Michaelmas Term
[2012] UKSC 48
On appeal from: [2011] EWCA Civ 1540; [2012] EWCA Civ 182

JUDGMENT

Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) *v* Yunus Rahmatullah (Respondent)

Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) *v* Yunus Rahmatullah (Appellant)

before

Lord Phillips
Lady Hale
Lord Kerr
Lord Dyson
Lord Wilson
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

31 October 2012

Heard on 2 and 3 July 2012

Appellant
James Eadie QC
Ben Watson
Dan Sarooshi
(Instructed by Treasury Solicitor)

Respondent
Nathalie Lieven QC
Ben Jaffey
Tristan Jones
(Instructed by Leigh Day & Co)

Intervener (JUSTICE)
Thomas de la Mare QC
Fraser Campbell
(Instructed by Allen & Overy LLP)

LORD KERR (WITH WHOM LORD DYSON AND LORD WILSON AGREE)

1. On 20 March 2003 military operations involving armed forces of the United States of America and the United Kingdom began in Iraq. Exactly six weeks later, on 1 May 2003, major combat operations came formally to an end. The United Kingdom became one of two occupying powers. The other was the United States.

2. On 16 October 2003, the United Nations Security Council adopted Resolution 1511 (2003) which authorised, "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq". From that date, UK Armed Forces deployed in Iraq formed part of that multinational force (MNF) and were responsible for security and stabilisation operations in south eastern Iraq as part of the Multi National Division (South East) (MND (SE)).

3. In February 2004 Yunus Rahmatullah, a citizen of Pakistan, was taken into custody by British forces. This took place outside MND (SE) and within an area of Iraq under US control. Mr Rahmatullah was transferred to US Forces in accordance with the terms of a Memorandum of Understanding which had been signed in Qatar on behalf of the armed forces of the US, UK, and Australia on 23 March 2003. That document was entitled, "An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia" and I shall refer to it as "the 2003 MoU". It will be necessary to discuss its terms in a little detail later in this judgment. It is sufficient for present purposes to say that the 2003 MoU was to be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (GC3) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC4), as well as customary international law. The 2003 MoU also provided that the removal of transferred prisoners of war to territories outside Iraq would only be made "upon the mutual arrangement of the Detaining Power and the Accepting Power". In the case of Mr Rahmatullah, the detaining power was the UK and the accepting power the US.

4. The UK authorities became aware, about a month after Mr Rahmatullah had been taken into custody, that US forces intended to transfer him out of Iraq. That transfer took place without the UK having been informed of it. By June 2004, however, UK officials knew that Mr Rahmatullah was no longer in Iraq. He had been taken to Afghanistan. At the time this information came to British officials,

Mr Rahmatullah was being held in a detention facility in Bagram Air Field and there he has remained.

5. On 5 June 2010, the US military held a Detainee Review Board hearing at Bagram in relation to Mr Rahmatullah's detention. The Board concluded that his continued detention was "not necessary to mitigate the threat he poses"; that he should be transferred to Pakistan for release; and that he was not an "Enduring Security Threat". On 15 June 2010 the recommendation of the Board was approved by Brigadier General Mark S Martins of the US army but it has not been implemented. It has been explained that the recommendation is but one component of the transfer process. Before third-country nationals are transferred from US custody a determination is made (based on evidence which was before the Board but not necessarily exclusively so) whether any threat posed by the detainee can be adequately mitigated by the receiving country. "Appropriate security assurances" are sought. Generally, these assurances require the receiving country to take measures to ensure that the detainee will not pose a threat to the receiving country or to the United States.

The 2003 Memorandum of Understanding

6. The 2003 MoU was signed three days after military operations in Iraq had begun. In a statement made for the purpose of these proceedings, Mr Damian Parmenter, Head of Operating Policy in the Operations Directorate of the Ministry of Defence, explained that it was considered important to obtain the 2003 MoU because of "the known US position on the application of the Geneva Conventions". That position, succinctly stated, was that the conventions did not apply to Al-Qaeda combatants. Mr Rahmatullah is believed by the US to be a member of Lashkar-e-Taiba, a group affiliated to Al-Qaeda. To say that it was important to obtain the 2003 MoU certainly does not overstate the position, therefore. Section 1(1) of the Geneva Conventions Act 1957 makes it an offence for any person to commit, or aid, abet or procure the commission by any other person of a grave breach of any of the Geneva Conventions. Article 147 of GC4 provides that unlawful deportation or transfer or the unlawful confinement of a protected person constitute grave breaches of that convention. It might be considered in those circumstances to have been not only important but essential that the UK should obtain a commitment from the US that prisoners transferred by British forces to the US army would be treated in accordance with GC3 and GC4.

7. The importance of the need to obtain that commitment is reflected in the terms of the very first clause of the 2003 MoU which provides:

> "This arrangement will be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law."

8. As Ms Lieven QC, who appeared for Mr Rahmatullah, pointed out, clause 4 of the 2003 MoU, which provides for the return of transferred prisoners, is in unqualified terms. This was no doubt necessary because of the unambiguous requirements of article 45 of GC4. It will be necessary to look more closely at that article presently but, among its material provisions, is the stipulation that if the power to whom the detainee is transferred (in this instance the US) fails to fulfil GC4, the detaining power (here the UK) must take effective measures to correct the situation or request the return of the transferred person. Clause 4 of the 2003 MoU therefore provides:

> "4. Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power [the UK] will be returned by the Accepting Power [the US] to the Detaining Power without delay upon request by the Detaining Power."

9. Ms Lieven argued – and I am inclined to accept – that the unvarnished and blunt terms of clauses 1 and 4 were designed to avoid disagreements as to the applicability of GC3 and GC4; to eliminate disputes as to whether particular actions of the accepting power might have breached the conventions; and to remove from the potentially controversial and delicate area of inter-state diplomacy debates about how prisoners should be treated.

10. Clause 5 of the memorandum deals with the situation where it is proposed that prisoners who had been transferred would be released or removed to territories outside Iraq. It seems likely that at least one of the reasons for including this provision was to cater for the requirement in article 45 of GC4 that protected persons may only be transferred to a power which is a party to the convention and after the detaining power has satisfied itself of the willingness and ability of the transferee power to apply GC4. Clause 5 of the 2003 MoU provides:

> "5. The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the Detaining Power and the Accepting Power."

11. It is common case that the 2003 MoU is not legally binding. It was, said Mr Eadie QC, who appeared for the Secretaries of State, merely a "political" arrangement. But its significance in legal terms should not be underestimated. That significance does not depend on whether the agreement that it embodies was legally binding as between the parties to it. As Lord Neuberger of Abbotsbury MR said at [2012] 1 WLR 1492, para 37 of his judgment in this case, the 2003 MoU was needed by the UK in order to meet its legal obligations under article 12 of GC3 and article 45 of GC4. (Such parts of these as are relevant to the present appeal are in broadly similar terms). Put plainly, the UK needed to have in place an agreement which it could point to as showing that it had effectively ensured that the Geneva Conventions would be complied with in relation to those prisoners that it had handed over to the US. The 2003 MoU was the means of meeting those obligations. It provided the essential basis of control for the UK authorities over prisoners who had been handed over to the US.

12. In other contexts the UK Government has deployed the fact that it has made arrangements with foreign powers in order to persuade courts that a certain course should be followed. Thus, in *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110 at para 192, Lord Hoffmann, referring to assurances which the Algerian and Jordanian Governments had given that the persons whom the Home Secretary proposed to deport to Algeria and Jordan would not face torture or other ill-treatment contrary to article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), said that the existence of those assurances was a sufficient basis on which it could properly be found that the deportee would not be subject to such treatment.

13. The assurances to which Lord Hoffmann had referred were considered by the European Court of Human Rights (ECtHR) in *Othman (Abu Qatada) v United Kingdom* (Application No 8139/09) (unreported) given 17 January 2012. At para 164, the court recorded the following submission made on behalf of the UK Government:

> "164. … the Government reiterated that the assurances contained in the MOU had been given in good faith and approved at the highest levels of the Jordanian Government. They were intended to reflect international standards. There was no lack of clarity in them, especially when the MOU was interpreted in its diplomatic and political context. … To criticise the MOU because it was not legally binding (as the applicant had) was to betray a lack of an appreciation as to how MOUs worked in practice between states; they were a well-established and much used tool of international relations …"

14. In *Ahmad and Aswat v Government of the United States of America* [2007] HRLR 157, in resisting an application for extradition to America to stand trial on various federal charges, the appellants claimed that if they were extradited there was a real prospect that they would be made subject to a determination by the President that would have the effect that they be detained indefinitely and/or that they would be put on trial before a military commission in violation of their rights under articles 3, 5 and 6 of ECHR. By Diplomatic Notes, the government of the US had given assurances that upon extradition they would be prosecuted before a federal court with the full panoply of rights and protection that would be provided to any defendant facing similar charges. It was held there was a fundamental assumption that the requesting state was acting in good faith when giving assurances in Diplomatic Notes. The assurances in the notes were given by a mature democracy. The United States was a state with which the United Kingdom had entered into five substantial treaties on extradition over a period of more than 150 years. Over this period there was no instance of any assurance having been dishonoured.

15. Memoranda of Understanding or their equivalent, Diplomatic Notes, are therefore a means by which courts have been invited to accept that the assurances which they contain will be honoured. And indeed courts have responded to that invitation by giving the assurances the weight that one would expect to be accorded to solemn undertakings formally committed to by responsible governments. It is therefore somewhat surprising that in the present case Mr Parmenter asserted that it would have been futile to request the US government to return Mr Rahmatullah. As the Master of the Rolls pointed out in para 39 of his judgment, this bald assertion was unsupported by any factual analysis. No evidence was proffered to sustain it.

The 2008 Memorandum of Understanding

16. On 28 June 2004, the period of occupation ended and the Iraqi Interim Government assumed full responsibility and authority for governing Iraq. After that date, UK forces remained in Iraq as part of the MNF at the request of the Iraqi Government and pursuant to the terms of various UN Security Council resolutions (UNSCRs). This change in the legal framework from an international armed conflict to operations conducted under UNSCRs apparently prompted discussions designed to conclude a second MoU. The discussions foundered in 2004 and again in 2006 but eventually in mid-October 2008 a revised MoU was concluded between the governments of the US and the UK (the 2008 MoU). It was not signed on behalf of the UK until March 2009, however.

17. It was Mr Parmenter's evidence that the 2008 MoU was designed to replace and supersede the 2003 MoU. I am not disposed to accept that claim. In the first

instance, while it may not be a matter of especial significance, the 2003 MoU was concluded between US, UK and Australia, whereas the 2008 MoU is between US and UK alone. Secondly, the 2008 MoU does not state that it replaces the 2003 MoU and there is nothing in its terms that make it inevitably implicit that this was to be its effect. Moreover, even if the 2008 MoU did indeed supersede the 2003 MoU, there is no reason to conclude that it had done so for prisoners already transferred under the earlier arrangements. I consider, therefore, that the UK government remained entitled to have recourse to the 2003 MoU to demand Mr Rahmatullah's release to them. This provides a sufficient basis for the finding that there was at least uncertainty as to whether the UK could exert control over Mr Rahmatullah. That uncertainty was enough to justify the issue of the writ.

18. Quite independently of the 2003 MoU, the UK remained under a continuing obligation, by virtue of GC4, to take such steps as were available to it to ensure that Mr Rahmatullah was treated in accordance with the conventions' requirements and, if necessary, to demand his return. It is not necessary to decide whether this circumstance would be sufficient to give rise to uncertainty as to whether the UK could obtain control of Mr Rahmatullah. It seems to me, however, that it might well be enough. The UK and the US were allies. If it was demonstrated that a failure to return Mr Rahmatullah might involve the UK being in breach of its international obligations, it is surely at least possible that its ally, the US, would return Mr Rahmatullah, upon request, in order to avoid that eventuality.

19. The 2008 MoU did not contain a replicate of clause 4 of the 2003 MoU. Clause 4 of the later document provides:

> "4. At all times while transferred detainees are in the custody and control of US Forces, they will treat transferred detainees in accordance with applicable principles of international law, including humanitarian law. The transferred detainees will only be interrogated in accordance with US Department of Defense policies and procedures."

20. Ms Lieven suggests that the phrase "applicable principles of international law, including humanitarian law" must comprehend the Geneva Conventions and Mr Eadie has not sought to challenge that claim but, for the reasons that I have given, this debate is of no more than academic interest in this appeal.

21. Clause 8 of the 2008 MoU, dealing with onward transfer of detainees, was also different from its counterpart, clause 5, in the 2003 MoU. Whereas the earlier MoU had stated that transferred detainees would not be removed from Iraq unless

"mutual arrangements" were made between the detaining power and the accepting power, clause 8 of the 2008 MoU provides:

> "8. US Forces will not remove transferred detainees from Iraq without prior consultation with the UK Government."

The legality of the respondent's detention

22. Before the Court of Appeal and, initially at least, before this court, the Secretaries of State took their stand on the proposition that they did not have a sufficient measure of control over Mr Rahmatullah's detention. On that account, they argued, it was not for them to address the question of whether the respondent is legally detained.

23. There is a certain logic in the Secretaries of State's position. If they are right in their claim that they cannot influence, much less dictate, a decision as to whether Mr Rahmatullah should be released, the legal justification for his continuing to be held is not a matter for them. On the other hand, if it could be shown that the respondent is legally detained, the relevance of the question whether the appellants have a sufficient measure of control over Mr Rahmatullah's detention falls away.

24. In some cases, (of which I do not believe the present appeal to be one) the legality of the detention of an applicant for habeas corpus will occupy centre stage. In such cases it may be better to focus first on that question and not be distracted by a, possibly academic, discussion of whether the respondent to the application for habeas corpus has a sufficient measure of control over the applicant's detention.

25. In other cases the issue of legality may not feature as prominently and the question whether the proposed respondent to the writ has the requisite control will be the principal issue. It is not strictly necessary to decide whether this is a case in which the primary focus should be on the legality of detention or on control, although I am of the view that control is really the critical issue here. But in deference to the arguments made on the question of the legality of Mr Rahmatullah's detention, it is right that I should address that issue.

26. Understandably, it did not exercise the Court of Appeal to any significant extent. As the Master of the Rolls pointed out in para 25 of his judgment, Ms Lieven claimed that the first element of her argument (that Mr Rahmatullah was unlawfully detained) succeeded by default since it was "a fundamental principle of

English law that, where an individual is detained against his will, it is for the detainer to show that the detention is lawful, not for the detainee to show that his detention is unlawful". The Secretaries of State did not challenge that principle nor Mr Rahmatullah's right to rely on it. And they did not seek to argue that the respondent was lawfully detained. Consistent with their stance on the question of control, they said that this was not a matter for them.

27. Before this court, however, in response to a question from the President, Lord Phillips, Ms Lieven was disposed to accept that the respondent had to raise a prima facie case that he was unlawfully detained, or, as it was sometimes put, a case of "putative illegal detention". That case, Ms Lieven contended, rested on the clear violations of articles 45 and 49 of GC4 constituted by Mr Rahmatullah's continued detention. Mr Eadie remained somewhat reserved on the issue. He suggested that the question of whether Mr Rahmatullah fell within the protection of the Geneva Conventions was, at least, problematic. It was not a given that because no justification for his detention had been proffered, Mr Rahmatullah was to be regarded, for habeas corpus purposes, as unlawfully detained.

The Geneva Conventions

28. Mr Eadie argued that Mr Rahmatullah did not come within the protection of GC3 since he was not a prisoner of war as defined in article 4 of that convention. It is not, I think, necessary to consider this provision in detail. I accept that it is at least arguable that Mr Rahmatullah would not fall within it. In light of my conclusions as to the applicability of GC4 to his situation, however, discussion of the possible application of GC3 to his situation is not required.

29. Article 4 of GC4 provides:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are …"

30. Pakistan is bound by the Convention and Mr Rahmatullah is therefore not excluded by the first sentence of the second paragraph of this provision. As to whether the second exclusionary condition (that he was a national of a neutral state who found himself in the territory of a belligerent state) should apply to him, Ms Lieven drew our attention to two documents which discuss this question. The first of these was a "memorandum opinion for the counsel to the President" of the US, prepared by Jack L Goldsmith III, assistant attorney general. In this paper, in a section entitled "Nationals of a Neutral State in the Territory of a Belligerent State" Mr Goldsmith said this:

> "Article 4(2) (*sic*) also excludes from 'protected person' status nationals 'of a neutral state who find themselves in the territory of a belligerent state' as long as the neutral state has 'normal diplomatic representation in the state in whose hands they are.' The phrase 'territory of a belligerent state' might appear at first to be capable of bearing two different readings. First, it might refer to the territory of any state that participates in an armed conflict covered by GC. As applied to the armed conflict with Iraq, this interpretation would mean that citizens of neutral states in occupied Iraq would not be 'protected persons' so long as the neutral states had 'normal diplomatic representation' in the United States. Second, 'the territory of a belligerent state' might refer to the *home* territory of the party to the conflict in whose hands the citizen of the neutral state finds himself. As applied to the armed conflict with Iraq, this interpretation would deny 'protected person' status to citizens of neutral states who find themselves in the territory of the United States, but not to those who find themselves in occupied Iraq.
>
> We conclude that the second interpretation is correct. The phrase '[n]ationals of a neutral state who find themselves in the territory of a belligerent state' must be understood in light of the Convention's overarching structure …"

31. The second document to which we were referred was the Joint Service Manual of the Law of Armed Conflict issued by the Director-General Joint Doctrine and Concepts of the Ministry of Defence. In para 11.1 of his document the following appears:

> "Neutral nationals in occupied territory are entitled to treatment as protected persons under Geneva Convention IV whether or not there are normal diplomatic relations between the neutral state concerned and the occupying power."

32. The interpretation placed on article 4 by Mr Goldsmith is unquestionably correct. To adopt the first interpretation mooted would run entirely counter to the purpose of the convention and, not at all incidentally, defy common sense. Why should nationals of a neutral state who happen to be in a country where conflict is taking place be denied protection under the convention simply because their country enjoys normal diplomatic relations with the state into whose hands they fall? That would arbitrarily – and for no comprehensible reason – remove from the protection of the convention an entire swathe of persons who would be entirely deserving of and who naturally ought to be entitled to that protection.

33. Mr Eadie pointed out, however, that the same opinion from Mr Goldsmith expressed the unequivocal view that Al-Qaeda operatives found in occupied Iraq are excluded from "protected person" status. That opinion seems to have been based on a narrow interpretation of the qualifying phrase "find themselves" as applied to those who come to be in Iraq at the material time. The presence of such as Mr Rahmatullah in Iraq could not, Mr Goldsmith suggests, be attributed to happenstance or coincidence. He was therefore not a protected person under the convention.

34. It is not necessary to deal with this argument, although, if it were, I would have little hesitation in dismissing it. To make happenstance or coincidence a prerequisite of protection seems to me to introduce a wholly artificial and unwarranted restriction on its availability under the convention. But, in any event, the position of the UK government, as evidenced by the Joint Service Manual, is plainly at odds with the stance taken by the US as to the application of GC4 to members of Al-Qaeda. This is confirmed by a statement in a report by Intelligence and Security Committee on The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq: (2005) Cm 6469. At para 8 of that report it is stated that, "the UK regards all personnel captured in Afghanistan as protected by the Geneva Conventions". Against this background it is simply not open to the Secretaries of State to suggest that the convention does not apply on the basis that Mr Goldsmith has advanced.

35. Given that GC4 does apply to Mr Rahmatullah, how does that bear on the legality of his detention? Article 49 forbids the forcible transfer of protected persons from the occupied territory, in this case Iraq. It provides:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

36. The, presumably forcible, transfer of Mr Rahmatullah from Iraq to Afghanistan is, at least prima facie, a breach of article 49. On that account alone, his continued detention post-transfer is unlawful. Quite apart from this, however, article 132 requires that every interned person must be released by the detaining power *as soon as the reasons which necessitated his internment no longer exist*. The conclusion of the Detainee Review Board that Mr Rahmatullah's continued detention was "not necessary to mitigate the threat he poses" strongly suggests that the reasons that necessitated his internment no longer apply. And article 133 stipulates that internment should cease as soon as possible after the close of hostilities. There may be some scope for debate as to when hostilities closed but it is at the very least eminently arguable that they ended long ago.

37. It is at this point that article 45 of GC4 comes directly into play. In so far as is material to the present case, it provides:

> "Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with."

38. In these circumstances the UK government was under a clear obligation, on becoming aware of any failure on the part of the US to comply with any provisions of GC4, to correct the situation or to request the return of Mr Rahmatullah. On 9 September 2004, the then Minister for the Armed Forces, Mr Adam Ingram MP, gave a written answer to a parliamentary question in which he stated that "all persons apprehended by the United Kingdom Forces in Iraq and transferred to United States forces, and who are still in custody, remain in Iraq". That was plainly incorrect. In February 2009 Mr John Hutton MP, then Secretary of State for Defence, made a statement to Parliament in which he said:

> "[I]n February 2004 … two individuals were captured by UK forces in and around Baghdad. They were transferred to US detention, in accordance with normal practice, and subsequently moved to a US detention facility in Afghanistan. … Following consultations with

> US authorities, we confirmed that they transferred the two individuals from Iraq to Afghanistan in 2004 and they remain in custody there today. I regret that it is now clear that inaccurate information on this particular issue has been given to the House by my Department … The individuals transferred to Afghanistan are members of Lashkar-e-Taiba, a proscribed organisation with links to al-Qaeda. The US Government have explained to us that those individuals were moved to Afghanistan because of a lack of relevant linguists to interrogate them effectively in Iraq. The US has categorised them as unlawful enemy combatants, and continues to review their status on a regular basis. We have been assured that the detainees are held in a humane, safe and secure environment that meets international standards that are consistent with cultural and religious norms. The International Committee of the Red Cross has had regular access to the detainees. … [The] review has established that officials were aware of the transfer in early 2004. … In retrospect, it is clear to me that the transfer to Afghanistan of these two individuals should have been questioned at the time." (See Hansard (HC Debates) 26 February 2009, cols 395-396.)

39. Not only should the transfer of the two persons have been questioned at the time that they were removed, it should have been the subject of representation by the UK at the time that the authorities here became aware of it and subsequently. If the UK government appreciated that the transfer was in apparent breach of article 49 of GC4 (and it has not been suggested otherwise) and if, as it should have done, it became aware that Mr Rahmatullah continued to be held in breach of articles 132 and 133, it was obliged by virtue of article 45 to take effective measures to correct the breaches or to ask for Mr Rahmatullah's return.

40. There can be no plausible argument, therefore, against the proposition that there is clear prima facie evidence that Mr Rahmatullah is unlawfully detained and that the UK government was under an obligation to seek his return unless it could bring about effective measures to correct the breaches of GC4 that his continued detention constituted. It is for that reason that I am of the view that the real issue in this case is that of control. But before examining that issue, it is necessary to say something about the nature of habeas corpus.

Habeas Corpus

41. The most important thing to be said about habeas corpus, at least in the context of this case, is that entitlement to the issue of the writ comes as a matter of right. "The writ of habeas corpus issues as of right" per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 at 111.

It is not a discretionary remedy. Thus, if detention cannot be legally justified, entitlement to release cannot be denied by public policy considerations, however important they may appear to be. If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified.

42. The remedy of habeas corpus is said to be imperative, even peremptory. Classically, it is swiftly obtained: see Lord Birkenhead in *Ex p O'Brien* [1923] AC 603 at 609. This reflects the fundamental importance of the right to liberty. And, of course, conventionally the respondent to the writ will be the individual or agency who has actual physical custody of the person seeking release. But habeas corpus is – as it needs to be – a flexible remedy. As Taylor LJ said in *R v Secretary of State for the Home Department, Ex p Muboyayi* [1992] QB 244, at 269, "The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

43. The effectiveness of the remedy would be substantially reduced if it was not available to require someone who had the means of securing the release of a person unlawfully detained to do so, simply because he did not have physical custody of the detainee – "actual physical custody is obviously not essential" per Atkin LJ in *Ex p O'Brien* [1923] 2 KB 361, 398 and Vaughan Williams LJ in *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, 592, stating that the writ "may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner".

44. The object of the writ is not to punish previous illegality and it will only issue to deal with release from current unlawful detention – see Scrutton LJ in *Ex p O'Brien* [1923] 2 KB 361, 391. And the writ should only be issued where it can be regarded as "proper and efficient" to do so, per Lord Evershed MR in *Ex p Mwenya* [1960] 1 QB 241, 303. Obviously, it will not be proper and efficient to issue the writ if the respondent to it does not have custody of the person detained or the means of procuring his release. And it is to this element of habeas corpus, what Mr Eadie describes as its core component, that I must now turn.

Control

45. At the heart of the cases on control in habeas corpus proceedings lies the notion that the person to whom the writ is directed has either actual control of the custody of the applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court. Thus in *Barnardo*

v Ford [1892] AC 326 where the respondent to the writ had consistently claimed to have handed the child, who was the subject of the application, over to someone whom he was no longer able to contact, the courts nevertheless ordered that the writ should issue because they entertained a doubt as to whether he had indeed relinquished custody of the child. There was therefore a reasonable prospect that the respondent, despite his claims, either had or could obtain custody of the child.

46. And in *R v Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361, Bankes LJ, although he accepted the affidavit evidence of the Home Secretary to the effect that Mr O'Brien was under the control of the governor of Mountjoy prison and that the governor was an official of the Irish Free State not subject to the orders or directions of the Home Secretary or the British government, nevertheless decided that the writ of habeas corpus should issue. This was because the arrangements which existed between the Irish Free State and the United Kingdom provided grounds for believing that the Home Secretary could obtain the return of Mr O'Brien. Mr O'Brien had been arrested in London under regulation 14B of the Restoration of Order in Ireland Regulations 1920 and deported to Ireland there to be interned until further order. A statement had been made in the House of Commons on 19 March 1923 that the Irish Free State had given the British government a number of undertakings, one of which was to the effect that if it was decided that any person should not have been deported he would be released. On this basis, the Court of Appeal in effect held that there was a reasonable prospect that the Home Secretary could exert sufficient control over the custody of Mr O'Brien to justify the issue of the writ. Scrutton and Atkin LJJ agreed with Bankes LJ, Atkin LJ observing that the question was whether control "exists in fact". The circumstance that Mr O'Brien was under the control of the governor of the prison was "by no means inconsistent with an agreement with the Free State Government to return on request". Although he acknowledged that there was doubt as to whether the Home Secretary could exert control, Atkin LJ held that there was material before the court which suggested that he could, and, on that account, habeas corpus should be granted. (Of course, the Court of Appeal's apprehension that the Home Secretary *did have* sufficient control to secure the production of Mr O'Brien proved to be entirely correct for he was brought to the court on 16 May 1923 and was "thereupon discharged".)

47. On appeal to the House of Lords, (*Secretary of State for Home Affairs v O'Brien* [1923] AC 603), the Home Secretary's appeal was dismissed on jurisdictional grounds. Lord Atkinson dissented on that issue but he clearly approved the Court of Appeal's analysis for, in a passage at p 624, which has resonances for the present appeal, he said this:

> "[The writ of habeas corpus] operates with coercive force upon the Home Secretary to compel him to produce in Court the body of the respondent. If the Executive of the Free State adhere to the

> arrangement made with him he can with its aid discharge the obligation thus placed upon him. If the Irish Executive should fail to help him he would be placed in a very serious position. Unless this Executive breaks what has been styled its bargain with the Home Secretary he had, in effect, the respondent under his power and control. It would be rather unfair to this Executive to assume gratuitously beforehand that it would not keep the bargain made with it, simply because that bargain was not enforceable at law."

48. The circumstance that the agreement between the British and Irish Free State Governments that internees would be returned was not legally enforceable did not detract, therefore, from the conclusion that there was at least a reasonable prospect that the Home Secretary could procure Mr O'Brien's return to England. This highlights the factual nature of the inquiry that must be made as to whether a sufficient degree of control exists. It is not simply a question of the legal enforceability of any right to assert control over the individual detained. The question is, as Atkin LJ put it, whether control "exists in fact".

49. In *Zabrovsky v General Officer Commanding Palestine* [1947] AC 246 Mr Zabrovsky's son, Arie Ben Eliezer, a Palestinian citizen, was detained under emergency powers regulations. He was issued with an order requiring him to leave Palestine. He was then transported to a military detention camp in Eritrea. At the time, Eritrea was "held" by the British under the control of a Chief Administrator. Proclamation No 54 issued by the Chief Administrator permitted detention without charge in Eritrea, and the order of the Eritrean Military Government for Eliezer's detention had been made pursuant to that Proclamation.

50. An application for habeas corpus was made in the Supreme Court of Palestine against the British Officer commanding Mandate Palestine and the police. That court, sitting as a High Court and exercising English common law rules, discharged a rule nisi on the basis that, although control could be established, the extant detention order had been issued by a state beyond the Supreme Court of Palestine's jurisdiction. On appeal from the decision refusing that application, the Privy Council held at pp 255-256 that the order for the banishment of Mr Zabrovsky's son was lawful, stating:

> "In the troublous times of war and in the chaotic post-war conditions the scope of legal and permissive interference with personal liberty has been extended and restraints have been legalised by the legislature which would not have been accepted as legitimate in normal times. Thus in England, in what are called the Reg 18B cases, *Liversidge v Sir John Anderson* … the House of Lords upheld the legality of a detention of the applicants by the Executive without

> trial and also held that the Executive could not be compelled to give reasons for the detention… … the effect of the decisions is to vest a plenary discretion in the Executive, affecting the liberty of the subject and pro tanto to substitute the judgment of the court, based on ordinary principles of common law right, the discretion of the Executive acting arbitrarily in the sense that it cannot in substance be inquired into by the court."

51. The Board distinguished *O'Brien* in the following passage of its opinion at pp 262-263:

> "[*O'Brien*] was relied upon for two purposes (1) to support an argument that on the facts of the present case the Palestine Government could properly be ordered to produce the body, and (2), that the proper order was not to discharge the order nisi but to make an order nisi which would enable the court, without deciding the question whether the Palestine Government had control of Eliezer, to clear up any doubts there might be as to the facts. In their Lordships' view, however, *O'Brien's* case does not, when carefully considered, afford any help in this appeal. The central feature in that case was that there never was an effective legal order. The order relied on was made by the English Secretary of State for internment of O'Brien in the Irish Free State after the setting up of an Irish constitution and an Irish Executive. The Court of Appeal held that the order was illegal. … The Secretary of State thereupon produced the body of O'Brien, giving as their justification, the order of internment which the court had held to be bad; the court made the order absolute and O'Brien was released … In the present case the Palestinian court has found itself unable to say that the detention was illegal. They have said that it was beyond their competence to decide on the illegality of the detention in Eritrea. Their Lordships, as they have indicated, agree with this view but offer no opinion as to the further suggestion of that court, that, if the petitioner wishes to question the validity of the order made in Eritrea, he must do so in the courts of Eritrea. The validity and effect of the Eritrean law and order may raise many difficult questions of constitutional or other law. The legality of acts done, or of detention enforced in, that country in pursuance or assumed pursuance of its law or orders is, however, clearly beyond the jurisdiction of the Palestine court and of this Board on appeal."

52. With respect, the suggestion that the central feature of *O'Brien* was that there was no effective legal order is open to serious question. A critical, if not the central, issue in that case, as I have sought to demonstrate above, is that there was reason to conclude that the Home Secretary had control over Mr O'Brien's release.

Habeas corpus was issued in his case not simply because it was held that he had been deported and interned on foot of an order which, it was found, had not been lawfully made. The issue of the writ depended crucially on the finding that it was likely that the Home Secretary could procure Mr O'Brien's release.

53. In any event, (and in contrast with the position in *Zabrovsky*) there is clear prima facie evidence in the present case that Mr Rahmatullah is unlawfully detained. That conclusion depends on the effect of the Geneva Conventions, not on an examination of the legal basis on which the US might claim to justify his detention. This court is not precluded, therefore, from expressing a view as to the apparent lack of legal justification for Mr Rahmatullah's continued detention, unlike the position in *Zabrovsky* where the Board felt constrained not to examine the legal basis for Mr Eliezer's internment in Eritrea. This court is not asked to "sit in judgment on the acts of the government of another done within its own territory" as in *Underhill v Hernandez* (1897) 168 US 250, 252. The illegality in this case centres on the UK's obligations under the Geneva Conventions. It does not require the court to examine whether the US is in breach of its international obligations, as in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), which was relied on by Mr Eadie in support of his argument that the Act of State doctrine forbade examination of the legality of Mr Rahmatullah's detention because he was held by the US authorities. Here, there was evidence available to the UK that Mr Rahmatullah's detention was in apparent violation of GC4. The illegality rests not on whether the US was in breach of GC4 but on the proposition that, conscious of those apparent violations, the UK was bound to take the steps required by article 45 of GC4.

54. A further point of distinction with the decision in *Zabrovsky* is that at p 259 the Board made an unequivocal finding of fact that "neither respondent had the deportee in his custody or control nor had either of them any power to produce the body". This is to be contrasted with the present case where the Court of Appeal has unequivocally found that there was sufficient reason to conclude that the Secretaries of State would be able to assert control over the custody of Mr Rahmatullah. I am therefore of the view that the decision in *Zabrovsky* has no bearing on the appeal before this court.

55. In *Ex p Mwenya* [1960] 1 QB 241, the Divisional Court (Parker LCJ, Slade and Winn JJ) considered an application brought on behalf of Mr Mwenya, who had been required by the Governor of Northern Rhodesia to remain within the Mporokoso District of Northern Rhodesia. Three respondents were named in the application: the Governor of Northern Rhodesia, the District Commissioner of the Mporokoso District, and the Secretary of State for the Colonies. In an affidavit filed in the proceedings the Secretary of State explained that the Northern Rhodesian Protectorate was a foreign territory under Her Majesty's protection. He averred that he had neither custody of Mr Mwenya nor control over his custody.

56. The Divisional Court was asked to consider two preliminary objections, one of which was that sufficient custody or control on the part of the Secretary of State could not be established. Delivering the judgment of the court, Lord Parker CJ said at p 279:

> "Reliance was further placed by the applicant on *Barnardo v Ford* and *Rex v Secretary of State for Horne Affairs, Ex p O'Brien.* Both those cases are authority for the proposition that the writ will issue not only to the actual gaoler but to a person who has power or control over the body. Further, in *O'Brien's* case the writ was issued to the Secretary of State for Home Affairs, who had in fact handed the physical custody of the body over to the Government of the Irish Free State. It is clear, however, from the facts of that case, that the Secretary of State had not only been responsible for the original detention but that there were strong grounds for thinking that in handing over the body to the Government of the Irish Free State he had not lost all control over it. In those circumstances the court decided to issue the writ in order that the full facts could be investigated and argument heard on the return.
>
> The position here is quite different. The restriction orders under which the applicant is detained were not made by the Secretary of State. His approval or consent was not required and there is no evidence that he took any part in the detention. No doubt the writ will issue not only to a person who has the actual custody but also to a person who has the constructive custody in the sense of having power and control over the body. Here, however, we can find no custody by the Secretary of State in any form."

57. The Divisional Court's ruling on the issue was not appealed but the clear distinction between *Mwenya* and *O'Brien* emerges unmistakably from this passage. Whereas in *O'Brien* there were "strong grounds" for believing that the Home Secretary had not lost control over Mr O'Brien's detention, in *Mwenya* no such grounds existed.

58. It had been argued in *Mwenya* that the Secretary of State had powers deriving from the constitution of Northern Rhodesia to which he might have resort in order to secure Mr Mwenya's release and that he was able to advise the Queen to require it. Of this argument the Lord Chief Justice said, at pp 279-280:

> "We were referred to a number of provisions in the constitution of, and in other legislation in regard to, Northern Rhodesia under which

> the Secretary of State is specifically given certain powers, and powers which extend beyond advice. But we find it impossible to say that as a result of those powers he can be said to have the custody of the body in any sense. Apart from the powers given by such legislation the only powers of the Secretary of State arise by reason of his constitutional position under which he advises Her Majesty. The fact, however, that he can advise and attempt to persuade Her Majesty to cause the body to be brought up does not mean that he has such a control as will enable the writ to issue. Nor is it in our view relevant that if the writ were issued the Secretary of State might well feel it proper to influence the production of the body."

59. Mr Eadie argued that these observations illustrated the impropriety of courts giving directions to ministers as to how they should conduct affairs of state. It was inappropriate, he said, for the Secretaries of State in the present case to be, in effect, instructed to ask the US authorities to return Mr Rahmatullah. Whether the UK government would have resort to the political agreement of the 2003 MoU was a matter for political judgment and the exercise of that judgment was not a matter for the courts. The writ in this case had a singular effect, Mr Eadie claimed, of requiring the Secretaries of State to engage at a diplomatic level with the custodian state, the US.

60. I do not accept this argument. In the first place, the Court of Appeal's decision does not amount to an "instruction" to the Government to demand Mr Rahmatullah's return. Its judgment merely reflects the court's conclusion that there were sufficient grounds for believing that the UK Government had the means of obtaining control over the custody of Mr Rahmatullah. On that basis the court required the Secretaries of State to make a return to the writ. The essential underpinning of the court's conclusion was that there was sufficient reason to believe that the Government could obtain control of Mr Rahmatullah. It might well prove that the only means of establishing whether *in fact* it could obtain control was for the Government to ask for his return but that remained a matter for the ministers concerned. The Court of Appeal's judgment did not require the Secretaries of State to act in any particular way in order to demonstrate whether they could or could not exert control. What it required of them was that they show, by whatever efficacious means they could, whether or not control existed in fact.

61. Another case on control to which we were referred by Mr Eadie is *In re Sankoh* (unreported) 27 September 2000, in which the Court of Appeal (Ward, Waller, Laws LJJ) considered an appeal against the High Court's earlier refusal (Elias J) to issue the writ on behalf of the Sierra Leonean revolutionary leader, Foday Sankoh, who had been detained in Sierra Leone while UK forces were

supporting the national government there, and in circumstances where they had been involved in his transfer between detention centres. The applicant relied on *O'Brien* and argued that a statement by Mr Peter Hain MP, a minister in the Foreign Office, which was made in response to a demand that Sankoh be released in return for certain hostages, demonstrated sufficiently arguable on-going control for the writ to run. Mr Hain had said that the UK government would not negotiate with hostage takers and that it would not trade Mr Sankoh's freedom. On the basis of that statement, it was argued that the British government was in a position to trade Mr Sankoh for the hostages. This assertion was directly confronted by the evidence of the Foreign and Commonwealth Office that Mr Sankoh was not under the custody or control of the British government and that there was no agreement between the UK and Sierra Leone under which the British government could require the release or "delivery up" of Mr Sankoh.

62. In light of that evidence it is perhaps not surprising that Laws LJ expressed himself in forthright terms that the appellant had not established that the Secretary of State had control over Mr Sankoh's detention: see para 12 of the judgment. But Mr Eadie relied on the decision more for Laws LJ's observations at para 9 where he said:

> "It seems to me, moreover, looking at the matter more broadly, that unless Mr Sankoh is actually in the custody of the United Kingdom authorities, the applicant's case must be that the British Government should be required by this court to attempt to persuade Sierra Leone either to identify his whereabouts or to deliver him up. But that involves the proposition that the court should dictate to the executive government steps that it should take in the course of executing Government foreign policy: a hopeless proposition."

63. For the reasons that I have given at para 60 above, I do not consider that the effect of the Court of Appeal's decision in the present case is to require the British Government to engage in a process of persuasion. It does not involve an attempt to "dictate to the executive government steps that it should take in the course of executing Government foreign policy". Rather it requires the Government to test whether it has the control that it appeared to have over the custody of Mr Rahmatullah and to demonstrate in the return that it makes to the writ that, if it be the case, it does not have the control which would allow it to produce the body of Mr Ramatullah to the court.

64. An applicant for the writ of habeas corpus must therefore demonstrate that the respondent is in actual physical control of the body of the person who is the subject of the writ or that there are reasonable grounds on which it may be concluded that the respondent will be able to assert that control. In this case there

was ample reason to believe that the UK government's request that Mr Rahmatullah be returned to UK authorities would be granted. Not only had the 2003 MoU committed the US armed forces to do that, the government of the US must have been aware of the UK government's view that Mr Rahmatullah was entitled to the protection of GC4 and that, on that account, it was bound to seek his return if (as it was bound to do) it considered that his continued detention was in violation of that Convention.

Foreign affairs

65. The Executive's conduct of foreign affairs has been described as "forbidden territory" for the courts. In *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Pirbhai* (1985) 107 ILR 462, Sir John Donaldson MR at 479 said that "it can rarely, if ever, be for judges to intervene where diplomats fear to tread". Ringing, declamatory statements to like effect are to be found in a number of other authorities. For instance, in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Ferhut Butt* (1999) 116 ILR 607 Lightman J said, at para 12, p 615:

> "The general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly, where such interference is likely to have foreign policy repercussions (see *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] 1 QB 811 at 820). This extends to decisions whether or not to seek to persuade a foreign government to take any action or remind a foreign government of any international obligation (eg to respect human rights) which it has assumed."

66. In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for the Home Department* [2002] EWCA Civ 1598; [2003] UKHRR 76, dealing with a submission that decisions taken by the executive in its dealings with foreign states are not justiciable, Lord Phillips MR said at para 106 (iii) "… the court cannot enter the forbidden areas, including decisions affecting foreign policy." And in *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations Comr for Refugees intervening)* [2008] QB 289 Laws LJ, at para 148, said:

> "This case has involved issues touching both the Government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if

> they combine in the same case. This is the law for constitutional as well as pragmatic reasons …"

67. Mr Eadie submitted that the issue of the writ of habeas corpus in this case represented an intrusion by the courts in the area of foreign policy, an area which the courts should scrupulously avoid. If, he asked rhetorically, the courts are prepared to require the Government to ask the US to release Mr Rahmatullah, why should they refrain from doing so even if there is no MoU in place.

68. This argument founders on the rock identified in para 60 above. The decision of the Court of Appeal that there were grounds on which it could be concluded that the Secretaries of State could exercise control over Mr Rahmatullah's custody and that they were therefore required to make a return to the writ does not entail an intrusion into the area of foreign policy. It does not require of the government that it take a particular foreign policy stance. It merely seeks an account as to whether it has in fact control or an evidence- based explanation as to why it does not.

69. In *Abbasi* the first claimant, a British national, was captured by US forces and transported to Guantanamo Bay in Cuba. The principal issues in the case were stated by Lord Phillips in para 2 of the court's judgment to be: (i) to what extent, if at all, can the English court examine whether a foreign state is in breach of treaty obligations or public international law where fundamental human rights are engaged? and (ii) to what extent, if at all, is a decision of the executive in the field of foreign relations justiciable in the English court?

70. Neither issue arises on the present appeal. For the reasons that I have given at paras 38-40 and 53, the legality of the US's detention of Mr Rahmatullah is not under scrutiny here. It is the lawfulness of the UK's inaction in seeking his return that is in issue. And the requirement to make a return to the writ of habeas corpus does not demand of the Government that it justify in political terms a decision not to resort to the 2003 MoU in order to request Mr Rahmatullah's return. What the Court of Appeal's judgment required of the Government was that it should demonstrate why, as a matter of fact, it was not possible to secure that outcome. This is to be contrasted with the duty which the appellant in *Abbasi* claimed was owed to him by the Foreign Secretary, viz to exercise diplomacy on his behalf: see para 79 of the judgment. In the present case, the Secretaries of State were not required to make any particular diplomatic move. Because they appeared to have the means of securing Mr Rahmatullah's production on foot of the writ of habeas corpus, they were required to bring that about or to give an account of why it was not possible.

Should entitlement to habeas corpus be coterminous with the right to judicial review?

71. Mr Eadie contended that it would be unacceptably incongruous that a different outcome should be possible on an application for a writ of habeas corpus from that which would result from an application for judicial review. In *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 Lord Wilberforce said, at p 99:

> "These remedies of judicial review and habeas corpus are, of course, historically quite distinct and procedurally are governed by different statutory rules, but I do not think that in the present context it is necessary to give them distinct consideration. In practice, many applicants seek both remedies. The court considers both any detention which may be in force and the order for removal: the one is normally ancillary to the other. I do not think that it would be appropriate unless unavoidable to make a distinction between the two remedies and I propose to deal with both under a common principle."

72. It would be quite wrong, in my opinion, to take from this passage a principle that habeas corpus can only be available where judicial review would also lie. Mr Eadie's argument was that a judicial review challenge to the failure of the Government to seek his return from the US authorities would face two formidable, interrelated obstacles. The first was the non-justiciability of decisions of the executive in the field of foreign affairs. The second obstacle was that the Government would be able to defend any claim for judicial review on the basis that a decision not to seek Mr Rahmatullah's production was justified because of the need to preserve good relations with an important ally.

73. The fallacy in the suggestion that habeas corpus should not be available where judicial review is not, lies in its conflation of two quite different bases of claim. The mooted judicial review application would proceed as a challenge to the propriety of the government's decision not to apply to the US authorities for Mr Rahmatullah's return. The application for habeas corpus does not require the government to justify a decision not to make that application. It calls on the government to exercise the control which it appears to have or to explain why it is not possible (not why it is not reasonable) to do so.

74. Apart from the differing nature of the two claims, the fact that habeas corpus, if the conditions for its issue are satisfied, is a remedy which must be granted as a matter of automatic entitlement distinguishes it from the remedy of

judicial review which can be withheld on a discretionary basis. It is unsurprising that habeas corpus is available as of right. If there is no legal justification for a person's detention, his right to liberty could not depend on the exercise of discretion. To bring the matter home to the circumstances of the present case, if it was established that Mr Rahmatullah was unlawfully detained and that the UK authorities had the means of bringing his unlawful detention to an end, it is inconceivable that they could lawfully decline to do so on the basis that it would cause difficulty in the UK's relations with the US. Such a consideration might provide the basis for asserting, in defence of a judicial review application, that the decision not to request the US to take a particular course of action was reasonable. In the context of a habeas corpus application, however, the question of reasonableness in permitting an unlawful detention to continue when the government had the means of bringing it to an end simply does not arise.

The Court of Appeal's conclusion on the question of control

75. The existence of the 2003 MoU and, in particular clause 4 of that document, provided more than sufficient reason to conclude that the UK government could expect that, if it asked for it, Mr Rahmatullah's return by US forces would occur. This is quite unrelated to the question of the legal enforceability of the MoU. The Court of Appeal had to make an assessment of what was likely to happen as a matter of factual prediction. The only countervailing argument to the claim that the US should be expected to adhere to the commitment that it had made was Mr Parmenter's suggestion that to make the request would be futile. But, as I have pointed out, this bald claim was not supported by anything beyond the suggestion that the 2003 MoU was nothing more than a political arrangement. Just because it was a political arrangement, should it be assumed that it would not be fulfilled by the US? I can think of no reason that such an assumption should be made.

76. Moreover, the US authorities must have been aware that the UK considered that GC4 applied to Mr Rahmatullah. On that basis, it ought to have anticipated that the UK would ask for his return, whether or not the 2003 MoU had been superseded. At the time that the Court of Appeal considered the matter, there was no reason to suppose that the US, a close ally of the UK, would be unheeding of such a request. I therefore consider that the Court of Appeal was justified in its conclusion, on the evidence then available to it, that there was every reason to believe that the US would respond positively to a request by the UK that Mr Rahmatullah should be returned. I would therefore dismiss the Secretaries of State's appeal.

The cross-appeal

77. The judgment of the Court of Appeal directing the issue of a writ of habeas corpus was handed down on 14 December 2011. The return date was fixed initially for 21 December 2011. The hearing due on that date was adjourned to 18 January 2012 and again to 20 February 2012 in order to allow the US authorities to make a response to the formal letter of request dated 16 December 2011 in which the British authorities had sought the release of Mr Rahmatullah.

78. On 8 February 2012 Mr William Lietzau, the US deputy assistant Secretary of State for Defense responded to the letter of request for Mr Rahmatullah's release. The following are the material passages from the letter:

> "Rahmatullah has been held by US military forces in accordance with Public Law 107-40, the Authorization for Use of Military Force (AUTMF), as informed by the laws of war. Consistent with the international law of armed conflict, this authority allows our forces to detain, for the duration of hostilities, persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces. Rahmatullah, a member of an al-Qaida affiliated terrorist group, travelled from Pakistan to Iraq for the express purpose of engaging United States and coalition forces in hostilities. Accordingly, he has been determined to meet the criteria for detention by multiple Detainee Review Boards (DRB), which are designed, *inter alia*, to determine whether an individual is lawfully detained. Rahmatullah is properly detained by the United States consistent with the international law of armed conflict.
>
> Once a detainee has been determined by a DRB to meet the criteria for detention, the board then makes a recommendation as to whether continued detention is necessary to mitigate the threat the detainee poses to US and coalition forces. Disposition recommendations for third-country nationals can include continued internment or repatriation to their home country for criminal prosecution, for participation in a reintegration or reconciliation program**,** or for release.
>
> Rahmatullah has been identified by a DRB as someone who could be transferred under appropriate circumstances. The board in this case, based on the information available to it, made a finding that the threat Rahmatullah posed could be mitigated if he was transferred to Pakistan with appropriate security assurances. This recommendation

is but one component of a transfer process. Before we transfer third-country nationals from US custody at the DFIP, we independently determine — using information the DRB relied upon as well as relevant information not necessarily available to the Board — whether any threat posed by the detainee can be adequately mitigated by the receiving country. Accordingly, we seek appropriate security assurances when we transfer a detainee who is being detained pursuant to the AUMF, as informed by the laws of war, regardless of whether the transfer is to be to the detainee's home country or to a third country. Generally, these security assurances commit the receiving, country to take measures that are necessary, appropriate, and lawfully available, to ensure that the detainee will not pose a threat to the receiving country or to the United States. In addition to security assurances, we seek humane treatment assurances in order to ensure that, upon transfer, the detainee will be treated humanely, consistent with applicable international law.

Normally, unless there is an obstacle to repatriation, transfer discussions in circumstances such as these would involve the detainee's home country. We have already received a request from the Government of Pakistan for Rahmatullah's repatriation, and we believe it may be more appropriate to discuss the conditions of transfer directly with the Government of Pakistan.

I look forward to discussing this matter further with you."

79. The Master of the Rolls dealt with this letter in paras 8-10 of a second judgment in the case delivered on 23 February 2012 ([2012] EWCA Civ 182; [2012] 1 WLR 1462, 1492):

"8. There can be no doubt but that the UK government made a bona fide request to the US authorities for the return of the applicant, which accorded with the terms of our judgment, and it had appended to it a copy of that judgment.

9. I turn, then, to the response of 8 February from Mr Lietzau. As I see it, the first problem for the applicant is that that letter makes it very difficult to contend that the UK Government has 'custody' or 'de facto control' of the applicant, as discussed in the cases considered at paras 27-31 (ante, pp 1483-1484), and if that is right, the uncertainty which gave rise to the issue of the writ has been answered, and sadly for the applicant, adversely to him.

> 10. The letter clearly maintains that the US authorities are entitled to continue to hold the applicant, that if he is to be released to anyone, it should be to the Pakistani Government, and the US authorities would not release him to anyone without what they regarded as appropriate safeguards. Whatever may be the legal right of the UK Government and the legal obligations of the US Government, under the MoUs discussed in our earlier judgments at paras 3-8 (ante, pp 1479-1480) or under Geneva III or Geneva IV, as discussed at paras 11-15 (ante, pp 1480-1481), it seems clear that the US authorities are not prepared to hand over the applicant to the UK Government in order for him to be released."

80. Mr Rahmatullah has appealed against the decision of the Court of Appeal, announced at the conclusion of the hearing on 20 February, that the Secretaries of State had made a sufficient return to the writ of habeas corpus. Before this court, Ms Lieven pointed out that Mr Lietzau's letter conspicuously failed to say that the British authorities were not entitled to exercise control over Mr Rahmatullah; it did not state that the 2003 MoU was no longer applicable; it did not deal with the Geneva Conventions; and it appeared to invite further exchanges on the question of whether Mr Rahmatullah would be released to the British authorities. She argued that the letter could not be seen as a rejection of the UK's request for Mr Rahmatullah's release and there remained a doubt as to whether that release could be secured. Until that doubt was satisfactorily eliminated, the return could not be regarded as sufficient.

81. Mr Lietzau's letter had been addressed to Mr Paul Vincent Devine, Director of Operational Policy at the Ministry of Defence and Mr Tom Drew, Director of International Security at the Foreign and Commonwealth Office. In a statement filed on behalf of the Secretaries of State for the purpose of the hearing before the Court of Appeal on 20 February, Mr Drew stated that Mr Lietzau's letter was "a definitive statement of the US position". The letter was the product of "careful consideration over a number of weeks". His view was that the "US authorities, in suitably diplomatic language, have effectively declined … the request that [Mr Rahmatullah] be transferred to UK custody in order that he be released". Mr Devine expressed agreement with Mr Drew's statement and adopted it on behalf of the Secretary of State for Defence. The final paragraph of Mr Drew's letter outlined what was described as "the respondents' position":

> "In light of this response from the US authorities, the Respondents are of the view that they have now made a full and sufficient return to the Court's writ. They have drawn the US authorities' attention to the Court of Appeal's decision and requested that the Appellant be released pursuant to it (specifically, that the Appellant be returned to UK custody in order that he be released). In response, the US

> authorities have effectively declined the Respondents' request while drawing attention to the on-going. efforts being made to transfer the Appellant to Pakistan — subject to "appropriate security assurances". In those circumstances, the Respondents do not intend to engage in further substantive correspondence on this matter with the US."

82. The Master of the Rolls dealt with Mr Drew's statement in para 11 of the second judgment as follows:

> "A further problem for the applicant is that, however a lawyer may be tempted to construe the 8 February letter, there is the unequivocal evidence of Mr Drew, supported by Mr Devine, that in the world of international relations, the letter amounts to a refusal to hand over the applicant. While we are not bound to accept such evidence, it seems to me that it would be dangerous to reject it in a case such as this where it does not appear unconvincing and there is nothing to contradict it. The language of diplomats representing different states discussing a problem can no doubt be very different from that of lawyers representing different interests discussing a problem or even the same problem, particularly when as here the problem may be one of some sensitivity."

83. One can see the force in the points made by Ms Lieven concerning the shortcomings of Mr Lietzau's letter as a means of dealing unambiguously with the basis on which the Court of Appeal had found that there were grounds for considering that the UK authorities had control over Mr Rahmatullah. But one can also readily understand why Mr Lietzau would have been reluctant to issue a forthright and peremptory refusal to accede to the request for Mr Rahmatullah's release. What is undeniable is that the US authorities had been provided with the Court of Appeal's judgment and had been afforded ample opportunity to consider it carefully. It could not have been lost on Mr Lietzau that his letter of 8 February, coming as it did merely weeks before the final return to the writ had to be made, would be a crucial and closely examined document. He was fully aware of the basis on which the Court of Appeal considered that the UK authorities could be said to have retained control. A diplomatic silence on that question does not necessarily indicate a lack of interest in the subject. It is at least as consistent with a profound disagreement with the view that the UK could assert entitlement to control but that this, in the interests of diplomacy, was better left unexpressed.

84. Whatever else may be said of his letter, Mr Lietzau was explicit in his assertion that the US was legally entitled to hold Mr Rahmatullah. His letter gave no indication that there would be any opportunity for discussion of that question. And it was at least implicit that the US considered that, if Mr Rahmatullah was to

be released from US custody, it would be to Pakistan that that release would take place.

85. In all the circumstances, I consider that the Court of Appeal was entitled to hold that a sufficient return to the writ was made by the Secretaries of State. I would dismiss the cross-appeal.

LORD PHILLIPS

Introduction

86. The issue on this appeal is whether the Court of Appeal was right, reversing the decision of the Divisional Court, to issue a writ of habeas corpus ad subjiciendum in favour of the respondent, Mr Rahmatullah.

87. The writ of habeas corpus requires a respondent who is detaining a person ("the prisoner") to produce him before the court and to justify his detention. The writ has its origin in the Middle Ages. Originally it was commonly used in circumstances where the detention was not in doubt but the issue was whether the detention was lawful. The writ would be issued ex parte on application by or on behalf of the prisoner, provided that he demonstrated a prima facie case. The issue of the legality of his detention would be determined after the prisoner had been produced to the court.

88. By about 1780 the practice had changed. The applicant would request a rule nisi requiring the respondent to show cause why the writ should not issue. On the return of the rule any issue as to whether the prisoner was in fact detained by the respondent or as to the legality of such detention would be resolved, and if the applicant was successful an order would be made for his release.

89. In 1938 the practice changed again to what it is today. The modern practice is set out in RSC Order 54, which appears in Schedule 1 to the CPR. The application for a writ of habeas corpus is made without notice, and is supported by evidence setting out the applicant's case. If the judge is satisfied that the applicant has made out an arguable case, notice of the application will be given to the respondent and to other interested parties. The hearing of the application will then normally become the substantive hearing. If the applicant succeeds, the prisoner's release will normally be ordered without more ado. In exceptional circumstances the court can, however, issue the writ so that a formal return is required. This is such an exceptional case.

90. Habeas corpus will lie not merely against a defendant who is himself detaining the prisoner, but against a defendant who holds the prisoner in his custody or control through another.

91. Typically habeas corpus lies against a defendant who is detaining the prisoner within the jurisdiction of the court. Where a defendant, who is within the jurisdiction, has unlawfully detained the prisoner within the jurisdiction and unlawfully taken him out of the jurisdiction, where he still holds him in his custody or control, habeas corpus will also lie.

92. The English court issued the writ of habeas corpus in two cases where the defendant had unlawfully removed the prisoner from the jurisdiction and where it was uncertain whether the defendant retained sufficient control over the prisoner to procure his release. The object of the issue of the writ was to put that question to the test: *Barnado v Ford* [1892] AC 326; *R v Secretary of State for Home Affairs v Ex p O'Brien* [1923] 2 KB 361. The principal issue canvassed in the present case has been whether what I shall call "the *O'Brien* approach" should be adopted on the facts of this case. Mr Rahmatullah is in the custody of the United States forces. The effect of the issue of the writ would be to require the United Kingdom to request the United States to release him. Should habeas corpus issue in order to require the Secretaries of State to take that action? The Court of Appeal said "yes". It was uncertain whether or not the United States would accede to such a request. The *O'Brien* approach should be adopted to resolve that uncertainty. The writ was duly issued, the request was made and it did not procure the release of Mr Rahmatullah. In these circumstances the appeal in this case is a post mortem. Its only practical consequence is the impact that it may have on the cross-appeal, under which Mr Rahmatullah seeks to impose on the Secretaries of State the obligation to take further steps to persuade the United States to release him.

93. In *Barnado v Ford* and, to an extent in *O'Brien*, there was uncertainty as to the relevant facts. The Secretaries of State contended that there was no such uncertainty in the present case. If there was any uncertainty it was not as to the facts but as to whether the United States would accede to a request from the United Kingdom to release Mr Rahmatullah. The Secretaries of State submitted that there was, in fact, no uncertainty as to this – it was plain that the United States authorities would not accede to such a request. In these circumstances the approach adopted in *O'Brien* was not appropriate. These submissions on the "control issue" were one of the two matters upon which the courts below and most of the argument in this Court focussed.

94. The Secretaries of State further submitted that whether to request the United States authorities to release Mr Rahmatullah was a matter that fell within the conduct of the foreign affairs of this country which was an area into which the

courts should not stray ("forbidden territory"). The "forbidden territory" issue was the other matter on which the courts below and most of the argument in this Court focussed.

95. Before this Court there was a further matter that received some consideration. This was the illegality of Mr Rahmatullah's detention. In this country detention is, prima facie, a violation of the "liberty of the subject" (and for this purpose anyone detained within this jurisdiction is treated as a "subject", regardless of his nationality). The customary object of habeas corpus is to make the respondent to the writ justify the detention of the prisoner in his custody. If he fails to do so, the illegality of the detention is presumed.

96. In the courts below Mr Eadie QC, for the Secretaries of State, did not make submissions in respect of the legality of Mr Rahmatullah's detention. He submitted that, as Mr Rahmatullah was detained by the authorities of the United States, it was not appropriate to do so. This was another area of "forbidden territory". Accordingly he took his stand on the issues relating to control. In this Court, when pressed with the question of illegality, Mr Eadie went so far as to submit that it was not clear that Mr Rahmatullah fell within the protection of either of the Geneva Conventions. He did not, however, advance a positive case on this matter.

97. The facts of this case differ markedly from those of *Barnado v Ford* and *O'Brien.* In those cases the defendant had unlawfully detained the prisoner within the jurisdiction and unlawfully removed him from the jurisdiction. Those cases thus proceeded on the basis that the defendant was responsible for the unlawful detention of the prisoner outside the jurisdiction. In this case no one has suggested that the forces of the United Kingdom acted unlawfully in detaining Mr Rahmatullah in Iraq, or in then transferring him to the custody of the United States forces. In so far as the United Kingdom's conduct has been criticised it is in failing to observe its obligations under one or other of the Geneva Conventions. I consider that an important, perhaps the most important, issue raised by this appeal is whether the *O'Brien* approach should have been adopted on the very different facts of the present case. I shall call this "the unexplored issue".

The result in this case

98. In a detailed and careful judgment Lord Kerr has set out the facts of this case and he has addressed the two issues that I have identified as having been those upon which the courts below and the argument have focussed. He has concluded that the appeal should be dismissed. He has held that it was proper to apply the *O'Brien* approach to resolve the uncertainty as to whether the United States would respond to a request to release Mr Rahmatullah. He has further held

that this did not involve trespassing on the forbidden territory. Putting the unexplored issue on one side, I agree with his judgment. Let me notionally rewrite the facts so as to render them similar to those in *O'Brien.* Imagine that the United Kingdom authorities had unlawfully seized Mr Rahmatullah in this country, had clandestinely transported him to Afghanistan and there handed him over to the United States forces. And imagine that before doing so, they had entered into a memorandum of understanding with the United States under which the United States agreed to hand Mr Rahmatullah back to the United Kingdom if requested to do so. And imagine that there was uncertainty as to whether the United States would comply with the memorandum of agreement. And imagine that the United Kingdom, in the interests of good relations with the United States, did not wish to request the United States to do so. I would have had no hesitation in those circumstances in applying the *O'Brien* approach. The reservations that I have in this case, and they are strong reservations, relate to the unexplored issue. As that issue has not been explored, it would not be right to resolve it against Mr Rahmatullah. I am, however, concerned that this case should not be treated as resolving it in his favour. In these circumstances I have decided that the right approach is to concur with the judgment of Lord Kerr, but to spell out my reservations in relation to the unexplored issue.

99. So far as the cross-appeal is concerned, I agree with the judgment of Lord Kerr, for the reasons that he gives.

The unexplored issue

100. Habeas corpus was a remedy usually sought on behalf of those who were unquestionably imprisoned within the jurisdiction. One reason for passing the Habeas Corpus Act 1679 was to expedite the procedure in respect of such prisoners. Section 11 of that Act was, however, intended to address the practice of taking prisoners outside the jurisdiction, thereby depriving them of the benefits of habeas corpus. This was made a criminal offence and an act giving rise to a claim for false imprisonment, the damages for which were set at a minimum of £500. More recently habeas corpus has commonly issued against a person who has been responsible for the unlawful detention and removal from the jurisdiction of a prisoner, provided that he has thereafter retained control over the prisoner. *O'Brien* was such a case.

101. Lord Kerr has set out the details of *O'Brien* at paras 46 to 48 of his judgment. A critical issue in that case was whether the Home Secretary retained sufficient control over Mr O'Brien to justify the issue of the writ. There was, however, an important antecedent issue namely, in the words of Bankes LJ at p 375:

> "Whether since the establishment of the Irish Free State an order can be lawfully made by the Home Secretary for the internment in that State of a person at the date of the order residing in England."

102. The major part of the judgment of Bankes LJ was devoted to resolving that issue. He concluded that the order for Mr O'Brien's detention had been unlawful. The major part of the judgment of Scrutton LJ was also devoted to the question of whether the Home Secretary, "who ordered his arrest and deportation to Ireland" (p 383) had done so lawfully. He held (p 387) that he had not. At the end of his judgment (p 391) he dealt quite shortly with

> "the question of whether a writ of habeas corpus is the appropriate remedy for the illegality of the *order and detention*" (my emphasis).

103. Atkin LJ summarised the case comprehensively as follows at p 393:

> "That a British subject resident in England should be exposed to summary arrest, transport to Ireland and imprisonment there without any conviction or order of a Court of justice, is an occurrence which has to be justified by the Minister responsible."

104. It seems to me at least questionable whether a claim for habeas corpus would have succeeded if the authorities of the new Irish Free State had seized and imprisoned Mr O'Brien on their own initiative, but were likely to be amenable to a request for his release by the United Kingdom, notwithstanding that Mr O'Brien was a British subject. Such a situation would have resembled that which arose in the case of *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76. That case related to a British subject detained by the United States authorities in Guantanamo. The Court of Appeal was careful not to trespass on the forbidden territory, and no one in that case thought that it might be appropriate to seek the issue of a writ of habeas corpus.

105. I know of no case in this jurisdiction where habeas corpus has issued in respect of a person, British or alien, held unlawfully outside the jurisdiction by a foreign State, on the simple ground that the United Kingdom was, or might be, in a position to prevail upon the foreign State to release him, although I note that the Federal Court of Australia has accepted that it was arguable that habeas corpus would lie in such circumstances in respect of an Australian citizen held by the United States in Guantanamo: *Hicks v Ruddock* [2007] FCA 299; (2007) 239 ALR 344.

106. Does it make a difference that the United Kingdom, having lawfully detained Mr Rahmatullah in the field of battle, handed him over to United States, an act not unlawful in itself? Can Mr Rahmatullah invoke in domestic proceedings the obligations of the United Kingdom under the Geneva Conventions? Is that question affected by the fact that section 1(1) of the Geneva Conventions Act 1957 makes it a criminal offence to be party to a "grave breach" of any of the Geneva Conventions? And if domestic law does provide Mr Rahmatullah with a remedy, is this the exocet of habeas corpus, which pays no regard to forbidden territory, or does the remedy perhaps lie in judicial review and the doctrine of legitimate expectation?

107. These are difficult questions. They have, unfortunately, not been addressed on this appeal. The object of this judgment is to make it plain that, despite the result of this appeal, so far as I am concerned they remain unresolved. Subject to this reservation I would, for the reasons given by Lord Kerr, dismiss the appeal and the cross-appeal.

LORD REED

108. I agree that the appeal at the instance of Mr Rahmatullah should be dismissed, for the reasons given by Lord Kerr. I have also concluded that the appeal at the instance of the Secretaries of State should likewise be refused. I have however reached that conclusion for reasons which I would wish to express more narrowly than those given by Lord Kerr. I can explain those reasons relatively briefly.

109. As Lord Phillips has explained, the writ of habeas corpus requires a respondent who is detaining a person ("the prisoner") to produce him before the court and to justify his detention. If the respondent cannot justify his detention of the prisoner, he will be ordered to release him. His failure to comply with such an order will fall within the scope of the court's jurisdiction to deal with contempt. It follows that the appropriate respondent to the writ is in principle the person who has custody or control (or, as it has sometimes been put, actual custody or constructive custody) of the prisoner: that is to say, either the actual gaoler, or some other person who has "such control over the imprisonment that he could order the release of the prisoner" (*R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, 592 per Vaughan Williams LJ). As Scrutton LJ said in the case of *R v Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361, 391, if the court is satisfied that the body whose production is asked is not in the custody, power or control of the person to whom it is sought to address the writ, a writ of habeas corpus is not the proper remedy.

110. Cases can arise in which it is uncertain whether the respondent has sufficient control of the prisoner's detention to be required to justify his detention and to be ordered to release him. In such a case, the court can issue the writ so that it can determine the question of control on the return, with a fuller knowledge of the facts. The cases of *Barnardo v Ford* [1892] AC 326 and *Ex p O'Brien* are examples.

111. These principles do not appear to me to have been in doubt at any stage of the present proceedings. The Divisional Court declined to issue the writ because they considered that the evidence as to the extent of control exercised by the Secretaries of State was clear, and that all that could be said was that there was a possibility that the United States of America might accede to a request by Her Majesty's Government for the release of Mr Rahmatullah. The existence of such a possibility did not confer upon the Secretaries of State control over Mr Rahmatullah's detention (*Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] 1 WLR 1462, para 29, per Laws LJ). That approach was consistent with the principles which I have summarised. The difficulty with the Divisional Court's decision, however, was that the reasons given (at para 33) for concluding on the evidence that there was no control were unsatisfactory. In particular, the fact that the 2003 MoU was not enforceable in law did not entail that it was not enforceable de facto.

112. The Court of Appeal on the other hand concluded, on the basis of its analysis of the evidence, that there was sufficient uncertainty to justify the issue of the writ. Although the primary facts were clear enough, it remained unclear whether the United Kingdom was in a position to make an effective demand for the return of Mr Rahmatullah from the custody of the United States. That appears to me to have been a reasonable conclusion. In terms of the 2003 MoU, in particular, the United Kingdom and the United States had agreed that persons such as Mr Rahmatullah, who had been detained by British forces and transferred to the custody of the United States, would be returned upon request. On its face, that agreement gave the Secretaries of State de facto control over Mr Rahmatullah's detention, on the reasonable assumption that the United States would act in accordance with the agreement it had entered into. In so far as the witness statements produced on behalf of the Secretaries of State emphasised that the MoU was not intended to be binding in law, they were inconclusive, since the issue was whether control existed in fact. In so far as they indicated that the Ministry of Defence believed that the 2003 MoU had been superseded by a 2008 MoU, they were again inconclusive, not least because the basis of that belief was unclear and appeared to be open to question.

113. Lord Neuberger MR addressed the nub of the matter at para 44:

> "Given the important principle established and applied in the *Barnardo* case [1892] AC 326, I would find it very unattractive to conclude that a writ in habeas corpus cannot issue where uncertainty as to the respondent's control over the applicant arises from the effectiveness and enforceability of certain agreements, even though such a writ can (and, absent any countervailing reasons, I think normally should) issue where the uncertainty arises from a need to investigate the facts. Indeed, I am inclined to think that such a distinction (i) does not work in theory (as in the end the effectiveness and enforceability in practice of an agreement is a matter of fact rather than law), and (ii) cannot really survive the decision and reasoning of this court in the *O'Brien* case [1923] 2 KB 361."

I respectfully agree with those observations.

114. None of the arguments presented in the present appeal has cast doubt on the Court of Appeal's approach to the relevant legal principles or on its evaluation of the evidence. In particular, the argument that the issue of the writ was an impermissible interference in diplomatic relations must be rejected. The purpose of issuing the writ was to obtain clarification of the extent, if any, of the United Kingdom's ability to exercise control over the detention of Mr Rahmatullah. It did not entail that the United Kingdom must demonstrate its lack of such control by means of a practical test. Ultimately, however, if control existed, the court's obligation to order the release of someone whose detention was unlawful under English law (if that were established) could not be deflected by considerations of diplomacy.

115. There are only two further points I would wish to mention. First, it is important, in my view, that Mr Rahmatullah was initially detained by British forces, with the consequence that the question was whether the Secretaries of State's control over him had been relinquished. But for that factor, I would find it difficult to see why the English courts should entertain an application which would otherwise have no real or substantial connection with this jurisdiction. Secondly, like Lord Phillips, I would wish to reserve my opinion as to what he has described as the unexplored issue: as I would put it, the implications of the fact that there was no suggestion that the Secretaries of State had committed any civil wrong under English law in respect of the detention of Mr Rahmatullah.

LORD CARNWATH AND LADY HALE

116. We gratefully adopt Lord Kerr's exposition of the facts and the relevant law, which was not materially in dispute. We agree with him that the Secretaries of State's appeal should be dismissed, but we differ respectfully on the cross-appeal.

117. We agree in particular that the crucial issue is that of control in the context of the law of habeas corpus, rather than legality as such. Legality is not an issue to be considered in the abstract. It arises as between the applicant and the respondent, and then only if the respondent has "control". We do not need therefore to consider whether the detention is legal in any broader sense, in particular whether it is lawful from the perspective of the United States government.

118. On the issue of control, in our view, the effect of the two MoUs concluded in 2003 and 2008 is crucial. The obligations of the UK under GC4 may explain why it had a continuing responsibility under international law, but "control" is a different issue turning on the realities of the relationship between the UK and the USA as the currently detaining power. It is doubtful whether provisions of an international treaty can on their own be relied on as giving control for the purposes of the domestic law of habeas corpus. It is particularly difficult in this case where it was known that the USA, unlike the UK, did not regard GC4 as applicable to the applicant, because of his alleged Al-Qaeda links.

119. In our view clause 4 of the 2003 MoU is central to this issue, because, on the evidence, it was designed specifically to ensure that the UK did retain control over the continuing legality of the detention, having regard to its own responsibilities under GC4 and the related domestic statute, and its knowledge of the different US position.

120. There is a possible issue as to whether the 2008 MoU, which did not contain an equivalent clause, was intended to alter the position in relation to those already detained. The evidence is equivocal on this point. However, the document does not in terms have that effect. Further, it is notable that the 2008 MoU was signed by the Secretary of State for Defence in March 2009, very shortly after his statement to Parliament (referred to by Lord Kerr para 38) expressing regret at the government's failure in June 2004 to question the removal of the applicant to Afghanistan. It would be very remarkable, if at the very time that the Secretary of State was apologising to Parliament for that oversight, and at a time when the government remained responsible under international law, he was signing away his power to do anything about it. In the absence (as yet) of any contrary assertion on behalf of the US, we would proceed on the basis that clause 4 of the 2003 MoU is still effective in respect of the applicant.

121. We are not unduly concerned by the “unexplored issue” identified by Lord Phillips and Lord Reed. Nor are we surprised that Mr Eadie did not attempt to explore it further. The strength of habeas corpus is its simplicity. There may be interesting theoretical arguments, turning on the different categories of illegality that may be in play: under international, criminal, or civil law. But the applicant is not concerned with such nice distinctions. For his purposes, detention once established is presumed to be illegal until the contrary is shown by the detainer or the person allegedly in control. The argument would have had to be that the removal of the applicant to, and his continuing detention in, Afghanistan may be illegal under international law as understood in this country, and they may also have involved breaches of domestic criminal law; but they did not and do not involve any tort under domestic civil law. Even if that is a valid line of distinction, which we doubt, we can well understand why it might not have seemed very attractive to those advising the Secretaries of State.

122. In any event, we do not think the unexplored question arises in the form in which Lord Phillips states it. The case does not (and could not in our view) rest on the “simple ground” that the UK might be in a position to persuade the US to release the applicant (para 105). It rests on the much stronger basis that the UK was the original detaining power, that as such it has continuing responsibilities under GC4, and that it entered into an agreement with the USA giving it the necessary control for that purpose.

123. As to the authorities, we accept of course that there are factual differences from *O'Brien*, in particular because in that case, unlike the present, the original detention was itself unlawful. However, habeas corpus is equally applicable where detention, originally lawful, later becomes unlawful. It is true also that in this case the illegality of the detention arose through the actions of the US, rather than the UK, and at a time when the UK no longer had actual custody. However, it is difficult to see why this should make a difference in principle. Since illegality of detention is presumed in favour of the applicant, it should not be a defence for the UK to say that it arose from someone else's actions, if the UK has the practical ability to bring it to an end.

The cross-appeal

124. In considering the cross-appeal, it is important not to lose sight of the extreme circumstances with which we are faced. The applicant was captured by British forces in Iraq. He may or may not have been fighting for the enemy. He says not; but even if he had been, he would have been entitled to release many years ago, if still in British custody, and he would have been released. Instead he has been imprisoned by the USA, which takes a different view of the requirements of international law, and accepts no limitations on its right to detain in these

circumstances. As a result the applicant, as far as his family was concerned, vanished without trace in 2004, until he was rediscovered in Afghanistan years later.

125. If our analysis of the appeal is correct, the basis for issuing the writ was, or should have been, the apparent control provided by the 2003 MoU, supported by the UK's continuing responsibility as detaining authority under GC4. Unfortunately, neither the UK letter nor the USA response began to address the real issue.

126. The UK government's letter missed the point. It should have made it clear (i) that the 2003 memorandum of understanding, including clause 4, governed the case; (ii) that the UK government had an unqualified right under that memorandum of understanding to require the return of the detainee; and (iii) that it was irrelevant to that unqualified right whether or not the USA considered that they were entitled to continue to detain the prisoner under their own view of international law. They had made an undertaking to the UK which it remained their duty to honour.

127. Similarly Mr Lietzau's letter for the US government, failed to mention, let alone respond to, the central point, which was not whether the US (from its own perspective) had a legal basis for detaining the applicant, but whether it accepted the distinct role of the UK as the detaining authority, and by virtue of the 2003 MoU.

128. The answer accepted by the Court of Appeal is that, in the light of the Secretaries of State's evidence, and in the language of diplomacy, the letter was to be read as an unequivocal refusal, and the court should not go behind that. As Lord Neuberger of Abbotsbury MR said (para 11):

> "The language of diplomats representing different states discussing a problem can no doubt be very different from that of lawyers representing different interests discussing a problem or even the same problem, particularly when as here, the problem may be one of some sensitivity."

129. We cannot accept this reasoning. We do not understand either why the US government should have had any diplomatic problem in expressing its position clearly, or still less why the court should acquiesce in that position. The US must have a view on the whether the UK retains an interest in the matter. Either it accepts that the UK retains an interest as detaining authority, and under the 2003 MoU, or it does not. One way or the other it should address the issue. Where

liberty is at stake, it is not the court's job to speculate as to the political sensitivities which may be in play.

130. For example, the US might plausibly have argued that whatever rights the UK may have had in 2003 have been effectively waived by its failure to take action in 2004, when its officials became aware of the transfer, or to raise the point at the time of the 2008 MoU. That might cause some marginal embarrassment to the UK officials at the time, but it is difficult to see what diplomatic difficulty it should cause now either to the US or the UK, or in any event why the courts should take notice of that as a factor. The fact that this argument has not been raised suggests that it may be a difficult one, so long as, under international law, the UK's responsibility under GC4 has not lapsed. Alternatively, it may be that both the UK and the US would prefer to leave the problem with the US authorities, rather than face up to what the UK would do with the applicant if he were to be transferred to them. That again is not a factor which should impress the court.

131. The governing consideration for the court should be that the applicant remains in detention in Afghanistan, many years after the conflict in Iraq ceased, and after GC4 (as seen through British eyes) required him to be released. He has now also been assessed by the US Detainee Review Board as suitable for release. Although Mr Lietzau's letter refers to discussions with the Pakistan government over the terms of transfer to them, we still have no clear indication as when that is likely to happen. In these circumstances, in our view, the court should not rest on an inconclusive response, but should require the resubmission of the request in terms specifically relying on the UK’s continuing responsibility under GC4 and its continuing rights under the MoU.

132. We would therefore dismiss the appeal and allow the cross-appeal.