CV-16-55837600CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

GODDAY DADZIE and AL ZEEKEHMENS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
and THE ATTORNEY GENERAL OF CANADA

Defendants

STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA

A. ADMISSIONS AND DENIALS

1. The Attorney General of Canada (AGC) admits the allegations contained in paragraphs 9, 10, 12, 17, 18, 23, 33, 41, 54, 55, 91, and 92 of the Amended Statement of Claim.

2. The AGC has no knowledge in respect of the allegations contained in paragraphs 19, 20, 21, 28 and 90 of the Amended Statement of Claim.

3. Except where expressly admitted herein, the AGC denies the balance of the allegations made in the Amended Statement of Claim and puts the Plaintiffs to the strictest proof thereof.

B. THE PARTIES

4. The AGC defends this action on behalf of the Canada Border Services Agency (CBSA) pursuant to sections 3, 10 and 23 of the *Crown Liability and Proceedings Act*. CBSA is a federal agency established pursuant to the *Canada Border Services Agency Act*. It is charged with providing integrated border services that support national security and public safety priorities.

5. Her Majesty the Queen in Right of Ontario defends this action on behalf of the Ministry of Correctional Services and Community Safety (MCSCS) pursuant to the *Proceedings Against the Crown Act*. MCSCS is the provincial ministry responsible for establishing, maintaining and operating adult correctional institutions in Ontario.

6. The Plaintiff, identified in the Amended Statement of Claim as Godday Dadzie (Mr. Dadzie), does not have status in Canada. He arrived in Canada in June 2003 as a stowaway on a ship. He did not have any identity documents with him upon his arrival. Since that time, CBSA has made efforts to confirm Mr. Dadzie's identity and nationality but he has provided inconsistent and misleading information to CBSA, including claiming that his name is Joseph Dadzie Godday and not Godday Dadzie. As a result of Mr. Dadzie's lack of cooperation, CBSA has been unable to remove him from Canada.

7. Mr. Dadzie was detained because it was determined that he was inadmissible to Canada and was unlikely to appear for his removal from Canada.

8. Mr. Dadzie was transferred to a provincial facility because he informed the CBSA that he was affiliated with a gang.

9. The Plaintiff, identified in the Amended Statement of Claim as Al Zeekehmens (Mr. Zeekehmens), also has no status in Canada. He arrived from the United States in April of 1993 using the name and birth certificate of one Frank Mosley. Since that time, the CBSA has made efforts to confirm Mr. Zeekehmens' identity, including his nationality, but he has provided inconsistent and misleading information regarding his name, the country where he was born, and other aspects of his personal history. As a result, the CBSA has been unable to remove Mr. Zeekehmens from Canada.

10. Mr. Zeekehmens was detained because it was determined that he was inadmissible to Canada and was unlikely to appear for his removal from Canada.

11. Mr. Zeekehmens was placed in a provincial facility because of prior criminal convictions and pending criminal charges.

C. THE DETENTION SCHEME UNDER THE *IRPA*

1) Authority to arrest and detain

12. The arrest and detention provisions under the *Immigration and Refugee Protection Act* (the *IRPA*) are preventive, not punitive. Officers of the CBSA have the discretion to arrest and detain foreign nationals and permanent residents in particular circumstances set out in the *IRPA* and the *Immigration and Refugee Protection Regulations* (the *Regulations*). In summary, a CBSA officer may detain an individual on the basis that:

(a) They are inadmissible to Canada; and,

(i) a danger to the public; and/or

(ii) unlikely to appear for examination, an admissibility hearing or removal from Canada; or,

(b) An officer is not satisfied of the identity of the foreign national in the course of any procedure under the *IRPA*.

13. CBSA officers making decisions regarding detention are guided by the CBSA's policies and procedures in effect, including an operational manual relating specifically to detention.

14. If a CBSA officer exercises his or her discretion to detain an individual, their decision to detain is subsequently reviewed by, at minimum, a CBSA Supervisor or Manager for all inland cases or a Superintendent for all port of entry cases. Following this review, release may be authorized or detention may be maintained. The review includes a review of the detention placement decision.

D. ONGOING REVIEW OF IMMIGRATION DETENTION

15. Within 48 hours of an arrest, the *IRPA* requires that individuals be brought before the Immigration Division of the Immigration and Refugee Board (Immigration Division) for a hearing to review their detention.

16. The Immigration Division is a quasi-judicial tribunal which operates independently of the CBSA. The Immigration Division is mandated by the *IRPA* to conduct detention reviews for persons detained pursuant to the Act.

17. If detention is ordered to continue by the Immigration Division after the initial 48-hour detention review, regular detention reviews by the Immigration Division are required pursuant to the *IRPA* within the next 7 days and within every 30 days thereafter.

18. Both parties before the Immigration Division are given an opportunity to submit evidence and make submissions during a detention review. An individual who is detained is allowed legal counsel (at their own expense) or may represent themselves. The Immigration Division is also authorized by the *IRPA* to appoint a designated representative for any individual who is under the age of 18 or who is unable to appreciate the nature of the detention review proceedings.

19. At each detention review, the Immigration Division can order unconditional release, release with conditions or continued detention. The presiding Member must release the person concerned from detention unless he or she is satisfied that there are one or more grounds for detention, as follows:

(a) The person concerned is a danger to the public;

(b) The person concerned is unlikely to appear for an examination, an admissibility hearing, removal from Canada, or an immigration proceeding that could lead to a removal order;

(c) The Minister is taking necessary steps to inquire into a reasonable suspicion that the person concerned is inadmissible to Canada on the grounds of security, violating human or international rights, or criminality;

(d) The Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or

(e) The Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

20. If one or more grounds for detention are established, the Immigration Division must consider the non-exhaustive factors set out in section 248 of the *Regulations* to determine whether the detention should continue. Those factors are:

(a) The reasons for the individual's detention;

(b) The length of time the individual has been in immigration detention;

(c) Whether the length of time detention is likely to continue can be determined, and if so how long detention is likely to continue;

(d) Unexplained delays or unexplained lack of diligence on the part of the Minister or the person detained; and

(e) The existence of alternatives to detention.

21. Decisions of the Immigration Division are reviewable by the Federal Court by way of judicial review.

22. Every class member was detained in accordance with the *IRPA* and had the benefit of regular detention reviews before the Immigration Division.

E. PLACE OF DETENTION

23. CBSA has the discretion and authority to determine the place of detention for an individual detained pursuant to the *IRPA*. In Ontario, individuals detained on immigration grounds are held at the Toronto Immigration Holding Centre (TIHC) or in a provincial correctional institution maintained and operated by MCSCS.

24. The place of detention in Ontario depends on geography and proximity to the TIHC and on an assessment of the detainee's risk level.

25. If placement is considered in an immigration holding centre, that decision may be reviewed by the manager of the facility. Presently, in regions with an IHC, any decision to send a detainee to a provincial correctional facility must be reviewed by an officer or a manager who works at an Immigration Holding Centre or a designated regional representative.

26. If a detainee is to be housed in a provincial facility, MCSCS determines the specific correctional institution where the person will be detained as well as any subsequent moves within provincial correctional institutions.

1) <u>Toronto Immigration Holding Centre</u>

27. The TIHC is one of three immigration holding centres in Canada that houses detainees.

28. The TIHC is operated by the CBSA. It became operational in March 2004. Prior to that, the CBSA and Immigration, Refugees and Citizenship Canada (IRCC), formerly known as Citizenship and Immigration Canada (CIC), used different facilities from time to time as immigration holding centres.

29. Historically, immigration holding centres were intended to house only low risk detainees. CBSA policies, as amended from time to time, generally provide that any

detainee assessed as a potential threat to themselves or to other detainees or to the public is not eligible for an IHC. In addition, detainees who are fugitives or who present escape risks, who have a history of violence or display violent or uncooperative behaviour, or who have serious medical issues are to be detained in a more secure facility.

30. At present, the TIHC has a maximum capacity of 188 detainees.

31. The facilities, personnel and procedures in place at immigration holding centres reflect the fact that they were historically intended to house lower risk detainees. Changes are currently underway to permit the TIHC to house higher risk detainees.

32. Individuals can be transferred to the TIHC from correctional facilities when their risk can be appropriately managed within the TIHC.

33. As of May 15, 2017, the TIHC began holding detainees who are assessed to be medium risk. Medium risk detainees include persons who may have prior criminal convictions but whose convictions do not relate to weapons offences, the trafficking, import or export of a controlled substance under the *Controlled Drugs and Substances Act*, or sexual assault or related sexual offences. Medium risk detainees exclude persons with a record of violence.

2) <u>Agreement to use provincial correctional facilities</u>

34. In Ontario, most high risk detainees, as well as all persons arrested and detained by the CBSA outside of the geographic area served by the TIHC, are housed in

provincial correctional facilities operated and maintained by MCSCS. For several years, MCSCS agreed to house immigration detainees pursuant to an unwritten agreement between Ontario and Canada.

35. From April 1, 2013 onward, a written agreement between the CBSA and MCSCS superseded the previous agreement governing the practice of detaining immigration detainees in provincial facilities. The written agreement was amended by letter on April 25, 2017 (the Agreement).

36. The Agreement between the CBSA and MSCSC is subject to regular review by both parties to the agreement.

37. Under the terms of the Agreement between the CBSA and MCSCS, the conditions of detention of immigration detainees are governed by the *Ministry of Correctional Services Act*, RSO 1990, c M.22 and the policy and procedures of the MCSCS, as amended from time to time.

38. The CBSA endeavours, in co-operation with MCSCS, to ensure to the maximum extent possible that immigration detainees are not commingled with inmates in provincial correctional institutions.

39. CBSA Jail Liaison officers and other CBSA officers have access to detainees in provincial institutions, on reasonable notice, for the purposes of monitoring their detention, and to carry out their functions under the *IRPA*.

40. The Agreement provides that detainees shall be allowed to meet with their legal counsel or designated representatives, in accordance with Ontario's policies and procedures governing visits by professionals.

41. The Agreement acknowledges that Canada has entered into agreements with the Canadian Red Cross and the United Nations High Commission for Refugees to allow those agencies to monitor conditions of detention for immigration detainees. The Agreement provides that those agencies may, pursuant to their respective mandates, meet with detainees in accordance with access granted by Ontario.

3) <u>Long term detention</u>

42. The CBSA (and before it the Minister of Citizenship and Immigration) established a Long Term Detention Committee (the Committee), which regularly reviews all cases in the Greater Toronto Area where persons are detained over 90 days.

43. The Committee reviews cases to ensure that detention is continued only when it is the only viable option. This includes ensuring that all possible enforcement action is taken, and assessing whether alternatives to detention would be appropriate, such as release on terms and conditions. The Committee can recommend logistical and/or mental health treatment plans, transfers to alternative facilities, supervision by the Toronto Bail Program, specific medical treatment, release, or file review to the CBSA hearings officer assigned to appear at the next detention review.

44. In January 2017, the CBSA implemented a Detention Governance Process to build on the best practices of the Long Term Detention Committee outside the Greater Toronto Area. CBSA managers of each region regularly review detention cases of 60 days or more to determine whether or not all alternatives to detention or transfer options have been exhausted. These Managers report to a Regional Review Committee, which in turn reports to CBSA Headquarters, Inland Enforcement Operations on all detention cases of 99 days or more. At each step, consideration is given to whether all alternatives to detention have been exhausted and to ensure that efforts to facilitate removal are continuing.

F. NO NEGLIGENCE

1) Crown immunity for policy decisions

45. The AGC's reasonable policy choices with respect to the immigration detention system are immune from claims in negligence.

46. The AGC's choice of which facilities to use to detain immigration detainees, and its agreements with provincial authorities for the use of provincial correctional institutions involve the allocation of government resources and policy choices which are dictated by financial, economic, social and political factors and constraints, and which are immune from a claim in negligence.

47. The AGC's oversight of agreements with provincial authorities for the use of provincial correctional institutions also involves policy decisions which are immune from a claim in negligence.

48. The AGC at all times made policy choices in a *bona fide* and reasonable manner.

2) No liability for actions pursuant to statutory authority

49. Pursuant to section 8 of the *Crown Liability and Proceedings Act*, the Crown is not liable when the act or acts complained of are committed under statutory authority. The AGC and its agents, servants and employees were at all times acting pursuant to statutory authority.

3) No duty of care owed

50. The AGC's agents, servants and employees did not owe a private law duty of care to individuals detained under the statutory authority of the *IRPA*. To find otherwise would undermine the AGC's ability to administer the *IRPA*. If a duty of care is found, which is not admitted but denied, it is negated as a result of important policy considerations.

4) No breach of a duty of care

51. In the alternative, if a duty of care is found, the AGC met the reasonable standard of care required in the circumstances.

52. Neither the AGC nor any person acting on its behalf committed any torts or was negligent as alleged in the claim or at all.

53. The AGC and its agents, servants, and employees at all times discharged their duties in a *bona fide*, proper, reasonable, prudent and conscientious manner and in

accordance with the policies, programs, procedures and practices in place from time to time and, in at all material times, met and maintained a reasonable standard of care.

54. If the AGC is found to have owed a duty of care and was in breach of such a duty, both of which are denied, and if the Plaintiffs suffered any loss, injury, or damage, which is also denied, such loss, injury or damage was not caused or contributed to by any negligence, breach of any duty or want of care on the part of the AGC or any person for whom the AGC is responsible in law.

55. The AGC also specifically denies the Plaintiffs' allegations respecting systemic negligence. At all material times, the AGC and the employees, agents and servants of the AGC met the standard of care reasonably expected in the context of administering the *IRPA* and the immigration detention system. The AGC did not create, perpetuate or allow to develop a system that amounted to systemic negligence.

G. NO LIABILITY UNDER THE *CHARTER*

56. The AGC denies that it breached the Plaintiffs' sections 7 and 12 *Charter* rights and puts the Plaintiffs to the strict proof thereof.

57. The AGC denies that any of its actions or omissions limited the Plaintiffs' right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice as protected by section 7 of the *Charter*. By definition, the Plaintiffs consist of a class whose liberty interests were lawfully curtailed by operation of the provisions of the *IRPA*. While in detention, the Plaintiffs' section 7

Charter rights were not infringed by reason of their transfer to provincial institutions nor by the conditions of their detention within provincial institutions. The AGC further denies that the Plaintiffs have identified any principle of fundamental justice that arises from the circumstances alleged in the Amended Statement of Claim.

58. The AGC also denies that the Plaintiffs were subjected to cruel and unusual treatment or punishment contrary to section 12 of the *Charter* or that any of the AGC's actions or omissions subjected the Plaintiffs to cruel and unusual treatment or punishment contrary to section 12 of the *Charter*. Further, whether treatment or punishment is so excessive and whether such excess outrages standards of decency are fact and circumstance-specific determinations which cannot be determined on a systemic or collective basis.

59. Alternatively, if the Plaintiffs' section 7 or 12 *Charter* rights were engaged and violated, as alleged, any such breach is justified under Section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.

H. CLAIMS BEYOND LIMITATION PERIOD ARE STATUTE BARRED

60. All claims alleged in the Amended Statement of Claim arising more than two years prior to the date of the Statement of Claim are statute-barred against the AGC. In this regard, the AGC pleads and relies upon the *Crown Liability and Proceedings Act*, RSC 1983, c C-50, section 32 and the *Limitations Act, 2002*, SO 2002, c 24, Sch B.

61. All proceedings (with a few exceptions which do not apply in this instance) must be commenced within two years of the date on which the claim was discovered. The Statement of claim in this action was issued August 11, 2016.

62. Class members would have been aware of any of the claims raised against the AGC in this action, at the very latest, when they were released from immigration detention in a provincial correctional facility. The claims of any of the class members released from immigration detention in a provincial correctional facility prior to August 11, 2014 are therefore statute-barred.

63. Personal claims made pursuant to the *Charter* are subject to the applicable limitation period where consequential relief is claimed. Even if class members could establish a breach of the *Charter*, the *Charter* claims of any of the class members released from immigration detention in a provincial correctional facility prior to August 11, 2014 are statute-barred.

I. NO DAMAGES WARRANTED

64. The AGC denies that the Plaintiffs suffered damages as alleged and puts the Plaintiffs to the strict proof thereof.

65. In the alternative, if the Plaintiffs suffered any damages, the Plaintiffs caused and/or contributed to their own injury and damages and the Plaintiffs failed to mitigate their damages. The actions of the AGC, its employees, agents or servants did not cause or materially contribute to any injuries or damages claimed by the Plaintiffs.

66. The Plaintiffs are not entitled to the damages sought as the damages are unforeseeable, not causally connected, grossly exaggerated, excessive and remote.

67. An award of damages would not constitute an appropriate or just remedy under subsection 24(1) of the *Charter* in the circumstances. Further, the claim for subsection 24(1) damages is premised on particular *Charter* violations in individual circumstances which cannot reasonably be assessed in the aggregate or in a factual vacuum based on a series of generalized allegations of misconduct.

1) <u>No basis to awarded aggregate damages</u>

68. An award of aggregate damages is not appropriate on the facts of this claim.

69. In the event that the AGC is found liable for damages, any fair assessment of damages will be inextricably linked to factual and legal issues specific to individual class members, including, but not limited to:

(a) Causation;

(b) Mitigation;

(c) Application of the *Limitations Act*;

(d) Discoverability; and

(e) Capacity of the class member.

70. Damages cannot reasonably be calculated without proof by individual class members.

2) No liability for punitive damages

71. There is no basis for an award of punitive, aggravated or exemplary damages. Neither the AGC nor any of its servants, agents or employees has acted in a high-handed, malicious, arbitrary or highly reprehensible manner.

72. The Defendant specifically pleads and relies on the following statutes and regulations made thereunder:

(a) *Immigration and Refugee Protection Act*, S.C. 2001, c. 27;

(b) *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50;

(c) *Negligence Act*, R.S.O. 1990, c. N.1;

(d) *Canada Evidence Act*, R.S.C. 1985, c. C-5; and

(e) *Limitations Act*, 2002, SO 2002, c 24, Sch B

J. CONCLUSION

73. The AGC requests that this action be dismissed, with costs.

May 30, 2018

ATTORNEY GENERAL OF CANADA
Department of Justice
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario
M5H 1T1
Fax: (647) 256-1160

Per: David Tyndale
Tel: (647) 256-7309
Email: David.Tyndale@justice.gc.ca

Lawyer for the Defendant, The Attorney General of Canada
File: 8650359

TO: **Koskie Minsky LLP**
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Kirk Baert LS #30942O
Tel: 416-595-2117
Fax: 416-204-2889

AND TO: **Henein Hutchinson LLP**
235 King Street E., 1st Floor
Toronto, ON M5A 1J9

Scott Hutchinson LS#29912J
Tel: 416-368-5000
Fax: 416-368-6640

Lawyers for the Plaintiffs

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**
Crown Law Office – Civil Law
720 Bay Street, 8th Floor
Toronto, Ontario
M5G 2K1

Tel.: 416-325-8535
Fax: 416-326-4181

CV-16-55837600CP

GODDAY DADZIE and AL ZEEKEHMENS	AND	HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA
Plaintiffs		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

STATEMENT OF DEFENCE

ATTORNEY GENERAL OF CANADA

Department of Justice
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario
M5H
Fax: (647) 256-1160

Per: David Tyndale
Tel: (647) 256-7309
Email: David.Tyndale@justice.gc.ca

Lawyer for the Defendant Attorney General of Canada
File: 8650359