52.
[28] *May v Ferndale Institution*, 2005 SCC 82, at para 19.
[29] *May v Ferndale Institution*, 2005 SCC 82, at para 21; see also *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 19.

warnings against "plac[ing] limits on the avenues through which an individual may apply for the remedy,"[30] and should be corrected.

17. The kinds of deprivations of liberty described in *Dumas* are simply illustrative of the "different circumstances in which a deprivation of liberty may arise."[31] *Dumas* does not establish the kind of "overly rigid rules" regarding the application of *habeas corpus* that the courts below articulate. Rather, as this Court has repeatedly warned, "[g]iven 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."[32] It is precisely this kind of jurisprudential limit on the availability of *habeas corpus* that this Court must guard against when considering the decision under appeal.

B. A DEPRIVATION OF LIBERTY OCCURS WHEN THE STATE CHOOSES BETWEEN MORE AND LESS RESTRICTIVE FORMS OF CONFINEMENT

18. It is well established that "[t]he transfer of prisoners from a lower to a higher security institution is emblematic of the second type of deprivation [described in *Dumas*]: a change in circumstances resulting in an additional deprivation of liberty."[33] However, this type of deprivation of liberty is not a closed category, limited to circumstances where a prisoner is transferred from a less restrictive form of incarceration to a more restrictive one. Rather, as this Court held in *Chinna*, such decisions are merely "emblematic" of the second type of deprivation of liberty identified in *Dumas*; the circumstances in which there may be a "change in conditions amounting to a further deprivation of liberty"[34] is much broader than that.

19. The CCLA submits that at the heart of this kind of deprivation of liberty is a decision by the state to select a form of confinement that is more restrictive than the reasonably available alternatives. In this respect, it is significant that *Dumas* does not describe the second type of deprivation of liberty as a substantial change in conditions that *causes* an additional deprivation of

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[30] *Mission Institution v Khela*, 2014 SCC 24, at para 55.
[31] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 23.
[32] *May v Ferndale Institution*, 2005 SCC 82, at para 50.
[33] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 23.
[34] *Dumas v Leclerc Institute*, [1986] 2 SCR 459, at para 12.

liberty. Rather, *Dumas* states that it is a "substantial change in conditions *amounting to* a further deprivation of liberty."[35] This includes not just changes in conditions that impose additional restrictions on a prisoner's residual liberty interest, but also changes in conditions that continue restrictions on a prisoner's liberty that are greater than the reasonably available alternatives.

20. In the case of a prisoner's application to be transferred from a higher security institution to a lower security institution, "the change in conditions" referred to in *Dumas* is rooted in the transfer application and the resulting decision, which serves to interrupt the *status quo* by forcing the state to review a prisoner's current form of confinement and decide whether it remains "the least restrictive environment for that person," in accordance with s. 28 of the *Corrections and Conditional Release Act*.[36] This change in conditions is particularly acute where (as is the case here) a prisoner's transfer application is supported by evidence from those who are most familiar with their progress since being incarcerated, and their resulting suitability to be transferred. By then refusing the prisoner's application to be transferred, the state's decision amounts to a further deprivation of liberty, as it denies the prisoner access to a less restrictive form of confinement in favour of a more restrictive one.

21. This approach to whether there has been a deprivation of liberty sufficient to entitle a prisoner challenge the lawfulness of their detention is in keeping with this Honourable Court's decision in *Cardinal v. Director of Kent Institution*. In that case, this Court held that *habeas corpus* provides prisoners with the right to challenge the lawfulness of a decision to *continue* their detention in administrative segregation, despite the recommendation of the Segregation Review Board that they be returned to the general population.[37] In *Cardinal*, the prisoners seeking *habeas corpus* review were already in administrative segregation and had not yet been granted a legal entitlement to be released from that form of confinement. Instead, they were entitled to what the court below described as "an avenue to greater liberty"[38] through the periodic review of their placement in administrative segregation.

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[35] *Dumas v Leclerc Institute*, [1986] 2 SCR 459, at para 12. [Emphasis added]
[36] *Corrections and Conditional Release Act*, SC 1992, c 20, at s 28.
[37] *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, at 649 & 661.
[38] *Dorsey v Canada (Attorney General)*, 2023 ONCA 843, at para 49.

22. The same logic applies here. There is no dispute that the appellants were entitled to a review of their security classification and to apply to be transferred to a lower security institution. By denying that request and continuing their confinement in their existing institutions, the appellants ought to be entitled to challenge the lawfulness of that decision in accordance with the writ of *habeas corpus*, just as the inmates were in *Cardinal*.

23. Importantly, however, allowing prisoners to seek *habeas corpus* review of decisions denying a request to be transferred to a lower security institution does not mean that the state can never choose to impose a more restrictive form of incarceration over the other options available. Nor will it allow prisoners to "challenge any and all conditions of confinement in a penitentiary or prison."[39] It simply means that the state is not insulated from having to justify the lawfulness of its decisions regarding the "distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than" the other reasonably available options.[40]

24. Decisions regarding a prisoner's security classification and the security level of the institution where they are incarcerated are fundamental to the residual liberty they are granted. The CCLA submits that it is essential to achieving the purpose of *habeas corpus* that prisoners be permitted to challenge the lawfulness of decisions regarding their fundamental form of confinement, even where the effect of that decision is to leave prisoner's existing form of confinement in place. The interests of liberty are only ever enhanced by *habeas corpus*' widespread availability. While the state is always able to defend a *habeas corpus* application by demonstrating that a deprivation of liberty is lawful and justified, it should not be provided the additional protection of being immune from *habeas corpus* review as a result of a "narrow, formalistic"[41] approach to what constitutes a deprivation of liberty.

25. The CCLA submits that the decision under appeal does precisely that by holding that the refusal to grant a prisoner's application to be transferred to a lower security institution is not a deprivation of liberty that engages *habeas corpus* at all. The CCLA submits that this Court should

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[39] *R v Miller*, [1985] 2 SCR 613, at 641.
[40] *R v Miller*, [1985] 2 SCR 613, at 641.
[41] *May v Ferndale Institution*, 2005 SCC 82 at para 21.

correct that error and instead hold that a deprivation of liberty sufficient to satisfy the first step of the *habeas corpus* analysis will occur any time the state chooses a more restrictive form of incarceration as compared to the other forms of incarceration that are reasonably available.

PART IV - SUBMISSIONS CONCERNING COSTS

26. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V - ORDER OR ORDERS SOUGHT

27. The CCLA seeks no orders from this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 1ST DAY OF APRIL, 2025.

Nader R. Hasan / Dan Goudge
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PART VI - TABLE OF AUTHORITIES

CASES	Cited in paras.
Canada (Public Safety and Emergecy Preparedness) v Chhina, 2019 SCC 29	1-2, 11, 14-15, 17-18
Cardinal v Director of Kent Institution, [1985] 2 SCR 643	21
Dorsey v Canada (Attorney General), 2023 ONCA 843	3, 6- 9, 21
Dumas v Leclerc Institute, [1986] 2 SCR 459	14, 18-19
May v Ferndale Institution, 2005 SCC 82	4, 15, 17, 24
Mission Institution v Khela, 2014 SCC 24	1, 4, 11-12, 15-16
R v Gamble, [1988] 2 SCR 595	15
R v Miller, [1985] 2 SCR 613	13, 23
Swan v British Columbia (Attorney General) (1983), 150 DLR (3d) 626	15

STATUTORY PROVISIONS	Cited in paras.
Corrections and Conditional Release Regulations, SOR/92-620, at s 18(c) *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620, art 18 (c)	7
Corrections and Conditional Release Act, SC 1992, c 20, at s 28 *Loi sur le système correctionnel et la mise en liberté sous condition*, LC 1992, ch 20, art 28	20