UKSC 2012/0033

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

AND

THE SECRETARY OF STATE FOR DEFENCE — **Appellants**

- and -

YUNUS RAHMATULLAH — **Respondent**

- and –

JUSTICE — **Intervener**

THE INTERVENER'S CASE

INTRODUCTION

1. The Intervener ("JUSTICE") is grateful for the opportunity to make submissions to the Court in this appeal. It will neither repeat points already made by the Appellants and Respondent, nor seek to present arguments on behalf of either of the parties.

2. In summary, JUSTICE contends that the decision of the Court of Appeal properly upheld the writ of habeas corpus as an efficient protection against arbitrary detention. JUSTICE submits that:

   2.1. The proper scope of habeas corpus is an issue with extensive international significance. While the writ, or its close equivalents, can be found in legal systems around the world, an international judicial consensus has yet to develop regarding, in particular, the question of the importance and relevance of physical "control". JUSTICE submits that the Court of Appeal was correct to interpret its jurisdiction in the manner most conducive to upholding the ongoing effectiveness of the writ as a protection against unlawful detention.

2.2. On the question of control, a purposive approach, focussing on the issue of control as a matter of fact, is preferable to an approach based on formalistic restrictions. Any doubts over the fact of control should be tested through the return process. In particular, a rejection of formalism is in keeping with the protective and expansive nature of the writ, as demonstrated by domestic and international courts.

2.3. In terms of justiciability, the doctrine of act of state has no relevance where the only respondents before the courts below have been representatives of the UK Government. As to wider objections of non-justiciability, a distinction is to be drawn between attempts to force the Government to engage in general diplomacy through judicial review, and cases (such as the present one) in which the vindication of a domestic legal right has the potential to have foreign policy implications. This conclusion is reinforced by consideration of the relevant international instruments (the Geneva Conventions) so far as they deal with liberty issues, and how they have been incorporated into municipal law.

2.4. The Government's arguments on the factual irrelevance of the Memoranda of Understanding in this case are inconsistent with the considerable weight it attaches to similar agreements for other purposes, notably in the context of diplomatic assurances surrounding proposed deportations. By contrast, the Court of Appeal's approach of treating the impact of the Memoranda as a factual question, to be resolved by looking at all the evidence in the round, was entirely consistent with the broader approach of the domestic and Strasbourg courts.

THE INTERNATIONAL SIGNIFICANCE OF HABEAS CORPUS

3. Some 118 national legal systems provide for a remedy in the nature of habeas corpus, and some 64 national constitutions contain an express right to a judicial

determination of the lawfulness of a person's detention.[1] The writ has been adopted by countries across the former British Empire, both through their adoption of the common law and by former colonies legislating to introduce equivalents to the Habeas Corpus Acts in local law (as was done in, for example, India).

4. The influence of the writ has also been seen outside the traditional common law world. In European civil law systems (including the former colonies of other European imperial powers), similar concepts have been developed, based *inter alia* on the Roman edict of *de homine libero exhibendo*.[2]

5. The importance of habeas corpus proceedings is also apparent from an examination of international human rights instruments. Article 9(4) of the International Covenant on Civil and Political Rights (which was adopted by the UN General Assembly in 1966 and which entered into force as a binding treaty in 1976) provides for a right of habeas corpus or its civilian equivalent (*"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"*). This complements the general provision for judicial supervision found in Article 8 of the Universal Declaration of Human Rights (*"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"*).

6. A right to habeas corpus (or a civilian equivalent) is embodied in Article 5(4) ECHR (*"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"*). Equivalent provisions are also found in other regional human rights

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[1] Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 Michigan State Journal of International Law 551 (2009) at 564.

[2] Such concepts have frequently been developed expressly by reference to the common law on habeas corpus: for example, in South Africa the terms habeas corpus and *de homine libero exhibendo* have been used interchangeably. Similarly, in Latin America, the influence of the common law (including as developed in the US courts) has seen the widespread adoption both of the writ of habeas corpus and of the similar writ of *amparo de la libertad* (shield of liberty), the latter deriving from the ancient Spanish remedy of *manifestación de las personas.*

instruments, including the American Convention on Human Rights (1969), while the African Charter on Human and Peoples' Rights (1982) contains a requirement for judicial supervision similar to that in Article 8 of the Universal Declaration.

7. In interpreting those instruments, the international courts have been alive to the need to ensure that the availability of habeas corpus is not limited, even in the most serious circumstances of national danger. The Inter-American Court of Human Rights has ruled that the right to habeas corpus under the American Convention on Human Rights is non-derogable, even during a state of emergency.[3] The African Commission on Human and Peoples' Rights has reached the same conclusion in respect of the African Charter, noting that it *"is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform"*.[4] The European Court of Human Rights has found (to take one example) a violation of Article 5(4) ECHR in circumstances where the justification for recall of a mental patient to a secure hospital was exclusively a matter for the Secretary of State and not subject to challenge by habeas corpus.[5]

8. The Court's decision in this case will have a tangible impact on legal systems around the world; most directly in Commonwealth countries, but also in other civilian systems that engage in legal comparative analysis when faced with questions of such obvious constitutional importance. Importantly, not all of those legal systems have developed in the same way as modern English law, in terms of the availability of additional or alternative remedies (namely the other prerogative orders, injunctions and declarations) to the writ of habeas corpus (or its civil law equivalents) in challenging arbitrary government action. Nor is it unknown for governments to take advantage of their domestic courts' strict interpretation of a requirement for physical "control" in order to evade the habeas corpus jurisdiction. The historical use of flight or exile to evade habeas corpus

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[3] *Habeas Corpus in Emergency Situations (Arts. 27(2). 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion, OC-8/87 of Jan. 30, 1987, Inter-Am. Ct H.R., Series A: Judgments and Opinions, No. 8 (1987).

[4] *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 143/95 and 150/96 (1999).

[5] *X v UK* (1981) 4 EHRR 188. This case led to the introduction of the supervisory mechanisms now found in the Mental Health Act 1983.

jurisdiction is discussed at §60 *et seq* of the Respondent's case.

9. More modern instances include, for example, reports that alleged renditions of detainees from Kenya to either Somalia or Guantanamo Bay have involved individuals being removed from the jurisdiction (and therefore from the physical control of the Kenyan authorities) while habeas proceedings were pending. The Kenyan courts have applied a control criterion strictly, so that jurisdiction has been treated as ending when the Government produces evidence of removal from the jurisdiction, significantly restricting the effectiveness of the habeas jurisdiction as a guarantor of individual liberty.[6] This is to be compared with the broader approach to the "control" test adopted by other African courts: see, for example, the approach of the Supreme Court of Zambia in *Shipanga v Attorney General* [1976] Zambia Reports 224, in International Law Reports Vol. 79, 1989, pp.18-47, discussed at §§99-104 of the Respondent's case.

10. There is of course no suggestion of deliberate evasion in the present case. However, it is submitted that the Court, when formulating its own view of the appropriate approach to "control", should be mindful of the implications that any control test adopted may have.

CONTROL (Issues (i) and (ii))

11. JUSTICE submits that the relevant law on the "control" requirement has long been settled, and was correctly characterised by the Court of Appeal on the basis of the principles set out in *Barnardo* and *O'Brien*. The law is that:

    11.1. Direct physical control of the applicant by the respondent is not necessary. At the least, respondent will be considered to have sufficient control if he has the ability effectively to require a third party to deliver the applicant into his physical custody.

    11.2. Whether this type of control exists in any given case is a question of fact, to be analysed by the court on the evidence available. It does not require

[6] REDRESS and REPRIEVE report, *Kenya and Counter-Terrorism: A Time For Change* (2009), pages 6, 12 – 20 *et seq*. See in particular, page 16, extract from the Kenyan High Court decision in *Mariam Mohamed & another v Commissioner of Police & another* [2007] eKLR at 7 – 9.

the existence of an agreement legally enforceable by the court.

11.3. Where there is doubt, the existence of factual control may be tested through the return consequent upon the issue of the writ.[7]

12. This position has been reflected in other jurisdictions, which have relied on and applied *Barnardo* and *O'Brien*: see, for example, the decision of the Federal Court of Australia in *Hicks v Attorney General* [2007] FCA 299 discussed at §§112-115 of the Respondent's case.

13. To the extent that a more restrictive approach to the control requirement is now being argued for in this case, JUSTICE submits that the long-established orthodoxy set out above is to be preferred. There is no justification for the Secretary of State's approach, which effectively invites the Court to hold that *Barnardo* and *O'Brien* were wrongly decided.

(i) The need to avoid distinctions without differences

14. The Secretary of State's case, at §3.6, says that "*A proper respondent to the writ will be able to give an account of the grounds upon which he is detaining the applicant: either because the applicant is held to the respondent's own order (directly or through another), or because the respondent is himself an agent detaining the applicant on behalf of a principal.*" There is, of course, a third relevant category: cases where the applicant is held by a person other than the respondent, but remains within the potential control of the respondent: so-called "doubtful control" cases.

15. In that third category of case, the respondent has the potential power to direct a third party to release the applicant; whether the respondent has done all that it reasonably can to exercise such power and whether or not the third party has

[7] This aspect of the English case law has not been taken up in all parts of the common law world (such as, for example, the US). But the use of the writ to enable a full investigation of the facts where public authorities deny knowledge of the whereabouts of the subject has been of substantial utility in other jurisdictions: see, for example, the Indian cases of *T.V. Eachara Varier v Secretary to the Ministry of Home Affairs* (1978 Cri LJ 86); *Krishna Raj v State of Kerala* (MANU/KE/0174/1979); *Sebastian Hongray v Union of India* ((1984) 1 SCC 339); and *Hasan Ammal v State* (MANU/TN/3390/2011). See also *Mosimane v Commissioner of Police* CIV/APN/35/80 (High Court of Lesotho).

complied with the request/instruction directed to him are matters properly to be investigated upon the return. Otherwise, there would on the Secretary of State's case be a distinction between (a) a case where a respondent has delivered the applicant to a third party on agreed terms that the third party shall hold him on the respondent's order until further notice; and (b) a case where the terms agreed are to hold him for as long as the third party wishes, but to return him on request.

16. In the latter case, the continued detention depends in part on decisions made by the third party, in that the applicant can be released at any time by that third party. But in both cases, continuing detention effectively relies on the consent of the respondent, who is in a position to end the detention by withdrawing its consent and directing the applicant's release or return. Accordingly, from the perspective of the respondent (and the courts within whose jurisdiction he falls) there is no principled reason (*contra* the Secretary of State's position) that a request for an account of the legality of the detention can be made in the first case but not the second.

(ii) The question of effectiveness

17. Reliance is placed at §3.10 of the Secretary of State's case on warnings in the case law against the issuance of writs to parties outside the court's jurisdiction, which consequently would be impossible to enforce. But that is not the situation in the present case, where the writ was issued to the Secretary of State within the jurisdiction (see also §§134-138 of the Respondent's case, with which JUSTICE agrees).

(iii) The principled approach to "doubtful control cases"

18. At §3.11 *et seq* of the Secretary of State's case, it is argued that the writ should only issue to resolve doubt over the question of control where such doubt has been created by the respondent's evidence. In particular, it is suggested that it should only issue where such evidence is vitiated by a perceived lack of credibility, or where it "betrays a lacuna or contradiction". JUSTICE submits that:

18.1. As a matter of fact in the present case, it was entirely open to the Court of Appeal to conclude that there was a lacuna in the Secretary of State's

evidence, insofar as it was considered to rest on an unexplained assertion that any request to the US authorities would be "futile", a contention advanced in the face of an undertaking contained in the MOUs which arguably required the US to return transferred detainees upon request.

18.2. In any event, there is no reason of principle to consider the categories of relevant "doubts" to be closed, or to take a restrictive view of them by reference to the particular facts of previous cases. On the contrary: the public interest lies in taking an expansive approach to the categories of cases where doubt may be resolved by the issue of the writ. The Secretary of State's approach would allow opacity to defeat the purpose of the writ.

18.3. This conclusion is reinforced by the trite fact that the purpose and role of the writ is protective, not punitive. If it were punitive, then it might be attractive to categorise doubtful cases by reference to the adequacy of the respondent's efforts to provide evidence, and the consistency of that evidence with his previous statements. But, because it is protective, that is not the correct approach. A detainee's requirement for protection does not reduce because a person with potential control of him has given a full and consistent explanation of why he believes that power, if exercised, may prove illusory. Far better in protective terms to assume control exists and require steps to be taken to illustrate otherwise (or steps to be taken to exercise that control to its full extent) than to assume no control exists, without adequate evidence in support, and leave an individual in detention while substantive control goes unexercised and unexplored.

18.4. Indeed, were a rigid approach adopted towards doubts (instead of the purposive approach urged by JUSTICE) it would provide a route map to evasion of the writ's operation. A party against whom the writ would lie in consequence of, say, a clear agreement identifying the respondent's ultimate power to determine the liberty of the subject of the agreement (e.g. a Memorandum of Understanding; a fostering agreement of a child kept abroad, etc) would be able to evade the writ's operation by recourse to increasingly informal arrangements.

19. Ultimately, then, regardless of the credibility and completeness of a respondent's explanation, the question for the court is whether, viewing the available evidence in the round, that explanation is correct as a matter of fact. Short of production of the subject, that explanation will either be that control never in fact existed (illustrated by adequate evidence) or that it has been broken by the third party breaching the obligation or understanding previously existing. These questions of substance should properly be tested by the issue of a writ.

20. Any injection by this Court of a more rigid or formalistic approach would run against: (a) the writ's long history in meeting and answering such formalistic innovations as attempts to defeat its operation; (b) the trend of international human rights instruments guaranteeing liberty to adopt a purposive and evolving approach to both liberty and its effective protection; and (c) the manner in which international law (specifically the Geneva Conventions) have provided additional detail to the conception of individual liberty pertinent in the particular context of this case.

(iv) Form v purpose

21. History has shown that neither the courts nor Parliament have responded favourably to attempts to evade the effect of the writ by physically removing a subject from the jurisdiction: see the Respondent's case at §§60-61.

22. A further strand of case law demonstrates the hostility of the writ to a formalistic approach. The writ of habeas corpus has frequently been used to test the validity of executive actions, in particular in terms of the legality of detention under emergency legislation. Notably, the courts have consistently been reluctant to find that the existence of broad powers of emergency detention deprives the court of the ability to review the legality of a detention, through habeas corpus, even if the detention is ultimately found to be legal on the basis of those powers.

23. *O'Brien* is an example of an emergency detention case. Another is *R v Governor of Brixton Prison, ex p Sarno* [1916] 2 KB 742. The latter case concerned article 12 of the Aliens Restriction (Consolidation) Order 1914, which provided that the

Secretary of State could order the deportation of any alien. The Divisional Court held that the article was within the power conferred by the enabling primary legislation. Nevertheless, the Court expressly left open the question of whether a particular exercise of that power might be an abuse of power. And it indicated that an application for a writ of habeas corpus could represent an appropriate means by which to test such a question.

24. In particular, Low J at 752 expressly rejected the submission by the Attorney-General (F.E. Smith) that the writ of habeas corpus was unavailable in circumstances where the Government could demonstrate that the present detention of the applicant was technically lawful. He said at 752:

> *"I wish, before parting with this case, emphatically to protect myself from being supposed to assent to some of the arguments which have been used at the Bar. For instance, I do not agree that if the Executive were to come into this Court and simply say "A person is in our custody, and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal," the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would, not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves.*

25. It is submitted that the same principle applies in the present case. It is no more acceptable for the Government to claim that the Respondent's ability to seek a writ of habeas corpus is barred because it claims to have – or has - no strictly enforceable legal control over him, than it was for the Government to claim that Mr Sarno could not seek a writ of habeas corpus because there was no strict illegality in his detention.[8] In determining the scope of the writ, the courts should be concerned with its purpose, rather than with formalistic or technical limitations.

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[8] Nor, notably, was there any indication that the Court considered as a conclusive argument that (as recorded in the report at 743): *"An affidavit made by the head of the department in the Home Office dealing with the administration of the Aliens Restriction Act, 1914, and the Orders in Council thereunder and filed on behalf of the respondent stated (so far as material) that it is considered to be contrary to the comity of nations for one country in the exercise of any power which it possesses of ridding itself of undesirable aliens to send them or knowingly to permit them to go to any country other than that of which they are nationals".*

26. Similarly, Lord Atkinson in *R v Halliday* [1917] A.C. 260, agreed with the majority of the House of Lords that regulations which allowed the Secretary of State to order the internment of any person "of hostile origin or associations," were *intra vires* by reference to primary legislation. But he made clear that this did not oust habeas corpus, saying at 272:

> *"It was also urged that this Defence of the Realm Consolidation Act of 1914, and the regulations made under it, deprived the subject of his rights under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a Court of law, by means of a writ of Habeas Corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra vires, do not infringe upon the Habeas Corpus Acts in any way whatever, or take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land. If it were otherwise, then every statute and every intra vires rule or by-law having the force of law creating a new offence for which imprisonment could be inflicted would amount, pro tanto, to a repeal of the Habeas Corpus Acts or of Magna Charta ..."*

27. In other words, the courts historically have been astute to distinguish between the substance of the question of whether a detention is lawful, and the means by which that question can be addressed. That distinction is of crucial importance when considering formalistic objections to the availability of habeas corpus in the present case.

(v) The trend of international human rights instruments

28. The centrality of habeas corpus in international human rights instruments is detailed at §§5-7 above. It is of course commonplace that such instruments should be interpreted purposively and so as to move with changing social and political context: they are, as expressed for example by the European Court of Human Rights, *"intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"*.[9] In the present era, therefore, they must be interpreted in light of modern phenomena including extraordinary rendition and long term extraterritorial and/or incommunicado detention. It is submitted that

[9] *Airey v Ireland* (1979) 2 EHRR 305, at paragraph 24.

protection against such abuses is in fact found in relevant provisions of the Geneva Conventions (see further §§34-36 below). In interpreting the case law on "control" and the limits of the jurisdiction of habeas corpus – the writ being designed, as expressed above, to protect the individual right to liberty (and the right to be free from arbitrary detention) - the Court should adopt a similarly purposive approach in order broadly to align the scope of the writ with the United Kingdom's international and domestic obligations. So where the control or doubtful control is itself grounded in or prompted by such international obligations relating specifically to questions of liberty (particularly, where such obligations are municipally incorporated), JUSTICE submits that the writ must run and it is for respondent to the writ to explain the steps taken to secure return and the basis for any failure to produce the party in question.

(vi) The "foreign control" case law

29. The factors set out above all suggest that an expansive and purposive approach should be adopted to the question of control in this case. In arguing to the contrary, three "foreign control" authorities are cited at §3.19 *et seq* of the Secretary of State's case. JUSTICE submits that the relevance of those authorities must be considered by reference to all relevant circumstances:

29.1. *Mwenya*, where there was "*no evidence that [the respondent] took any part in the detention*", is clearly different from the present case. In this case, Mr Rahmatullah's present detention has flowed directly from the actions of the UK authorities which were the first to detain him.

29.2. Equally, the present case is quite different from *Sankoh*, where there was "*not the whisper of an objective basis for the suggestion that the Secretary of State has now, or had at any time [following the lodging of the habeas corpus application] anything amounting to a degree of control*". The contents of the Memoranda of Understanding, seen against the context of the Geneva Conventions, provide at the very least an arguable basis of control.

29.3. Finally, matters are not advanced by the Secretary of State's reliance on *Zabrovsky*. Aside from the fact that the correctness of that authority has

subsequently been called into question in both the Court of Appeal and the House of Lords (see §92 of the Respondent's case), the Secretary of State is wrong to suggest that it establishes that a writ of habeas corpus will only be issued where the initial detention was illegal. *Zabrovsky* appears to have been decided, in part, on the basis that there was no illegality in either the initial or the continuing detention. But in the present case it appears to be common ground that Mr Rahmatullah's current detention is unlawful. It would be highly surprising, and contrary to principle, if he could not rely on the habeas corpus jurisdiction simply because his initial detention by UK forces was lawful.

FOREIGN AFFAIRS/JUSTICIABILITY (Issue (iii))

30. JUSTICE submits that a distinction should be drawn, in terms of justiciability, between situations in which the conduct of diplomatic relations is challenged in some general way by means of judicial review, and the exercise of the habeas corpus jurisdiction in a case properly falling within its compass. In particular:

30.1. Habeas corpus is fundamentally a domestic procedure, based on the existence of a respondent within the jurisdiction who arguably has sufficient control to bring the applicant before the court.

30.2. The mere fact that the exercise of that control could conceivably have diplomatic repercussions is not a reason for the courts to decline jurisdiction and frustrate a vindication of the right to liberty. This is particularly so where the respondent has been directly involved in or facilitated the detention.

30.3. The Secretary of State's case, by suggesting that where the exercise of the habeas corpus jurisdiction should not be exercised in any case where it might touch on foreign relations, effectively suggests that *O'Brien* is no longer good law.

(i) Compelled diplomacy v diplomatic repercussions

31. The distinction between compelling diplomacy through judicial review, and enforcing domestic remedies notwithstanding that this might have diplomatic consequences, is one which has been recognised in other jurisdictions. In particular, the US courts have consistently held that the mere fact that the adjudication of a habeas corpus petition may touch upon issues of foreign affairs or foreign policy does not, without more, provide sufficient grounds for denying the writ. See, for example, *Plaster v United States*, 720 F.2d 340 (4th Cir. 1983) at 350-351 (*"[W]e do not think that the foreign policy implications of a refusal to extradite Plaster are sufficient to divest the jurisdiction of the district court to grant habeas corpus relief ... the mere presence of treaty obligations is generally insufficient to override constitutional rights"*) and *Suhail Najim Abdullah Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009) at 713 (*"CACI argues that the Court will demonstrate a lack of respect due to the political branches should it adjudicate Plaintiffs' claims because the Constitution vests the power to wage war and conduct foreign affairs in the political branches ... As CACI is undoubtedly aware, matters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs"*).

32. It is certainly the case that the domestic courts will not, in the context of a judicial review challenge, compel the Government to engage in diplomacy. But, contrary to the Secretary of State's submissions, this is not such a case. Mr Rahmatullah's case has always been based on the fact that the Government has (or, at least, arguably has) actual control over him. This control may not have arisen through a legally enforceable agreement: but, for reasons set out above, the courts should adopt a purposive approach of looking at the substance of control rather than its technical legal form. There is no suggestion that Mr Rahmatullah has sought to force the Government to engage in discretionary diplomacy on his behalf, or that this was the effect of the writ issued by the Court of Appeal. Instead, the issue is whether the Government can be asked to exercise its specific (arguable) control over him, so as either to procure his release or to establish that no such control exists as a matter of fact.

33. Implicit in the Secretary of State's case is the suggestion that the US may not take kindly to an attempt by the Government to exercise its alleged control over Mr Rahmatullah. In this sense, the issue of the writ potentially has foreign policy implications. This cannot, in itself, be a reason for the Court to find that the principle of non-justiciability, based on the separation of powers and of institutional competence, ought to have precluded the issue of the writ. The enforcement of domestic legal obligations may frequently have the capacity to touch upon international relations, for example: extradition law (in which there is plainly scope for tension between diplomatic demands and domestic due process); or, still more obviously, asylum law (which may require the most embarrassing judgments about the practices of foreign states); or the exercise of jurisdiction on *forum conveniens* grounds (e.g. because of the corruptibility of or susceptibility to political pressure of a foreign judicial process); or the non-recognition of judgments on public policy grounds. In none of these cases does the potential for diplomatic repercussions cause English courts to consider the relevant actions to vindicate rights non-justiciable. It is submitted that, subject to the condition of (arguable) control being satisfied, the same principle applies in the present case.

(ii) The importance of the Geneva Conventions

34. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147, the House of Lords held that the State Immunity Act 1978 did not preclude criminal proceedings against a former head of state in respect of allegations of torture. In doing so, it rejected arguments made on behalf of the former head of state based on the doctrines of act of state and non-justiciability, since they were inconsistent with the terms of the International Convention Against Torture, which had been agreed by the relevant state parties (see, for example, Lord Saville at 267). Similarly, it is submitted that in this case the Court should be slow to decline jurisdiction in circumstances where the rights which it is sought to vindicate through habeas corpus are recognised not only in domestic law but by both the UK and the US through the Geneva Conventions (which were given specific effect through the 2003 MOU).

35. JUSTICE agrees fully with the review of the operation of Geneva III and Geneva

IV set out at §§24-39 of the Respondent's case. It is important to bear in mind the domestic effect of such Conventions. Those Conventions have a greater status in English law than unincorporated international treaties, because not only do they arguably amount to *ius cogens,* they have been incorporated in domestic law through primary legislation by both the Geneva Conventions Act 1957 ("GCA 1957"), which criminalised "grave breaches" of the Geneva Conventions,[10] and the International Criminal Court Act 2001 ("ICCA 2001"), particularly its Part 5 read with Schedule 8 which criminalised serious breaches of the Geneva Conventions.[11] By enacting such legislation, which included specific offences for grave and other breaches of the Conventions, Parliament made clear its intention to provide in domestic law for the enforcement and vindication of the critical rights and obligations arising under the Conventions. Extraordinary rendition and prolonged incommunicado detention are plainly criminalised by the GCA 1957 and/or ICCA 2001.

36. It is submitted that criminal justiciability over (im)permissible forms of essentially extraterritorial deprivation of liberty is highly significant when considering the scope for the protection of those rights through habeas corpus proceedings. The Conventions set out specific rights and obligations in respect of detained prisoners of war and civilian detainees, which were in turn reflected in the provisions of the 2003 MOU. Measures intended to secure compliance with Geneva III and IV, notably by an apparent maintenance of continued control over the transferred prisoner, should be presumed effective and real, unless proven otherwise. By extension, the recognition granted to those international Conventions by Parliament should inform the Court's approach in determining the extent to which their contents can be made effective via the domestic civil remedy of habeas corpus. Where a proper domestic respondent has the ability to demand a person's release (or arguably so), the remedy of habeas corpus must be available to secure the practical release of a person whose detention does not accord with the Conventions.

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[10] See in particular Schedules 3 and 4 of GCA 1957, read together with s.1.

[11] See in particular the definition of "war crimes" in Article 8(2)(a)(vi) and (vii) of Schedule 8, as given effect by s.51 ICCA and done so on an extraterritorial basis by s.52 ICCA. The MOUs concluded by the United Kingdom were plainly intended as part of a regime of Geneva Convention compliance that, amongst other things, would preclude potential domestic criminal liability if effective: see §§38-39 of the Respondent's case.

ACT OF STATE (Issue (iv))

37. JUSTICE submits that the doctrine of Act of State has little if any real relevance in the present case. The essence of the Act of State doctrine is that English courts should not pass judgment upon the acts of the government of another state done within its own territory: see *Lucasfilm v Ainsworth* [2012] 1 AC 208 at [81] *et seq* per Lords Walker and Collins. But as set out above, the Court of Appeal purported only to impose requirements on the Secretary of State, not any foreign power. In no way was judgment passed upon any refusal or potential refusal by the United States to return Mr Rahmatullah. Nor did the Court of Appeal trespass on the jurisdiction of the US courts by engaging in any kind of review of the legality of Mr Rahmatullah's detention by the US government. Indeed, as noted in the Secretary of State's case at §1.4(vi): "*On 20 February 2012, the Court of Appeal held that the Appellants had made a full and sufficient return to the writ and discharged them from further obligations under it. They did so, correctly, without considering the legality of the continuing detention of the Respondent by the US.*"

THE RELEVANCE OF A MEMORANDUM OF UNDERSTANDING

38. A central issue in this case concerns the view to be taken where a Memorandum of Understanding ("MOU") provides (or arguably provides) the Government with a right to obtain the return of a detainee whom it has passed to another administration. The essence of the Secretary of State's argument at §4.18 is that the only factual relevance to be afforded to the MOUs in the present case is that they grant the Government the right to make a diplomatic request for Mr Rahmatullah's return. But this in effect renders the MOUs factually irrelevant (or a statement of the banal), since it is always open to the Government to make such a request within the bounds of its diplomatic relations with other states.

39. JUSTICE submits that the existence of MOUs and other diplomatic assurances – and specifically, those in this case – are of substantially greater relevance and importance. This is demonstrated by the fact that the Government's consistent position in other cases is that MOUs are very far from being irrelevant to

decisions faced by domestic courts and international courts. In particular, they are routinely relied upon by the Government in the context of Article 3 ECHR claims regarding proposed deportations. In those cases, they are relied upon as providing evidence of adequate protection against a *prima facie* risk of torture following a person's return to another state.

40. In the deportation cases, the courts' assessment of the risk of torture often includes a detailed assessment of the terms of an MOU, and an express analysis of the weight to be afforded to any specific agreement, by reference to its terms and the circumstances of its conclusion. For example, in *Othman v UK* [2012] ECHR 56, the Government submitted detailed factual statements on the relevance and reliability of the relevant MOU, including two statements by Mr Anthony Layden, the UK's Special Representative for Deportation with Assurances (see paragraphs 83-90). That evidence was to the effect that the relevant MOU would be respected, because otherwise damage would occur to diplomatic relations between the UK and Jordan (see paragraphs 88-89). That evidence is in striking contrast to the statements in the present case on the futility of making requests to the US.

41. The European Court of Human Rights in *Othman* concluded that a number of factors were relevant to the judicial assessment of the Government's assertions, including the detail of the undertakings made and the factual circumstances surrounding the arrangements therein (see paragraphs 187-89). Similarly, in the Special Immigration Appeals Commission ("SIAC") decision in *XX (Ethiopia) v SSHD* [2010] UKSIAC 61/2007, witness statements of Mr Layden were reviewed on the relevance of the MOU and the likelihood that it would be complied with for the purposes of removing the real risk of torture (see paragraphs 21-23). See also paragraph 8 *et seq* of the SIAC decision in *J1 (Ethiopia) v SSHD* [2011] UKSIAC 98/2010. And the House of Lords in *RB (Algeria) v SSHD* [2010] 2 AC 110 ruled that whether a specific diplomatic assurance provided a sufficient guarantee that a deportee would be protected against the risk of torture was a question of fact to be decided in the light of all the evidence (see Lord Hoffmann at [192], quoted at §133 of the Respondent's case).[12]

[12] Nor is the UK Government alone in placing reliance on MOUs in this context: see, for example, *Saadi v Italy* (2009) 49 EHRR 30 (paragraphs 147-148).

42. Accordingly, the approach of the Court of Appeal in this case – *viz.* that the relevance of the MOUs is a matter of fact suitable for determination by the court and testing by the issue of a writ of habeas corpus – is entirely consistent with the broader case law of both the domestic courts and Strasbourg. As with the deportation with assurances cases, the purpose and/or effect of the MOU is to generate evidence that one party (the receiving state) will comply with its international obligations, such that the other state (the sending state) also acts lawfully by transferring custody. JUSTICE submits that the relevance of an MOU to the assessment of "control" for the purposes of the habeas corpus jurisdiction must be assessed by the court on a case by case basis, just as routinely happens in deportation cases. An MOU may not of itself be justiciable, but it is factually relevant to the assessment of questions which are justiciable: such as, in the present case, whether for the purposes of habeas corpus jurisdiction the Government has sufficient control over Mr Rahmatullah.

43. Finally, it is notable in the present case that at least the earlier of the two MOUs was, on the Government's evidence, entered into because it was "considered politically important" to do so (see quotation at §35 of the Respondent's case). It appears safe to assume that at least part of that political importance arose from the need to reassure the UK public and the wider world that the UK intended to ensure compliance with international obligations and their corresponding domestic criminal obligations of extraterritorial character. Against that background, there is an obvious public interest in testing the unsubstantiated assertion that a request under that MOU would be "futile".

CONCLUSION

44. For all the reasons set out above, JUSTICE commends to the Court the approach to questions of law and policy which was adopted by the Court of Appeal.

THOMAS DE LA MARE Q.C.
FRASER CAMPBELL
Blackstone Chambers
20 June 2012