

APPLICATION UNDER THE HABEAS CORPUS ACT, R.S.O. 1990, ch.h.1, s. 1.7
And Rule 43 of the Criminal Proceedings Rules

NOTICE OF APPLICATION

(Rules of the Ontario Superior Court of Justice in Criminal Proceedings, Form 1)

TAKE NOTICE that an application will be brought at 10:00 AM on the 7th day of July, 2017, at Courtroom No. _____ at the Superior Court of Justice, located at 361 University Avenue, Toronto, Ontario, for:

- a. A writ of *habeas corpus* with *certiorari* in aid, pursuant to the *Habeas Corpus Act* and sections 7, 9, 10(c), 11 and 12 of the *Canadian Charter of Rights and Freedoms* [*Charter*] on the basis that the Applicant's continued detention is unlawful;
- b. Declarations that the Applicant's detention is unlawful and contrary to sections 7, 9, 11 and 12 of the *Charter*;
- c. An Order that the Applicant be released from detention pursuant to s. 10(c) of the *Charter*, subject to appropriate terms and conditions;
- d. The Applicant's costs on a solicitor-client basis;
- e. Such further and other relief as counsel may advise and this Court permit.

THE GROUNDS FOR THIS APPLICATION ARE:

1. Ricardo Scotland, a citizen of Barbados and no other country, is currently being detained at the Niagara Detention Center (NDC) in Thorold, Ontario, by the Canada Border Services Agency (CBSA) pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and *Regulations*, SOR/2002-227 (IRPR).

2. Mr. Scotland has no criminality and is not considered to be a danger to the public. Nevertheless, he has been detained for a cumulative period of 17 months at a maximum security prison (16 months in the past 2 years), and his request to be transferred to a medium security Immigration Holding Centre denied. He is also the single father of a 13-year-old daughter who has been profoundly impacted by his prolonged detention. Yet, her best interests have never been adequately considered.

3. The sole basis for Mr. Scotland's continued detention is that he is subject to a conditional removal order that will become operative *only* if his pending refugee claim fails. In other words, the reason for his *current* detention is strictly to facilitate a *future* removal that is strictly conditional on the outcome of an ongoing refugee claim. He is being detained exclusively for effecting a removal that may or may not occur.

4. The Applicant submits that his detention is unduly lengthy and is of uncertain duration. Although Mr. Scotland has been detained for a cumulative period of 17 months for the purpose of effecting his removal from Canada, removal cannot occur until his pending refugee hearing is finalized and all legal avenues are exhausted. As such, there is currently no legitimate reason for his current detention.

5. Although the Immigration Division (ID) of the Immigration and Refugee Board of Canada (IRB) has conducted regular reviews of Mr. Scotland's immigration detention, ID members have ordered his continued detention as a flight risk by simply adopting the CBSA's representations that the Applicant has breached his previous conditions of release; in doing so, the ID has failed to provide Mr. Scotland with a fair hearing that includes the presentation and adjudication of evidence, the opportunity to cross-examine arresting officers and without being informed of his rights to such a hearing. The ID's failure to properly adjudicate whether the alleged breaches have in fact occurred is in violation of the principles of fundamental justice.

6. As such, Mr. Scotland claims that his continued detention is unlawful:

- a. His detention is both lengthy and of uncertain duration and is a breach of his rights under ss. 7, 9, 11 and 12 of the *Charter*.
- b. In particular, detention has become arbitrary, in violation of s. 9 of the *Charter*, because it is "unhinged" from its removal purpose. The Applicant's detention has become arbitrary because the purpose of his detention is to execute the removal order; however, the removal order cannot be executed until his refugee claim and all flowing legal avenues are exhausted.

- c. Moreover, given its arbitrariness and indefinite nature, Mr. Scotland's ongoing detention is contrary to the principles of fundamental justice and therefore contrary to s. 7 of the *Charter*.
- d. The failure to transfer the Applicant to the Toronto Immigration Holding Centre, and instead holding his detention review hearings in a maximum security facility, violate his s. 11 right to be presumed innocent in a fair and public hearing. The refusal to release the Applicant despite onerous release conditions further violate his right not to be denied reasonable bail.
- e. Finally, on the facts of this case, continued detention amounts to cruel and unusual treatment, and is therefore contrary to s. 12 of the *Charter*. Despite the ID's determination that he is not a danger to the public, the Applicant has been separated from his daughter and detained in a maximum security provincial facility. He has been subject to invasive and unnecessary strip searches. He has also been denied adequate healthcare including be exposed to and tested positive for Tuberculosis in 2013 while in detention, but inadvertently not informed of this diagnosis until June of 2017.
- f. Because his detention is unlawful, he is therefore entitled to release under s. 10(c) of the *Charter*.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES ON THE FOLLOWING:

1. Affidavit of Ricardo Scotland (signed but not commissioned), dated June 24, 2017;
2. Affidavit of Hanna Gros, dated June 30, 2017
3. Such further and other material as counsel may advise and this Court permit.

THE RELIEF SOUGHT IS:

- a. A writ of *habeas corpus* with *certiorari* in aid, pursuant to the *Habeas Corpus Act* and sections 7, 9, 10(c), 11, and 12 of the *Canadian Charter of Rights and Freedoms* [*Charter*] on the basis that the Applicant's continued detention is unlawful;

- b. Declarations that the Applicant's detention is unlawful and contrary to sections 7, 9, 11 and 12 of the *Charter*;
- c. An Order that the Applicant be released from detention pursuant to s. 10(c) of the *Charter*, subject to appropriate terms and conditions;
- d. The Applicant's costs on a solicitor-client basis;
- e. Such further and other relief as counsel may advise and this Court permit.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

By service in accordance with Rule 5, at the office of his solicitor:

Subodh S. Bharati
Barrister & Solicitor
LSUC#: 56187P

103 Church Street
Toronto, Ontario
M5C 2G3

Tel: 416-645-8855
Fax: 416-645-8856
Email: subodh@ssblaw.ca

Dated at Toronto, Ontario, this day 30th day of June, 2017.

Subodh S. Bharati
Barrister & Solicitor
LSUC#: 56187P

103 Church Street
Toronto, Ontario
M5C 2G3

Tel: 416-645-8855
Fax: 416-645-8856

Email: subodh@ssblaw.ca

Solicitor for the Applicant

TO: THE MINISTER OF JUSTICE and
THE MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS
and THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
c/o Attorney General of Canada
1230 King Street West
Suite 3400, Exchange Tower
Box 36
Toronto, Ontario M5X 1K6
Tel: 416-973-0942
Fax: 416-973-3004
Solicitor for the Respondents