

COURT OF APPEAL FOR ONTARIO

CITATION: Dorsey v. Canada (Attorney General), 2023 ONCA 843

DATE: 20231221

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Simmons, Harvison Young and George JJ.A.

BETWEEN

Frank Dorsey and Ghassan Salah

Applicants (Appellants)

and

The Attorney General of Canada

Respondent (Respondent)

Jessica Orkin, Adriel Weaver, Simon Borys and Kate Mitchell, for the appellants

John Provart and Wendy Wright, for the respondent

Paul Quick, for the intervener John Howard Society of Canada

Geetha Philipupillai and Saneliso Moyo, for the intervener Black Legal Action Centre

Jessica D. Rose, for the intervener Canadian Association of Elizabeth Fry Societies

Nader R. Hasan and Dan Goudge, for the intervener Canadian Civil Liberties Association

Alison Craig, for the intervener Canadian Prison Law Association

Heard: May 29, 2023

On appeal from the order of Justice Jocelyn Speyer of the Superior Court of Justice, dated June 30, 2022, with reasons reported at 2022 ONSC 2107.

George J.A.:

A. BACKGROUND

[1] The appellant, Frank Dorsey, has been designated a dangerous offender and was incarcerated at Warkworth Institution, a medium security facility. The appellant, Ghassan Salah, was sentenced to concurrent life sentences and is currently incarcerated at Bath Institution, also a medium security facility. In 2019, the appellants each applied for a transfer to a minimum security institution.

[2] Mr. Dorsey's case management team, his Manager of Assessment and Intervention ("MAI"), and his Warden all agreed that he met the criteria for reclassification to minimum security. However, because Mr. Dorsey is a dangerous offender, his transfer request also had to be approved by the Regional Deputy Commissioner ("RDC") and subsequently by the Assistant Commissioner of Correctional Operations and Programs. In September 2019, the RDC assessed Mr. Dorsey's public safety rating as moderate and denied his transfer request.

[3] Mr. Salah's case management team, his parole officer, and his MAI similarly recommended reclassification and transfer to a minimum security facility. In October 2019, however, a new MAI was assigned to Mr. Salah's file and assessed him as a moderate escape risk on the basis that he was subject to a deportation order. Mr. Salah's Warden accordingly denied his transfer request and

advised him that he must wait to reapply until two years before his parole eligibility date.

[4] Both appellants then commenced an application under the *Habeas Corpus Act*, R.S.O. 1990, c. H.1 for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid. Although their proceedings were not brought as applications under the *Canadian Charter of Rights and Freedoms*, the appellants alleged that the denial of their transfer requests engaged ss. 7, 9, 10(c), and 12 of the *Charter*.

[5] The parties agree that on an application for *habeas corpus*, an applicant must first establish a deprivation of their liberty and then raise a legitimate ground for questioning the legality of that deprivation. If the applicant can establish both, the onus then shifts to the respondent to demonstrate that the deprivation was lawful.

[6] In this case, on consent of the parties, the application judge joined the appellants' applications for the purpose of determining a threshold legal issue common to both: "specifically, whether the [appellants] may resort to *habeas corpus* to challenge the denials of their applications to transfer to lower-security prisons".

[7] This threshold question turned on whether the denials of the appellants' requests for reclassification constituted a deprivation of liberty. As I will explain, in the correctional context, deprivation of liberty refers to whether an inmate has been

deprived of their “residual liberty”. Because the proceedings were joined to determine this threshold question, the merits of the appellants’ applications were not in issue. That is to say, the sole issue before the application judge was whether *habeas corpus* was available as a remedy rather than the merits of the reclassification denials themselves.

[8] The application judge concluded that *habeas corpus* was not available to the appellants because the reclassification denials were not deprivations of their residual liberty. The appellants appeal.

[9] While Mr. Dorsey has since been reclassified and transferred to a minimum security institution, he still seeks to reverse the decision in the court below.

[10] Five interveners made submissions on this appeal: the John Howard Society of Canada (“JHSC”), the Canadian Association of Elizabeth Fry Societies (“CAEFS”), the Black Legal Action Centre (“BLAC”), the Canadian Civil Liberties Association (“CCLA”), and the Canadian Prison Law Association (“CPLA”). Each argue that neither the grievance procedure, nor judicial review in the Federal Court, is an adequate remedy, and that *habeas corpus* should accordingly be available to inmates in circumstances like the appellants.

[11] For the reasons that follow, I would dismiss the appeal.

B. SECURITY CLASSIFICATION FRAMEWORK

[12] The Correctional Service of Canada (“CSC”) classifies each offender as minimum, medium, or maximum security in accordance with ss. 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (“CCRR”) under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“CCRA”). Offenders classified as either medium or maximum security must be reassessed every two years.

[13] Section 28 of the CCRA requires CSC to ensure that each offender receives the least restrictive classification and is placed in the least restrictive setting appropriate in the offender’s circumstances based on several relevant factors:

28. If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account

(a) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

(b) accessibility to

(i) the person’s home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

[14] Under the *CCRR*, an inmate can grieve a reclassification decision with which they disagree. If the grievance process is not resolved to the inmate's satisfaction, they can then appeal to the Commissioner of Corrections (or to a senior CSC staff member on the Commissioner's behalf): ss. 74-82. And, of course, an inmate can subsequently seek judicial review in the Federal Court, which was not pursued in this case by either appellant.

C. DECISION BELOW

[15] The sole question before the application judge was whether the reclassification denials amounted to a deprivation of the appellants' residual liberty.

[16] The application judge reviewed the development of the writ of *habeas corpus* in the correctional context. She observed that *habeas corpus* – a right guaranteed under s. 10(c) of the *Charter* – is not intended to be a static, narrow, or formalistic remedy, but rather a purposive one designed to protect individuals against the erosion of their right to be free from wrongful restraints on their liberty: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 21.

[17] The application judge noted that, in a trilogy of cases in 1985, the Supreme Court of Canada expanded the scope of *habeas corpus* in the correctional context by making it available to challenge not only the commitment to custody but also decisions that significantly deprive an inmate of the liberty available to the general

inmate population, such as a transfer to a special handling unit or to administrative segregation: *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; and *Morin v. SHU Review Committee*, [1985] 2 S.C.R. 662.

[18] She also reviewed the Supreme Court's decision in *Dumas v. Leclerc Institution*, [1986] 2 S.C.R. 459, in which Lamer J. described three different deprivations of liberty that could arise in the correctional context:

Habeas corpus is available to challenge an unlawful deprivation of liberty. In 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.

[19] The application judge rejected the appellants' submission that their situation amounted to "a continuation of the deprivation of liberty" under the third *Dumas* category.

[20] She noted that, in *Dumas*, the Supreme Court concluded that *habeas corpus* was not available to an offender who had been granted day parole conditionally, prior to the parole decision being reversed by the National Parole Board on account of an applicable condition not being met. According to the Supreme Court, the offender's continued detention was not a deprivation of liberty because he had never acquired the status of a parolee.

[21] The application judge adverted to instances where an offender's residual liberty would be deprived, including administrative segregation, confinement in a special handling unit, and transfer to a higher-security institution: *Mission Institute v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 34; *Dumas*, at para. 10; *Miller*, at para. 35; and *Cardinal*, at para. 13.

[22] The application judge also noted that the issue raised by the appellants had been considered by provincial superior courts, and by appellate courts in other provinces, on numerous occasions over the preceding decade, with most concluding that, absent a change in an inmate's security classification, the refusal to transfer them from a higher to a lower-security institution was not a deprivation of their residual liberty: see e.g. *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, at para. 15; *Robinson v. Attorney General of Canada*, 2013 ONSC 7992, at para. 11; *White v. The Attorney General of Canada*, 2015 ONSC 6994, at para. 21; *Ahmad v. Canada (Attorney General)*, 2015 ONSC 7010, at para. 18; *Lao v. The Attorney General of Canada*, 2016 ONSC 1273, at para. 5; *Bell v. Canada (Attorney General)*, 2019 ONSC 540, at para. 22; *Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 318 B.C.A.C 139, at para. 16; *L.V.R. v. Mountain Institution (Warden)*, 2016 BCCA 467, 346 C.C.C. (3d) 254, at para. 25; *Barkley c. Head*, 2014 QCCS 5718, aff'd 2014 QCCA 2268, leave to appeal refused, 2016 CanLII 12148 (SCC); and *Reynosa Ricci c. Centre régional de réception*, 2018 QCCA 82, at paras. 3-4.

[23] The application judge took care to acknowledge the pre-2012 cases which support the contrary proposition – namely, that reclassification denials are reviewable by way of *habeas corpus* even if an offender’s security classification has not changed: see e.g. *Musitano v. Canada (Attorney General)*, 2006 CanLII 9151 (Ont. S.C.); *Canada (Attorney General) v. Hollinger*, 2007 CanLII 36816 (Ont. S.C.); *R. v. Scarcella*, 2009 CanLII 32918 (Ont. S.C.); *Hutchinson v. Attorney General of Canada*, 2010 ONSC 535; and *Moulton v. Canada (Attorney General)*, 2010 ONSC 2448. However, she concluded that these cases were wrongly decided, or had since been overtaken.

[24] The application judge noted that while a decision may be disadvantageous to an inmate, that does not amount to a deprivation of residual liberty unless it is characterized by a reduction in the prisoner’s liberty. Here, there was no such reduction in liberty.

[25] The appellants submitted that a “deprivation of liberty” for the purposes of *habeas corpus* encompassed not only formal detentions or new reductions in residual liberty, but also any circumstances in which an individual continues to experience restrictions on their liberty at the hands of the state. The appellants acknowledged that if their position is correct, the security classification (and reclassification) of every offender in the custody of CSC would be reviewable by superior courts on a reasonableness standard. The application judge accepted that

if the law compelled the opening of that floodgate, then it must open, but in the end concluded that it did not:

The cases relied on by the applicants confirm that *Dumas* remains good law. *Habeas corpus* is available to challenge an unlawful deprivation of liberty. In the context of correctional law, three types of deprivations of liberty are amenable to [*habeas corpus*] review: 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. The applicants submit that their situation is captured by the third *Dumas* category, a continuation of the deprivation of liberty, but the third *Dumas* category does not capture any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. Rather, the third *Dumas* category appears to have been applied in cases of extended detentions or detentions of uncertain duration, such as may occur in the immigration context, which may engage ss. 7 and 9 of the *Charter*, and in criminal cases where the sentence imposed has become unlawful.

[26] In the application judge's view, to accept the appellants' argument would be to confer on them an entitlement to a minimum security classification, when no such entitlement had been established:

[T]here has not been a new detention of the applicants, that purports to rest on its own foundation of legal authority. There has been no change in the conditions of their imprisonment nor any orders leading to further deprivations of their liberty. There has been no change in their security classification, the way their sentences are being served, or the location where their sentences are being served. They are not subject to a distinct form of confinement or detention in which their actual physical constraint or deprivation of liberty is more restrictive or severe than the normal one in an institution. Their

residual liberty has not been reduced by a decision of the prison authorities.

The applicants in effect ask the court to confer on them an entitlement to a minimum-security classification; not to restore a classification of which they have been deprived. They challenge decisions that maintained the *status quo* and did not deprive them of any liberty that they enjoyed before the decisions were made.

[27] The application judge concluded that *habeas corpus* was not available to the appellants.

D. ISSUES

[28] Only one issue is raised on this appeal: does a refusal to reclassify and transfer an inmate to a lower-security institution constitute a deprivation of residual liberty reviewable by way of *habeas corpus*?

[29] The parties agree that the standard of review is correctness.

E. POSITIONS OF THE PARTIES

Appellants

[30] The appellants highlight the fact that *habeas corpus* is “not now and never has been a static, narrow, formalistic remedy”: *Jones v. Cunningham*, 371 U.S. 236 (1963), quoted in *Miller*, at para. 34. The appellants point to what they characterize as the Supreme Court’s steady expansion of the writ’s scope since *Miller*, asserting the need to continue “the policy of flexibly and generously

adapting the writ” to give fuller effect to constitutionally protected liberty interests:

R. v. Gamble, [1988] 2 S.C.R. 595, at paras. 66-74.

[31] The appellants argue that *habeas corpus* should be available in respect of decisions not to reclassify to a lower level – even if there has been no change in the conditions of confinement – because this is merely a technical, artificial, and non-purposive distinction. That is to say, regardless of whether a deprivation of residual liberty arises from a reclassification, or a decision to not reclassify, “the importance of the ‘great writ of liberty’ underlies the general rule that exceptions to the availability of *habeas corpus* must be limited and carefully defined”: *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 19.

Interveners

[32] The common theme of the interveners’ submissions is the inadequacy of CSC’s inmate grievance process and judicial review – the only two procedural avenues available to prisoners who wish to challenge a transfer denial. The interveners argue that neither of these avenues offer a timely review mechanism, and that the grievance procedure in particular is ineffective and dysfunctional. Compounding the problem is the fact that inmates can only seek judicial review once they have exhausted the grievance procedure: see e.g. *Robertson v. Canada (Attorney General)*, 2016 FCA 30, 480 N.R. 353, at para. 6.

[33] The interveners argue that the inadequacy of these remedies has a disproportionate impact on those who are overrepresented in the criminal justice system, particularly Black and Indigenous offenders. Without access to meaningful and timely judicial oversight, the liberty interests engaged in cases like the appellants' are susceptible to abuse and risk being rendered meaningless.

[34] While the appellants argue that their situation is captured by the third *Dumas* category, one intervener – CCLA – submits that the second *Dumas* category is also engaged. CCLA argues that “a substantial change in conditions amounting to a further deprivation of liberty” occurs whenever the state decides to confine a prisoner in conditions that are substantially more restrictive than the least restrictive option available.

Respondent Crown

[35] The Crown argues that the application judge did not err when she determined that *habeas corpus* was not an available remedy. It relies on what it says is the Supreme Court's clear direction in both *Miller* and *Dumas* that *habeas corpus* is not available to challenge any and all conditions of confinement, but only those which unlawfully restrict an inmate's residual liberty. The application judge correctly found that the appellants' residual liberty had not been restricted.

F. WAS THERE A DEPRIVATION OF RESIDUAL LIBERTY?

[36] As discussed earlier, to be successful in an application for *habeas corpus*, the applicant must first establish that they have been deprived of their liberty. If they can establish a deprivation, they must raise a legitimate ground upon which to question its legality. If the applicant accomplishes that, the onus then shifts to the respondent authorities to show that the deprivation of liberty was lawful: *Khela*, at para. 30. This appeal concerns only the first part of the test – was there a deprivation of liberty?

[37] In the correctional context, *habeas corpus* is available in order to protect an inmate’s “residual liberty” – that is, the freedoms that remain available to an inmate notwithstanding the restraints imposed by incarceration: *Khela*, at para. 34; *Miller*, at para. 32.

[38] As the application judge noted, while not a closed list, *Dumas* identifies three general ways in which a deprivation of liberty may arise in the context of a detention. A deprivation of liberty may relate to 1) the initial decision requiring the detention, or to a restriction of residual liberty resulting from 2) a change in the conditions of the detention or 3) the continuation of the detention.

[39] While the three categories are not exhaustive, they are often used by applicants to pinpoint the nature of their alleged deprivation of liberty: *Chhina*, at

para. 23. The appellants claim that the denial of their requests for transfers to a minimum security facility falls squarely under the third *Dumas* category.

[40] The problem with the appellants' argument is that it presumes they are entitled to reclassification to a minimum security institution. This is misguided. There is no standalone entitlement to a minimum security classification simply because the *CCRA* directs CSC to take all reasonable steps to ensure inmates are placed into the "least restrictive environment". This very argument was considered, and rejected, by the British Columbia Court of Appeal in *L.V.R.*:

The appellant argues that *Dumas* is distinguishable because it addressed parole, which he describes as a "privilege", as opposed to being held at an institution with the lowest restrictions, which he describes as an "entitlement". He argues that he suffers a deprivation of residual liberty because his entitlement to be in a minimum security facility is deprived. In my view, he misconceives his entitlement under the *CCRA*. His entitlement is qualified and is subject to considerations that find expression in the classification process.

[41] As noted earlier, the preponderance of provincial superior court decisions, and decisions of appellate courts from other provinces, over the past decade have similarly relied on *Dumas* and held that there is no deprivation of residual liberty where a security classification has been, as in the appellants' case, maintained. While these cases have only persuasive value, they are instructive in two respects. First, they confirm that transfer refusals would fall under the third *Dumas* category, which addresses CCLA's argument that they are also covered by the second.

They are also consistent with the general proposition that no inmate is entitled to be placed at a minimum security institution. Here, the denial of transfers to minimum security institutions resulted in the appellants remaining in the same position they were before their requests. Their residual liberty was therefore not further deprived nor were they placed in a more restrictive form of confinement.

[42] As in *L.V.R.*, the court in *Lao* held that the “reduction of [a] security classification itself is not an entitlement” and that “[a]n inmate can have no expectation that [such] a request will be granted”. The court noted that reclassification “is not the kind of decision, based on [a] weighing of enumerated factors, that allows [an inmate] to say [they] were entitled to a reduction and [were] deprived of it”. Rather, a transfer denial only constitutes a deprivation of residual liberty where the inmate establishes that they are entitled to be placed in a lower-security institution. Put differently, a deprivation of residual liberty under the third *Dumas* category will only arise if the inmate becomes entitled to greater liberty than that afforded by their continued detention at the same security level.

[43] Contrary to what the appellants claim, their situation does not fall within the third *Dumas* category. Both appellants had been classified as medium security inmates and were incarcerated at medium security institutions. Therefore, as it was put in *Dumas*, they had not “acquire[d] the status” of a minimum security classification. To hold otherwise would effectively make *habeas corpus* available to every federal inmate in respect of every security classification decision. As noted

by the application judge, there is nothing to compel or warrant opening this floodgate. CSC's grievance procedure and judicial review in the Federal Court remain available to inmates in these circumstances. The perceived shortcomings of these remedies are not a legitimate basis for this court to make *habeas corpus* available as a collateral method of attacking every security classification decision. Indeed, the Supreme Court has highlighted the need for courts to restrict the growth of such collateral methods: *May*, at para. 35.

[44] It is worth repeating that Mr. Dorsey did ultimately obtain a minimum security rating on a subsequent review, which then entitled him to a transfer. If, after Mr. Dorsey was reclassified, CSC still declined to move him to a lower security facility, *habeas corpus* would have been available. Again, however, this is not what occurred.

[45] It is important to remember that *habeas corpus* applications are different than *Charter* applications, and that, while the engagement of an inmate's liberty interest might be readily established on a *Charter* application, this is an entirely different question than whether an inmate can establish the requisite deprivation of residual liberty for *habeas corpus*. In short, *Charter* engagement is not coextensive with the threshold on a *habeas corpus* application.

[46] Based on the principles established in *Dumas*, the appellants have not demonstrated a deprivation of their residual liberty.

[47] The question then becomes whether the Supreme Court's decisions which postdate *Dumas* – particularly *Khela* and *Chhina* – have changed or recalibrated *Dumas* in a way that supports the appellants' position. The answer is no.

[48] Each of the Supreme Court's post-*Dumas* decisions supports the proposition that a deprivation of residual liberty under the third *Dumas* category will only arise when the conditions of an inmate's continued detention have somehow changed. Indeed, only where the nature of a continued detention has changed can there be a possible basis for questioning its legality on a *habeas corpus* application. 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.

[49] For example, although the inmates in *Cardinal* had their detention in administrative segregation simply maintained, the conditions of that detention changed when the inmates were denied a hearing to which they became entitled after the Segregation Review Board recommended transfer to the general inmate population: *Cardinal*, at para. 21. That is, the inmates became entitled to an avenue to greater liberty, but had that entitlement denied. The denial changed the nature of their continued detention in administrative segregation and transformed it into a deprivation of residual liberty.

[50] Unlike the inmates in *Cardinal*, the appellants did not become entitled to anything that might have afforded them greater liberty. As explained earlier, inmates have no standalone entitlement to a minimum security classification. Accordingly, the nature of the appellants' continued detention in medium security remained unchanged.

[51] *Khela* supports rather than supplants these principles. In *Khela*, the inmate was subjected to an involuntary and emergency transfer from a medium security institution to a maximum security institution, with the question being whether a provincial superior court could review the reasonableness of that transfer decision. The Supreme Court, focusing on the Attorney General of Canada's argument that a reasonableness review should be left with the Federal Court exercising judicial review powers, set out the previously discussed two-step procedure on a *habeas corpus* application.

[52] The appellants focus on the following passage from *Khela*, at para. 72, which they argue supports their position that *habeas corpus* is available in circumstances like theirs:

[U]ltimately then, where a deprivation of liberty results from a federal administrative decision, that decision can be subject to either two forms of review [being *habeas corpus* and judicial review], and the inmate may choose the forum he or she prefers.

[53] This passage, however, cannot be read in isolation. Later on, at para. 91, the Supreme Court, *per* LeBel J., held:

As I mentioned above, the writ of *habeas corpus* will issue if (1) the applicant has been deprived of his or her liberty and (2) that deprivation was unlawful.

He similarly noted, at para. 77:

The intervener the BCCLA argues that the application of a standard of review of reasonableness should not change the basic structure or benefits of the writ. I agree. First, the traditional onuses associated with the writ will remain unchanged. Once the inmate has demonstrated that there was a deprivation of liberty and casts doubt on the reasonableness of the deprivation, the onus shifts to the respondent authorities to prove that the transfer was reasonable in light of all the circumstances. [Emphasis added.]

[54] It is important to understand that, because it was uncontested that Mr. Khela's involuntary transfer to a maximum security institution from a medium security institution amounted to a deprivation of his residual liberty, the court did not even address the meaning of that concept, which is what is at issue in the appellants' case.

[55] Put another way, although the word "reasonableness" appears in the passage above, it is clearly in reference to the second part of the two-step *habeas corpus* test – namely, whether the applicant has raised a legitimate ground upon which to question the legality of their continued detention – and has nothing at all to do with the first step or with how a deprivation of liberty is categorized.

[56] While *Khela* did not specifically address *Dumas*, the court made this notable point about when the writ is available to inmates:

Le Dain J. also held in *Miller* that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose “residual liberty” has been reduced by a decision of the prison authorities ... Decisions which might affect an offender’s residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution. [Emphasis added.]

[57] The Supreme Court’s view on this issue could not be any clearer: the writ of *habeas corpus* is available to an inmate *only* when their residual liberty has been reduced or, put differently, deprived.

[58] In *Chhina* – the Supreme Court’s most recent discussion of *habeas corpus* – Karakatsanis J., while addressing jurisdiction in an immigration context, offers us some helpful guidance, with specific reference to *Dumas*:

[*Dumas*] helpfully illustrates different circumstances in which a deprivation of liberty may arise, and thus, different ways in which a detention may be challenged. A deprivation of liberty may relate to (1) the initial decision requiring the detention; or to a further deprivation of liberty based on (2) a change in the conditions of the detention; or (3) the continuation of the detention.

While not exhaustive, this list may be particularly helpful in pinpointing the nature of a challenge to a deprivation of liberty for reasons beyond those underlying an initial order. As I shall explore in more detail below, these three categories can assist in explaining the relevant case-law. For example, in the immigration context, a finding of inadmissibility may lead to a detention order that constitutes an initial deprivation of liberty: this is the first *Dumas* category (*Peiroo*). The transfer of prisoners from a lower to a higher security institution is emblematic of the second type of deprivation: a change in

circumstances resulting in an additional deprivation of liberty (*May*). The third type of deprivation outlined in *Dumas* can speak to extended detentions or detentions of uncertain duration, which may engage ss. 7 and 9 of the *Charter*, as was argued here (and in *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 O.R. (3d) 401, and *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220).

[59] The majority in *Chhina* confirms the two-step process in *habeas corpus* applications, and affirms the *Dumas* categories.

[60] The appellants further argue that *Chhina* stands for the proposition that there need not be a change in the inmate's situation in order to commence a *habeas corpus* application. This submission, however, overlooks the fact that Mr. Chhina proceeded on the basis that his immigration detention was indeterminate and that there was no reasonable prospect that his immigration proceeding would be completed within a reasonable amount of time. That is to say, *Chhina* did not address a discrete decision about Mr. Chhina's status in a correctional setting, but rather whether his detention was *Charter*-compliant. Mr. Chhina's situation is not analogous to someone who is serving a sentence, like the appellants. As *Chhina* was not concerned with the carceral setting, it should not be read as a statement on deprivations of liberty in that context.

[61] As discussed already, although *Khela* widens the scope of review at the second stage of the analysis, it says nothing of the first stage. It therefore cannot be said that *Khela* expanded the threshold requirement, which is where the

appellants failed in the court below. And, again, *Chhina* addresses *habeas corpus* in an immigration context.

[62] Finally, and in any event, the appellants did not present their case in the court below, or on appeal, as a fourth category not covered by *Dumas*. In other words, they did not seek to expand what everyone accepts is a non-exhaustive list of categories; they argued that they fell within the well-established and previously defined third *Dumas* category, which the application judge correctly rejected.

G. CONCLUSION

[63] For these reasons, I would dismiss the appeal.

“J. George J.A.”
“I agree Harvison Young J.A.”

Simmons J.A. (Dissenting):

A. INTRODUCTION

[64] The sole issue on this appeal is whether a refusal to reclassify and transfer a medium security penitentiary inmate to a minimum security institution constitutes a deprivation of liberty reviewable by way of *habeas corpus*.

[65] I have had the benefit of reading my colleague's reasons. For the reasons that follow, I respectfully disagree with his conclusion and would set aside the judgment dismissing the appellants' applications. With respect to Mr. Dorsey, I would substitute an order staying his application. With respect to Mr. Salah, I would substitute an order permitting him to proceed with his application.

B. BACKGROUND

[66] My colleague has set out the background facts relating to this matter. However, for the sake of completeness, I will review the most salient aspects so that I can explain my decision.

[67] The appellants were both incarcerated at medium security institutions. Mr. Dorsey is designated a dangerous offender and is serving an indeterminate sentence. Mr. Salah is serving two concurrent life sentences for first degree murder.

[68] In 2019, the appellants each applied for a transfer to a minimum security institution. Mr. Salah's application was supported by his parole officer and a

Manager of Assessment and Intervention (“MAI”). Mr. Dorsey’s transfer application was supported by his case management team and MAI, who agreed that Mr. Dorsey met the criteria for reclassification to minimum security.

[69] Mr. Dorsey’s Warden also supported his request, but because he is designated as a dangerous offender, his request also had to be approved by the Regional Deputy Commissioner of Corrections (“RDC”), and subsequently by the Assistant Commissioner, Correctional Operations and Programs. The RDC assessed Mr. Dorsey’s public safety risk as moderate and maintained the medium security classification.

[70] In Mr. Salah’s case, a new MAI assigned to his file assessed him as a moderate escape risk because a deportation order is in place. This despite the fact that Mr. Salah had a detailed release plan to Jordan. Mr. Salah’s Warden therefore denied his transfer request and advised him he must wait to reapply until two years before his parole eligibility date.

[71] Following the reclassification denials, both appellants applied for a writ of *habeas corpus ad subjiciendum with certiorari in aid*, requesting a transfer to minimum security unless the respondent on behalf of Correctional Service Canada (“CSC”) could justify their continued detention in medium security. Both alleged that the reclassification denials constitute a deprivation of liberty so as to engage *habeas corpus* and their rights under sections 7, 9, 10(c) and 12 of the *Canadian*

Charter of Rights and Freedoms. Further, they alleged that the reclassification denials were unlawful. In essence, they claimed that the reclassification denials were unreasonable, relied on irrelevant criteria and failed to adequately explain why a decision was reached contrary to the recommendations of other CSC officials.

[72] As my colleague has explained, on an application for *habeas corpus* an applicant must first establish a deprivation of their liberty and then raise a legitimate ground for questioning the legality of that deprivation. If those thresholds are met, the onus then shifts to the respondent to demonstrate that the deprivation was lawful.

[73] In this case, the appellants' applications were joined on consent to permit determination of a threshold legal issue common to both, namely, "whether the [appellants] may resort to *habeas corpus* to challenge the denials of their applications to transfer to lower-security prisons."

[74] Resolution of this threshold question turned on whether the reclassification denials constituted a deprivation of liberty. Accordingly, the issue of whether the appellants have raised a legitimate ground for questioning the legality of the reclassification denials, and the merits of their claims, were not in issue.

[75] My colleague has explained that, in the correctional context, deprivation of liberty refers to whether an inmate has been deprived of their "residual liberty".

[76] The application judge concluded that the reclassification denials did not constitute a deprivation of residual liberty. In her view, while a reclassification decision may be disadvantageous to an inmate, it will not amount to a deprivation of residual liberty unless it is characterized by a reduction in the prisoner's liberty. Here, the appellants challenged discretionary decisions that maintained the status quo. She concluded that, in effect, the appellants were asking the court to confer on them an entitlement to a minimum-security classification; not to restore a classification of which they had been deprived. Put another way, the reclassification denials did not deprive them of any liberty that they had enjoyed before the decisions were made. She accordingly dismissed the appellants' applications.

[77] The appellants submit that the application judge erred in law in dismissing their applications. They submit that the application judge's decision is inconsistent with *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, which held that a continuing deprivation of liberty that has become unlawful is reviewable by way of *habeas corpus*. They contend that, contrary to the application judge's decision, no change in the conditions of detention is required to give rise to a deprivation of liberty. Rather, a reclassification refusal crystallizes an initially lawful deprivation of liberty into an unlawful deprivation of liberty by withholding a lower security classification in a manner that is arbitrary or unreasonable such that the continuation of the deprivation of liberty is reviewable by *habeas corpus*.

[78] The appellants say that the application judge's decision rests on a technical, formalistic and categorical approach to *habeas corpus* and does not reflect the purposive, expansive and flexible approach required by Supreme Court of Canada. Nor does the application judge's decision recognize developments in Supreme Court of Canada jurisprudence, subsequent to *Dumas*, holding that the lawfulness of discretionary classification and transfer decisions may be reviewed on a reasonableness standard.

[79] As my colleague has said, Mr. Dorsey has subsequently been reclassified and transferred to a minimum security institution. Nonetheless, he asks that the application judge's decision be reversed.

C. THE CSC SECURITY CLASSIFICATION FRAMEWORK

[80] My colleague has reviewed the CSC security classification framework. I will repeat his discussion of same for ease of reference.

[81] CSC classifies each offender as minimum, medium, or maximum security in accordance with ss. 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 ("CCRR") under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA").

[82] Offenders classified as either medium or maximum security must be reassessed every two years.

[83] Consistent with the overall purposes of the federal correctional system, s. 28 of the *CCRA* requires CSC to ensure that each offender receives the least restrictive classification and is placed in the least restrictive setting appropriate in the offender's circumstances based on several relevant factors:

28. If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account

(a) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

(b) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

[84] Under the *CCRR*, an inmate can grieve a reclassification decision with which they disagree. If the grievance process is not resolved to the inmate's satisfaction, they can then appeal to the Commissioner of Corrections (or to a senior CSC staff member on the Commissioner's behalf): ss. 74-82. And, of course, the inmate can

subsequently seek judicial review in the Federal Court, which was not pursued in this case by either appellant.

D. THE APPLICATION JUDGE'S REASONS

[85] In her reasons, the application judge recognized that *habeas corpus* is a flexible remedy that has developed over time and that its availability has expanded. She noted that it is “not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty”: at para. 22, citing *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 21.

[86] At para. 26 of her reasons, the application judge explained that, in the correctional context, *habeas corpus* has evolved beyond its original availability, which was restricted to challenging the initial committal to custody. In a 1985 trilogy of cases, the Supreme Court of Canada expanded the scope of *habeas corpus* by making it available to challenge decisions that significantly deprive an inmate of the “residual liberty available to the general inmate population”: *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; and *Morin v. SHU Review Committee*, [1985] 2 S.C.R. 662. The decisions subject to challenge in the 1985 trilogy cases included inmate transfers to a special handling unit or to administrative segregation. Notably, *habeas corpus* was thus available

to free inmates from a “prison within a prison”¹, but not from “any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population”:

I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a 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 normal one in an institution: *Miller*, at p. 641.

[87] One year later, in *Dumas*, Lamer J. described three different deprivations of liberty that could arise in the correctional context and therefore be subject to *habeas corpus* review: 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.

[88] The application judge recognized that, like Mr. Dumas, the appellants relied on the third *Dumas* category, a continuation of a deprivation of liberty that has become unlawful, to claim that they had suffered a deprivation of liberty.

[89] Ultimately, the application judge rejected the appellants’ claim that they fell within the third *Dumas* category. She reached that conclusion for several reasons.

¹ See *Miller*, at p. 637.

[90] First, she found that, in *Dumas*, the Supreme Court concluded that Mr. Dumas was not deprived of liberty and his situation did not amount to a continuation of a deprivation of liberty. Mr. Dumas had been granted day parole conditionally, but the Parole Board later reversed its decision after the condition was not met. The application judge described the Supreme Court's decision in *Dumas* in the following terms, at para. 32 of her reasons:

The Court explained that because Dumas never became a parolee, he had no right to *habeas corpus*, because the decision of the Parole Board to grant him parole was reversed and having never become a parolee, his continued detention was not a deprivation of liberty.

[91] Second, the application judge observed that the preponderance of jurisprudence from the Ontario Superior Court² and courts in other provinces³ during the preceding 10 years had concluded that a refusal to transfer an offender from a higher to a lower security institution is not a deprivation of the offender's residual liberty. In Ontario, this recent line of jurisprudence had overtaken an earlier line of authority which had come to a different conclusion⁴.

² See *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, 291 C.C.C. (3d) 123; *Robinson v. Attorney General of Canada*, 2013 ONSC 7992; *Bell v. Canada (Attorney General)*, 2019 ONSC 540; *Canada (Attorney General) v. White*, 2015 ONSC 6994, 26 C.R. (7th) 235; *Ahmad v. Canada (Attorney General)*, 2015 ONSC 7010; *Lao v. Canada (Attorney General)*, 2016 ONSC 1273.

³ See *Palfrey v. Warden of Mission Institution*, 2015 BCSC 1777, 344 C.R.R. (2d) 132; *Pallagi v. Canada (Attorney General of)*, 2011 QCCS 2423; *Mallen v. Page*, 2015 QCCS 4197; *L.V.R. v. Mountain Institution (Warden)*, 2016 BCCA 467, 346 C.C.C. (3d) 254; *Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 255 C.R.R. (2d) 335, leave to appeal refused, [2012] S.C.C.A. 217; *Purdy v. Pacific Institution (Warden)*, 2016 BCSC 1201; *Wood v. Canada (Atlantic Institution)*, 2014 NBQB 135, 27 N.B.R. (2d) 205.

⁴ See *Musitano v. Canada (Attorney General)*, 2006 CanLII 9151 (Ont. S.C.); *Canada (Attorney General) v. Hollinger*, 2007 CanLII 36816 (Ont. S. C.); *R. v. Scarcella*, 2009 CanLII 32918 (Ont. S.C.);

[92] At para. 43 of her reasons, the application judge accepted that the prevailing jurisprudence indicated that while a decision may be disadvantageous to an inmate, “[that] does not amount to a deprivation of residual liberty unless it is characterized by a reduction in the prisoner’s liberty.”

[93] Third, the application judge accepted that absent three exceptions, she was bound by the principle of judicial comity to apply the well-established reasoning of the current jurisprudence of the Superior Court. In this instance the only applicable exception was whether the rationale of the existing jurisprudence had been undermined by subsequent appellate decisions.

[94] She considered several decisions relied on by the appellants in that regard, but concluded that none of them undermined the current Superior Court jurisprudence: *R. v. Gamble*, [1988] 2 S.C.R. 595; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Khadr v. Edmonton Institution*, 2014 ABCA 225, aff’d, 2015 SCC 26, [2015] 2 S.C.R. 325; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409; *Wang v. Canada*, 2018 ONCA 798, 143 O.R. (3d) 161; and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467.

Hutchison v. Attorney General of Canada, 2010 ONSC 535; and *R. v. Moulton*, 2010 ONSC 2448, aff’d 2011 ONCA 85 (without consideration of the deprivation of liberty issue).

[95] In the application judge's view, the decisions relied on by the appellants demonstrated only that the third *Dumas* category had been applied in limited circumstances:

[T]he third *Dumas* category does not capture any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. Rather, the third *Dumas* category appears to have been applied in cases of extended detentions or detentions of uncertain duration, such as may occur in the immigration context, which may engage ss. 7 and 9 of the *Charter*, and in criminal cases where the sentence imposed has become unlawful. [Emphasis added; see para. 73 of the application judge's reasons.]

[96] The application judge concluded her reasons by saying, at para. 74:

[T]here has not been a new detention of the [appellants], that purports to rest on its own foundation of legal authority. There has been no change in the conditions of their imprisonment nor any orders leading to further deprivations of their liberty. There has been no change in their security classification, the way their sentences are being served, or the location where their sentences are being served. They are not subject to a distinct form of confinement or detention in which their actual physical constraint or deprivation of liberty is more restrictive or severe than the normal one in an institution. Their residual liberty has not been reduced by a decision of the prison authorities.

[97] In the application judge's view, to accept the appellants' arguments would be to confer on them an entitlement to a minimum security classification, when no such entitlement had been established. She concluded that *habeas corpus* was

not available because the appellants were simply challenging the status quo and had not been deprived of residual liberty.

E. DISCUSSION

[98] The fundamental submission of the appellants is that the application judge erred in failing to find that the reclassification denials fall within the third *Dumas* category and that, in light of *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, the reclassification denials are subject to review by *habeas corpus* on a reasonableness standard. The appellants submit that there are no decisions binding on this court adopting the application judge's conclusion.

[99] The respondent submits that the application judge's decision is correct essentially for the reasons she articulated. The respondent also submits that this court lacks the jurisdiction to grant the remedy the appellants seek, which the respondent claims is a disguised form of *mandamus* or *certiorari*.

[100] As the decision under review involved a question of law, the standard of review is correctness. For the reasons that follow, I would accept the appellants' submissions.

[101] I will begin by reviewing the Supreme Court of Canada's decision in *Dumas*.

[102] As noted above, the National Parole Board ("NPB") granted day parole to Mr. Dumas conditional on his acceptance by a community centre. Prior to that condition being fulfilled, the NPB initially delayed and subsequently reversed its

decision granting parole. The decisions in the lower courts refusing *habeas corpus* were made prior to the 1985 *Miller, Cardinal* and *Morin* trilogy and held that *habeas corpus* was available to attack only the initial warrant of committal. In *Dumas*, the Supreme Court confirmed that that position had been rejected by its 1985 trilogy. The Supreme Court also clarified, at p. 464, that *habeas corpus* is available to challenge an unlawful deprivation of liberty and that, in the context of correctional law, there are three different deprivations of liberty, the third being a continuation of an initially lawful deprivation of liberty that becomes unlawful:

Habeas corpus is available to challenge an unlawful deprivation of liberty. In 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. ... What is being challenged in this case is the continuation of the deprivation of liberty.

The continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful. [Emphasis added.]

[103] Further, the Supreme Court also clarified, at p. 464, that, in the parole context, the continuation of an initially valid detention will only become unlawful if the inmate acquires the status of a parolee:

In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee. An inmate acquires that status as of the moment the decision to grant him parole takes effect. Thus, if parole is granted effective immediately, he becomes a parolee when the decision is rendered. ... If

parole is granted effective at some later date, then the inmate acquires the status of parolee at that date and not at the date of the decision. [Emphasis added.]

[104] Concerning Mr. Dumas, the Supreme Court said, at p. 465: “It is clear that [he] never became a parolee, and he thus has no right to *habeas corpus*”.

[105] The Supreme Court went on to say, however, that issues such as the NPB’s jurisdiction to review its earlier decision or whether the NPB had infringed the rules of natural justice or Mr. Dumas’s rights under ss. 7 or 9 of the *Charter* could be raised on an application under s. 18 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, or s. 24(1) of the *Charter*.

[106] As I read *Dumas*, the critical issue in relation to the reviewability by *habeas corpus* of an initially valid continuing deprivation of liberty is whether the continuing deprivation has become unlawful. Although in *Dumas* the Supreme Court linked unlawfulness to acquiring a particular status, it did so in the context of reviewing a decision concerning parole. Because of that context, I do not read *Dumas* as establishing a general rule concerning the point at which an initially valid deprivation of liberty becomes unlawful, thereby potentially crystallizing it into a deprivation of liberty reviewable by way of *habeas corpus*.

[107] In *Dumas*, the Supreme Court was careful to note that the NPB decision was reviewable by the Federal Court. In that respect, *Dumas* was in line with subsequent case law which held that, save in unusual circumstances, such as existed in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, courts should not

entertain an application for *habeas corpus* from someone who had not yet attained the status of parolee. “[T]o do otherwise would disturb the parole scheme, and as Cory J. said in *Steele*, set up a duplicate procedure for review of [NPB] decisions”: *M.S. v. Canada (National Parole Board)* (1995), 102 C.C.C. (3d) 273 (B.C.C.A.), at para. 20. See also Judith Farbey, R. J. Sharpe and Simon Atrill, *The Law of Habeas Corpus*, 3rd ed., (New York: Oxford University Press, 2011), at pp. 168-69.

[108] In contrast, the 1985 trilogy cases demonstrate that CSC security classification decisions can be reviewable by *habeas corpus*. Moreover, although the Supreme Court’s subsequent decision in *Khela* involved a transfer to a more restrictive security classification and institution and therefore falls into the second *Dumas* category, *Khela* makes it clear that CSC security classification decisions are subject to review on a reasonableness standard.

[109] Notably, at least one of the 1985 trilogy cases, *Cardina*⁵, was not decided on the basis that the initial imposition of administrative segregation was unlawful. Rather, it was decided on the basis that the Warden’s decision to continue

⁵ See also *Morin*. In that case, the Deputy Commissioner continued Mr. Morin’s incarceration in the Special Handling Unit of a maximum security institution following Mr. Morin’s acquittal for a murder committed at his pre-existing medium security institution. On his application to the Superior Court of Quebec, that court held there was no jurisdiction to grant *habeas corpus*, a decision upheld by the Quebec Court of Appeal. By the time the case reached the Supreme Court of Canada, Mr. Morin had been transferred out of the Special Handling Unit. Nonetheless, the Supreme Court held that the Superior Court had jurisdiction to determine the validity of Mr. Morin’s continued confinement in the Special Handling Unit.

administrative segregation contrary to the recommendation of the Segregation Review Board was unlawful because of a breach of the requirements of procedural fairness.

[110] In that case, Mr. Cardinal was serving a sentence at a medium security institution. Following a hostage-taking incident in which he was allegedly involved, he was transferred to a maximum security prison and immediately placed in administrative segregation. When the appeal of the denial of his *habeas corpus* application reached the Supreme Court of Canada, there was no serious challenge to the initial decision to place him in administrative segregation. Rather, it was the decision to maintain administrative segregation contrary to the recommendation of the Segregation Review Board that was challenged. The Supreme Court held that *habeas corpus* was available. No doubt Mr. Cardinal's residual liberty was affected because he was in administrative segregation. However, as I see it, the availability of *habeas corpus* in *Cardinal* did not depend upon there having been a reduction in Mr. Cardinal's pre-existing residual liberty or, put another way, a change in the status quo. Rather, it was the decision to withhold a lesser security classification (transfer to the normal prison population of a maximum security institution) that created the deprivation of liberty. Because that decision was unlawful, it crystallized what was an initially valid lawful deprivation of liberty (administrative segregation) into an unlawful deprivation of liberty.

[111] Similarly, in the post-trilogy decision of *Gamble*, Ms. Gamble was tried and convicted of murder under provisions of the *Criminal Code* enacted after the murder was committed. She was thus sentenced to a 25-year period of parole ineligibility, when a period of parole ineligibility of not less than 10 years and not more than 20 would have applied had she been tried under the provisions in force when the murder was committed. In 1986, after serving 10 years of imprisonment, Ms. Gamble claimed that the 25-year period of parole ineligibility had become unlawful by reason of the enactment of the *Charter*. The Supreme Court held that her application for *habeas corpus* fell within the third *Dumas* category: the continuation of an initially valid deprivation of liberty that can be challenged by way of *habeas corpus* only if it becomes unlawful. Applying a flexible approach to *habeas corpus* in the context of a claim also brought under s. 24(1) of the *Charter*, the Supreme Court declared Ms. Gamble eligible for parole as of the date of release of its judgment.

[112] With respect to security classification decisions in the carceral context, I see no reason why a decision to maintain an initially valid security classification should not be considered a deprivation of liberty reviewable by *habeas corpus* where the reasons for the decision show a legitimate ground for concluding that the only basis for withholding a lower security classification may be arbitrary or unreasonable and therefore unlawful. The decision to withhold a lower security classification in such circumstances crystallizes the deprivation of liberty. Where an applicant can

demonstrate that the only basis for withholding the lower security classification may be unreasonable in a manner indicating that the lower security classification would otherwise have been granted, that creates the reasonable ground for challenging the lawfulness of the decision and makes the decision reviewable by *habeas corpus*.

[113] For example, if the Commissioner for Corrections enacted a policy that inmates convicted of first degree murder could not be classified as minimum security until they had served at least five years of their original life sentence and that policy exceeded the Commissioner's authority, I see no reason why an inmate convicted of first degree murder and classified as medium security prior to the enactment of the policy should not be able to challenge by *habeas corpus* a decision refusing to reclassify them as minimum security where it was clear that the policy was the only basis for the denial. If the policy was found to be unlawful there would be no basis for withholding the minimum security classification. See *Spindler v. Warden of Millhaven Institution* (2003), 15 C.R. (6th) 183 (Ont. C.A.).⁶

⁶ In *Spindler*, the Commissioner of Corrections issued a policy applicable to all persons convicted of murder and assessed for initial placement after a certain date. Under the new policy, murderers brought into the Federal prison system after a certain date would necessarily be classified as maximum security because of a change to the 'score' assigned to their length of sentence that automatically qualified them as maximum security under the classification scheme. They could apply to the Assistant Commissioner of Corrections for a discretionary override but only one such override had been issued in the two and a half years since the policy had been enacted. Among other things, this court stated, at para. 15: "A claim that a prisoner is being unlawfully detained in a part of the prison where his liberty is subject to significant restrictions that would not exist if the prisoner was held in the part of the prison in which he claims he should be held, may be advanced by way of a *habeas corpus* application." Nonetheless, based on the decision in *Steele*, this court dismissed an appeal from the Superior Court decision holding that the

[114] Where an inmate can show a legitimate ground to question the lawfulness of a reclassification refusal such that the reclassification would otherwise have been made, in my view, resort to *habeas corpus* should be permitted. Permitting resort to *habeas corpus* in such circumstances does not presume an entitlement to a lower security classification. Rather, the ultimate assessment of the lawfulness of the reclassification refusal will determine whether the inmate is entitled to the lower security classification. An unlawful reclassification refusal crystallizes the required continuation of the inmate's deprivation of liberty under the third *Dumas* category at the time the reclassification decision is made. I see no reason why an inmate who can meet the above requirements should be barred from resorting to *habeas corpus*, rather than the more cumbersome grievance/judicial review procedure. Demonstrating the unlawfulness of the reclassification refusal will demonstrate the entitlement to the lower security classification in the circumstances.

[115] In this case, I conclude that the fact that the appellants were seeking *habeas corpus* based on a denial of a lower security classification was not a bar to their claim for *habeas corpus*. The question whether they are entitled to resort to *habeas*

Federal Court (Trial Division) was the more appropriate forum. The correctness of that latter holding was later rejected in *May*.

corpus under the third *Dumas* category must depend on whether they can show a legitimate ground for concluding that the only basis for withholding a minimum security classification was unlawful such that a minimum security classification would otherwise have been granted. In these circumstances, if the reclassification decision is ultimately found to be unlawful, a continuing deprivation of liberty under the third *Dumas* category will have crystallized as of the date of the reclassification decision and the finding of unlawfulness will also trigger entitlement to the lower security classification.

F. DISPOSITION

[116] Based on the foregoing reasons, I would set aside the judgment dismissing the appellants' applications. Given that Mr. Dorsey was subsequently transferred to minimum security, I would substitute an order staying his application as moot. In Mr. Salah's case, I would substitute an order permitting him to proceed with his application.

Released: December 21, 2023 "J.S"

"Janet Simmons J.A."