Court of Queen's Bench of Alberta

Citation: Chan v Her Majesty the Queen, 2017 ABQB 796

Date:
Docket: 1701 07909
Registry: Calgary

Between:

Nicholas Cypui Chan

Applicant

- and -

Her Majesty the Queen

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice P.R. Jeffrey

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[1] Her Majesty the Queen, by Alberta Justice, the Calgary Remand Centre, and the Solicitor General of Alberta (collectively "**Sol Gen**") and separately by Alberta Health Services ("**AHS**"), applies to strike the *habeas corpus* application of Nicholas Cypui Chan ("**Chan**"), pursuant to Rule 3.68.

[2] Chan's *habeas corpus* application is in process, presently nearing the end of the evidentiary phase. Chan remains in custody pending trial before a judge and jury for one count each of first degree murder (s 235(1)), instructing the commission of an offence as part of a criminal organization (s 467.13), and conspiracy to commit murder (s 465(1)(a)). Trial is scheduled to commence March 5, 2018.

[3] The constraints on curial resources, in combination with Chan representing himself even though in custody, has resulted in his *habeas corpus* application taking longer to complete than is desirable for such applications. Therefore some portions of his application were addressed more immediately while the broader application continued to be litigated. On June 1, 2017, Chan was granted the remedy he requested in respect of his treatment when in custody at the Calgary Courts Centre, for its breaches of Alberta *Public Health Act* regulations. On August 1, 2017, Chan's request was denied for AHS to supply him with certain health products while in custody at the Calgary Remand Centre awaiting his trial: ***Chan v HMTQ***, 2017 ABQB 480. On September 5, 2017, Chan was granted immediate access to a medical appointment. On September 22, 2017, the Calgary Remand Centre was ordered to provide Chan with access to a functioning laptop computer with access to case law and statutes. Despite *habeas corpus* being ill-suited to these complaints, Chan was not forced to re-file proper process but rather relief was given where warranted out of expedience.

[4] The remainder of Chan's *habeas corpus* application is the subject of Her Majesty the Queen's application to strike; both AHS and the Sol Gen say it should be struck. The AHS says no further relief is sought against it and the Sol Gen says Chan's complaints do not give rise to any further deprivation of his liberty that can attract the remedy of *habeas corpus*. They say his remaining complaints merely relate to the conditions of his detention.

[5] The outstanding grounds for Chan seeking *habeas corpus* are:

1. strip search practices at the Calgary Remand Centre;
2. conditions of segregation in the Calgary Remand Centre; and
3. inability to access the courts while a self-represented litigant from the Calgary Remand Centre.

[6] Chan has raised still further complaints from time to time since commencing this particular *habeas corpus* application. Some were addressed immediately and are included in the items listed in paragraph 3 above. The remainder have been left to Chan to raise as he may wish in the context of his ongoing pre-trial case management by another member of this Court.

Background

[7] Chan awaits trial in custody at the Calgary Remand Centre. He arrived there on January 8, 2016 from the Edmonton Remand Centre.

[8] Chan suffers from a form of thalassemia. This part of his evidence is outlined at paragraphs 2-5 of ***Chan v HMTQ***, 2017 ABQB 480.

[9] Chan alleges inadequate access to his disclosure to prepare for his upcoming trial, and that this is a violation of his right to make full answer and defence and his right to a fair trial. Additionally, Chan alleges that his inability to access the courts while being held at the Calgary Remand Centre as a self-represented litigant is a violation of his right to access the courts as guaranteed by the ***Charter***.[1]

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[1] Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 ("***Charter***").

[10] On March 3, 2017, Chan refused to comply with a strip search at the Calgary Remand Centre. He landed in observational segregation. Later Chan went on a hunger strike and was subject to the hunger strike protocol, which also includes placement in observational segregation. Chan alleges that he is unable to view his disclosure or have access to the courts while he is in observational segregation. Chan agreed to comply with the strip search and concluded his hunger strike on March 10, 2017. For policy reasons, Sol Gen limits access to disclosure while in observational segregation. Paper disclosure is restricted in observational segregation, but Chan has been advised that he can request access to the computer when he is in the observation unit. Paper and pen for document review are also available but upon request. This Court ordered Chan receive access to a functioning computer to ensure he could review the Crown's disclosure in the pending trial.

Analysis

[11] For the reasons that follow, I grant the applications to strike.

[12] The AHS is correct that none of the remaining outstanding grounds for *habeas corpus* asserted by Chan are matters over which the AHS has control. It has no authority over the terms of Chan's detention. It bears no responsibility for any residual loss of liberty by Chan. It is doubtful that a writ of *habeas corpus* may even lie against the AHS. Nothing more need be said in respect of Chan's application against AHS.

[13] Regarding the Sol Gen parties, even if I assume the facts Chan alleges are true, they do not make out a residual loss of liberty of the sort remediable by *habeas corpus*. It is not the Court's place to reviewing and interfere with security measures and administrative decisions at prisons and remand centres by writ of *habeas corpus*.

[14] *Habeas corpus* "is a common law right of persons who are retained by state actors to go to court and demand that the state actor prove that detention is lawful": ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 237 at para 18. The remedy is enshrined in section 10(c) of the ***Charter***:

> 10. Everyone has the right on arrest or detention
>
> ...
>
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[15] The Supreme Court of Canada has outlined the process for a *habeas corpus* application:

> To be successful, an application for *habeas corpus* must satisfy the following criteria. 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 was lawful: ***Mission Institution v Khela***, 2014 SCC 24 at para 30.

[16] *Habeas corpus* is available to challenge further restrictions on the liberty of those already incarcerated: ***R v Miller***, [1985] 2 SCR 613 at para 32; ***Mission Institution*** at para 34. The Court held that:

> ... a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty: ***Miller*** at para 32.

[17] *Habeas corpus* applies to "present and ongoing detention": ***Cundell v Bowden Institution***, 2016 ABQB 348 at para 37; ***Dumas v Leclerc Institute***, [1986] 2 SCR 459 at paras 12-14. Further, *habeas corpus* "cannot be sought where the detention or form of detention is voluntary or caused by the detained person": ***Ewanchuk*** at para 24; ***R v Blanchard***, 2011 SKCA 60 at para 13; ***Biever v Alberta (Director of Edmonton Remand Centre)***, 2015 ABQB 609 at para 32. There is no deprivation of liberty when the form of detention is due to the inmate's own volition: ***Blanchard*** at para 13. While ***Blanchard*** and ***Biever*** concerned a *habeas corpus* application with respect to voluntary segregation, the proposition still holds when it is the prisoner's own decisions that lead to his form of detention. In ***Biever*** this Court declined to hear a *habeas corpus* application, stating that the applicant caused his form of detention himself: ***Biever*** at para 32.

[18] *Habeas corpus* does not apply to privileges or to many of the conditions and circumstances in prisons: ***Ewanchuk*** at para 25. *Habeas corpus* does not apply to "the loss of any privilege enjoyed by the general inmate population"; however, "it should lie ... 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 para 35.

[19] The deprivation of liberty cannot be "insignificant or trivial"; it must be substantial: ***Ewanchuk*** at para 26; ***Cunningham v Canada***, [1993] 2 SCR 143 at 151; ***Canada (Attorney General) v Whaling***, 2014 SCC 20 at para 57.

[20] The remainder of Chan's *habeas corpus* application are complaints about the conditions of his detention at the Calgary Remand Centre. His complaints of the conditions of detention do not equate to a decision that led to a further deprivation of liberty, except for a few select situations that resulted directly from his defiance of institutional requirements.

[21] Chan's complaints regarding the conditions at the Calgary Remand Centre are a misuse of the *habeas corpus* process and remedy. His refusal to comply with a strip search, his decision to go on a hunger strike and his conduct resulting in his being placed in observational segregation resulted in the only deprivations of liberty alleged. They are all under his control. *Habeas corpus* does not apply to voluntary detention or when the form of detention is due to the inmate's own volition. Here, as in ***Biever***, the Court declines to classify this placement as a deprivation of liberty or a further deprivation of residual liberty.

[22] As in his application for interim relief, I find that Chan's circumstances do not warrant *habeas corpus*. They offer no reasonable claim and have no hope of success.

Conclusion

[23] I therefore grant the applications to strike the remainder of Chan's *habeas corpus* application, pursuant to Rule 3.68.

Heard by written submissions between October and December, 2017.
Dated at the City of Calgary, Alberta this 20th day of December, 2017.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

Nicholas Cypui Chan
Applicant, Self Represented

Lisa Friesenhan
for the Respondents, Alberta Justice, the Calgary Remand Centre and the Solicitor General of Alberta

Donald M. McLaughlin
for the Respondent, Alberta Health Services