Neutral Citation Number: [2023] EWCA Civ 444

Case No: CA-2022-002378

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Lord Justice Lewis & Mr Justice Jay
[2022] EWHC 2772 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal (Criminal Division))
and
LADY JUSTICE ELISABETH LAING

- -

Between :

(1)C3
(2) C4 **Appellants**

- and -

THE SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH & DEVELOPMENT AFFAIRS **Respondent**

- -
- -

Phillippa Kaufmann KC, Dan Squires KC and **Jessica Jones** (instructed by **Birnberg Peirce**) for **C3**
Phillippa Kaufmann KC, Dan Squires KC and **Isabel Buchanan** (instructed by **ITN Solicitors**) for **C4**
Sir James Eadie KC, **Lisa Giovannetti KC**, **Lord Verdirame KC, Jason Pobjoy** and **Emmeline Plews** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates: 27 & 28 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Underhill :

INTRODUCTION

1. This appeal concerns two British women ("the Applicants"), anonymised as C3 and C4, who travelled to Syria to join the Islamic State in Iraq and the Levant ("ISIL", also known as "ISIS" or "Daesh"). Since the defeat of ISIL they have been detained in a camp in northern Syria called Camp Roj operated by the Autonomous Administration of North and East Syria ("the AANES"). Both have young children. Conditions in the camp are unsafe and unhealthy and are wholly inappropriate for the detention of adults, let alone children. It is their case that there is no legal basis for their detention.

2. The AANES has indicated that it would be prepared to release the Applicants and their children, so that they can be repatriated to the UK, if it receives an "official request" from the UK Government. The Secretary of State for Foreign, Commonwealth and Development Affairs ("the Foreign Secretary") has refused to make such a request as regards the Applicants themselves, principally on the ground that they travelled to Syria voluntarily and would be a threat to national security if returned to this country, although he has expressed himself willing to consider doing so as regards the children if asked.

3. It is the Applicants' case that the AANES's offer means that the Foreign Secretary has *de facto* control over whether they are released, and that he can accordingly be compelled to repatriate them by the issue of a writ of habeas corpus. On 4 July 2022 they began habeas corpus proceedings in the Administrative Court in accordance with Part 87 of the Civil Procedure Rules. I will have to say more about habeas corpus later; but at this stage it is enough to say that it is a summary procedure by which a person who is detaining the applicant is required to produce them (formally, "have their body") in the High Court in London and to provide a legal justification for their continued detention, failing which they will be released. Thus if it were issued in this case the effect would be to require the Secretary of State to make the requisite official request to the AANES and take whatever other steps were necessary to bring the Applicants back to this country and produce them to the Court.

4. By a judgment handed down on 2 November 2022 a Divisional Court comprising Lewis LJ and Jay J refused the applications: see [2022] EWHC 2772 (Admin). This is an appeal from that decision. The Applicants have been represented by Ms Phillippa Kaufmann KC, Mr Dan Squires KC and (in the case of C3) Ms Jessica Jones and (in the case of C4) Ms Isabel Buchanan. The Foreign Secretary has been represented by Sir James Eadie KC, Ms Lisa Giovannetti KC, Lord Verdirame KC, Mr Jason Pobjoy and Ms Emmeline Plews.

5. I should mention for completeness that at an earlier stage in the history the Home Secretary deprived the Applicants of their British citizenship under section 40 of the British Nationality Act 1981. However in March 2021 the Special Immigration Appeals Commission allowed an appeal against that decision on the ground that the effect of the deprivation was to render them stateless.

6. It is important to appreciate the limited nature of the issue on this appeal. The Foreign Secretary accepts that in principle his decision not to take steps to secure the

Applicants' release from Camp Roj, and their repatriation to this country, can be challenged in the Courts. But he says that habeas corpus is not the correct vehicle for such a challenge and that what the Applicants should have done is to bring proceedings for judicial review of that decision. His case is not simply that habeas corpus is formally unavailable but also that if it were issued it would have the effect of bypassing any examination by the Courts, of the kind which would occur in judicial review proceedings, of the legitimacy of his reasons for not being prepared to accept the AANES's offer. The issue for us is thus a procedural one, albeit with substantive consequences: does habeas corpus lie in the circumstances of the present case?

THE BACKGROUND FACTS

7. The Applicants' evidence before the Divisional Court consisted of three witness statements from C3's solicitor, Anne McMurdie; one from C4's solicitor, William Kenyon; a witness statement from the Rt. Hon. Andrew Mitchell MP, the then co-Chair of the All-Party Parliamentary Action Group on Trafficked Britons in Syria ("the APPG"); and a witness statement from Maya Foa, joint Executive Director of the charity Reprieve. The Foreign Secretary relied on two witness statements from Jonathan Hargreaves, the (then) UK Government Special Representative for Syria. Before us the Applicants sought to put in evidence a further witness statement from Mr Kenyon.

8. In view of the limited nature of the issue before us, I need not give any details of how the Applicants came to travel to Syria, or their experiences prior to their detention by the AANES. It is enough to say that both are in their early thirties and that C3 travelled to Syria in 2014 and C4 in 2015. Each has children, some of them born in Syria and still very young.

9. There is clear evidence that the conditions in Camp Roj are dire. Details are given by Ms McMurdie in her second witness statement, drawing on a powerful report from Rights & Security International, *Europe's Guantanamo: the indefinite detention of European women and children in North East Syria*; but, again, I do not need to summarise that evidence here.

10. The AANES has had *de facto* control of parts of north-east Syria since 2012. It is controlled by the Syrian Democratic Council, whose military wing is known as the Syrian Democratic Forces. The AANES is not a state but it has its own constitution and provides quasi-governmental services to the population within the area that it controls. It has informal international relations with some states, including the UK. Its official position has for some time been that it does not wish to continue to detain foreign nationals and that it will co-operate with governments to facilitate the release and repatriation of their citizens held in Camp Roj (or its other principal detention facility at Al Hol). In accordance with that policy women and children from a number of countries including Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Sweden and the United States have been returned home in the last few years. The main point made in Mr Kenyon's further witness statement is that since the hearing in the Divisional Court there have been further instances of such returns, including one to the UK arranged by the British Government (in fact this is said to have occurred prior to the hearing but too late for it to be put in evidence). I would be prepared to

admit that evidence as useful background, but it does not materially add to the effect of the evidence adduced below.

11. On 25 October 2021 Mr Mitchell and the other co-Chair of the APPG, Lord Jay of Ewelme, wrote to the then co-Chair of the AANES's Department of Foreign Relations, Dr Abdulkarim Omar, and other AANES officials, as follows:

> ".. [W]e would like to confirm your position on releasing British families from Camp Roj for repatriation to the UK. In particular, we wish to confirm that the AANES would release British families from Camp Roj if the UK Government were to authorize the release of these families and issue the requisite travel documents to enable repatriation.
>
> We understand, of course, that the finer details of the repatriation of individual families would be a matter for further discussion, but we would be grateful if you can confirm that in principle you would release British families currently held in Camp Roj for repatriation to the UK if the UK were to authorize the release and issue the requisite travel documents."

The reference to "travel documents" reflects the fact that detainees would typically not have current British passports (and any children born in Syria certainly would not). As I understand it, both Applicants are in that situation and would require fresh passports, or emergency travel documents, in order to return to the UK.

12. In his reply dated 30 October 2021 Dr Omar said:

> "[W]e are ready to provide unconditional assistance and cooperate with the UK to hand over its citizens, if we receive an official request on this matter."

13. On 14 February 2022 Mr Mitchell and Lord Jay wrote to the then Foreign Secretary, the Rt. Hon. Liz Truss MP, referring to the AANES's position and asking her to:

> "… take immediate steps to:
>
> 1. make an official request to the AANES for the release of the British families from detention;
>
> 2. issue the British families with the requisite travel documents to allow them to re-enter the UK.
>
> Once this is done, we are sure that the practicalities of repatriation can be arranged."

14. On 24 March 2022 the Minister of State with responsibility for Asia and the Middle East replied on behalf of the Foreign Secretary. She said that women who had travelled to the region could pose "as significant a risk to our national security as returning male fighters" and that it was difficult to provide direct help to British nationals in these camps. She continued:

> "We are committed to considering every request for consular assistance on a case-by-case basis, taking into account all relevant circumstances."

15. Correspondence then ensued between the Applicants' solicitors and the Government Legal Department ("the GLD"). The Applicants in effect adopted the request made in the APPG's letter of 14 February 2022. The Government's position was stated in a letter from the GLD dated 17 June 2022, as follows:

> "*Your Client's [C3] [C4] Request for Consular Assistance*
>
> The Foreign Secretary has carefully considered the request for consular assistance on behalf of [C3] [C4] and her children. She has considered the conditions in which [they] currently find themselves, the length of time [they] have been in the camp and the nationality of [C3] [C4] and [their] children.
>
> In taking this decision, the Foreign Secretary has had particular regard to the best interests of the children, and treated those interests as a primary consideration. Notwithstanding these factors, the Foreign Secretary has decided that that she will not seek to assist [their] repatriation to the UK on national security grounds, given that [they] travelled of [their] own volition and [in the case of C3] with her eldest children to join a proscribed terrorist organisation.
>
> Nevertheless ... the Government is sympathetic to the situation of those children who, through the decisions of their parents, find themselves in IDP camps in NE Syria. Accordingly, while the Government will not assist the repatriation of [C3] and [C4] to the UK, if [they] were to make a fresh request for [their] children to be repatriated without [them], the Government would urgently investigate the practicalities of doing so, subject to confirmation of their identities and nationality."

In short, the Foreign Secretary was not willing to take any steps to assist in repatriating the Applicants themselves, but she was prepared to help repatriate their children if practicable and if the Applicants so requested. No such request has been made. I should note that although she describes the Applicants' request as being for "consular assistance" they do not accept that that is a correct characterisation.

16. Mr Hargreaves met Dr Omar on 23 August 2022. He confirmed that the AANES's position was that British nationals detained in Camp Roj would only be released on the basis that the British Government would ensure that they were repatriated to the UK.

17. It was part of the Applicants' case in the Divisional Court, although not pursued before us, that, provided the Foreign Secretary made the necessary official request to the AANES and issued travel documents to enable them to enter the UK, the practical arrangements for their release and repatriation could be undertaken by Reprieve, which had access to Camp Roj and experience of assisting with repatriations in other

cases. In response to Ms Foa's evidence on this aspect, Mr Hargreaves in his second witness statement gave evidence about the procedure which the AANES would require to be followed if the Applicants were to be released for repatriation. Either he or another UK Government representative would have to travel to an agreed hand-over point in order to officially "receive" the released detainees and sign appropriate paperwork. He does not say where the hand-over point would be likely to be, but plainly it would be somewhere within the part of Syria controlled by the AANES. Since the UK Government does not at present maintain a mission in Syria, that would mean that its representatives would have to cross the border into Syria from a neighbouring state – also unidentified, but as a matter of geography the only possibilities are Iraq or Turkey – and return across that border, with the Applicants and their children, to an airport from which they could be flown to the UK. His evidence was that the necessary arrangements would involve not only "extensive multi-agency co-ordination" in this country, and the issue of travel documents, but also significant diplomatic engagement with the relevant neighbouring country or authority, in order for it "to allow [the returning detainees] entry and exit permissions, [and] enable transit through checkpoints and airports, as well as across the border". Released detainees formerly aligned to ISIL would be regarded by the country or authority in question as potential security risks, and it would therefore require formal guarantees that the UK Government would take full responsibility for them while on its territory and that they would be accompanied by consular and security staff at all times. It was likely also to require that the party be accompanied by its own security forces. He observes that this represents "a significant bilateral ask". It can also be inferred from Mr Hargreaves' evidence that – as one would expect as a matter of general knowledge – the areas in question, particularly the area controlled by the AANES, are unstable and transit through them is not without risk. None of this evidence is disputed.

THE ISSUES

18. It is, as I have said, the Applicants' primary case that the effect of the AANES's letter of 30 October 2021 is that the Foreign Secretary has the *de facto* power, by making the appropriate "official request", to procure their release from unlawful detention; and that the law is that in those circumstances he is to be regarded as having control over that detention – or "constructive custody" – such that habeas corpus is an available remedy. Before us Ms Kaufmann advanced an alternative submission by way of fallback, but I need not summarise it at this stage.

19. The Foreign Secretary's case is that habeas corpus is not available in circumstances of this kind. His main point is that the UK Government had no involvement in the Applicants' original detention, and the AANES's offer cannot have the effect of making it responsible for their custody. But he also emphasises that what was required in order to procure the Applicants' release is not simply the making of the official request but that it be willing and able to procure their repatriation by taking the steps summarised at para. 17 above, which involve the deployment of significant resources in terms of personnel (with some risk to those involved), cost and diplomatic capital. That being so, the Government's "power" to procure the Applicants' release was qualified and conditional. In reality, what the Applicants were asking for was, as the Minister had said, consular assistance. Whether to afford such assistance to British nationals abroad in any given case is a matter for the

(reasonable) judgment of the Foreign Secretary, and it was wrong in principle to pre-empt his responsibility by subjecting him to the absolute obligations imposed by a writ of habeas corpus.

20. The principal issue for us therefore is whether, by reason of the AANES's offer, the UK Government should be regarded as having control over the Applicants' detention in the sense necessary to justify the issue of a writ of habeas corpus.

21. The Divisional Court held that the Government had no such control. Jay J delivered a careful leading judgment, incorporating a full review of the authorities, but for present purposes I need set out only the summary and other observations in Lewis LJ's concurring judgment:

> "108. The AANES authorities have indicated that they are prepared to release the applicants in circumstances which require action on the part of the Secretary of State (by requiring the United Kingdom to make an official request for release and by making arrangements for the repatriation of the applicants to the United Kingdom). That does not alter the fact that it is the AANES authorities, not the Secretary of State, who are determining whether, and in what circumstances, C3 and C4 can be released and who, thereby, control their custody. The Secretary of State may be able to facilitate or help bring about the applicants' release if he were able or willing to do the things required by the AANES authorities before they will release the applicants from the camp. As Jay J explains …, the ability of the Secretary of State to respond to the conditions fixed by the AANES authorities for release of the applicants does not, however, mean that he has custody, or the control of the custody, of the applicants. In those circumstances, the writ of Habeas Corpus is not available against the Secretary of State in the present case.
>
> 109. That conclusion is reinforced by the following consideration. Habeas Corpus is concerned with the lawfulness of the detention of an individual. In the present case, the reality is that, in the event that the court issued the writ, on the return date, the court would not be concerned solely, or perhaps even principally, with the legality of the detention of the applicants in North East Syria by the AANES under Syrian or international humanitarian law (even assuming, without deciding, that that was a proper matter for consideration by the court). Rather, the court would be likely to be concerned with the response by the Secretary of State to the conditions fixed by the AANES authorities for the release of the applicants. By way of example, the court may be concerned with the lawfulness of any refusal by the Secretary of State to make an official request to the AANES for the release of the applicants, or any refusal to issue emergency travel documents or to deliver those documents to the applicants in the camp in North East Syria. It may, perhaps, even involve consideration of any

> failure of the Secretary of State to make, or participate in, the necessary arrangements for repatriation of the applicants to the United Kingdom. Those matters are not concerned with the subject matter of an application for Habeas Corpus, that is, with the lawfulness of the detention. Rather, they fall within the scope of a claim for judicial review of the actions taken by the Secretary of State in his dealings with the AANES in relation to detainees in the camp. The lawfulness of any action or failure to act by the Secretary of State would be determined by reference to established principles of public law including those governing the circumstances in which judicial review is available to review decisions concerning the provision of assistance to British nationals abroad or decisions involving the conduct of foreign relations. They are not matters that properly fall to be decided on an application for Habeas Corpus which is concerned with the questions of whether a person is detained and, if so, if the detention is lawful."

22. I should note one further point. Habeas corpus will only lie where there is reason to believe that the detention is unlawful. As I have said, it was the Applicants' case that there was indeed no legal basis for their detention by the AANES. In the Divisional Court the Foreign Secretary did not advance any case to the contrary; however, he submitted that the Court ought to determine the question of the legality of the detention by reason of the foreign act of state doctrine. The Court held that since it had found that habeas corpus would not in any event lie it was unnecessary to consider that submission: see para. 103 of Jay J's judgment. The issue was not live before us.

THE APPLICABLE LAW

Habeas Corpus

23. I should as a preliminary set out the standard terms of the writ of habeas corpus ad subjiciendum, as it appears in the Civil Procedure Forms in the current edition of the Supreme Court Practice:

> "We command you that you have in the King's Bench Division of our High Court of Justice at the Royal Courts of Justice, Strand, London, on the day and at the time specified in the notice served with this writ, the body of A.B. being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, that Our Court may then and there examine and determine whether such cause is legal, and have you there then this writ."

24. The writ of habeas corpus has a long and important history in English law as a remedy against unlawful detention. We are, however, on this appeal concerned only with the specific question of the circumstances in which it lies against a person who does not have actual custody of the applicant but who is said nevertheless to have the power to

procure their release. We can ignore the case of detention by someone who is the respondent's agent or employee: in such a case there is obviously no difficulty in treating the principal or employer as the responsible person. But the situation is less straightforward where the actual detainee is an independent actor but the respondent is said nevertheless to have *de facto* control over the detention. That question is addressed in a small number of authorities to which we were referred in some detail. In my view only three directly address the relevant principles – *Barnardo v Ford* [1892] AC 326; *R v Secretary of State for Home Affairs, ex p O'Brien* [1923] 2 KB 361, [1923] AC 603; and *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614. I will consider them first, but it is necessary also to refer to two other authorities – *Ex p Mwenya* [1960] 1 QB 241 and *Re Sankoh* (unreported 1.9.00 (HC) and 27.9.00 (CA)) – which illustrate how those principles have been applied in particular circumstances.

Barnardo v Ford

25. In *Barnardo v Ford* a boy had been placed in a Barnardo's home, but his mother later asked for him to be moved elsewhere. She was told by Dr Barnardo, as he confirmed on affidavit, that the child had been transferred to the care of a Mr Norton, who had taken him to Canada, and that he did not know where Mr Norton was and had no means of communicating with him. It appears to have been accepted that the boy was no longer in the Barnardo's home, but the mother did not accept that Dr Barnardo had no control over his current circumstances. The House of Lords upheld the order of the High Court for the issue of a writ of habeas corpus for the purpose of establishing, as Lord Macnaghten put it (see p. 340), "the circumstances under which Dr Barnardo parted with the child, and ascertaining beyond all doubt whether the child is or is not still under Dr Barnardo's control or within his reach".

26. The primary point established by *Barnardo v Ford* is that a writ of habeas corpus can properly be issued where there is a doubt about whether the respondent does in fact have custody of the putative detainee. In such a case the respondent will in the return to the writ required by CPR 87.10 state, if that remains their case, that they do not have custody and adduce appropriate supporting evidence, on which they will be liable to be cross-examined on the return date: as to this, see the speech of Lord Herschell at p. 340.

27. Equally important for our purposes is that the question that would be examined by the Court on the return date was not defined by the House simply as whether the child was in Dr Barnardo's actual custody (which on the face of it he was not) but extended to whether he was in his "power or control" – a phrase used by Lord Herschell at p. 340, which is plainly to the same effect as Lord Macnaghten's language of "control … or reach".

28. A related point which emerges from *Barnardo v Ford* is that the sole purpose of the writ is to procure the release of a person currently being detained, unless their detention were shown to be lawful, and not to investigate the lawfulness of any past detention with a view to punishment or compensation: see in particular the speeches of Lord Halsbury LC at pp. 332-333 and Lord Watson at pp. 333-334. That point is not directly significant for our purposes because the Applicants' object is indeed to seek release from their current detention; but it is an illustration of the specific and limited nature of the habeas corpus jurisdiction.

O'Brien

29. In *O'Brien* the applicant, who was living in London, had originally been detained by the Home Secretary under emergency powers contained in the Restoration of Order in Ireland Regulations 1920. Under the terms of an arrangement with the newly independent Irish Free State, he was transferred to Dublin and interned by the Free State authorities in Mountjoy prison. His application for habeas corpus was dismissed by the High Court, but the Court of Appeal held both that his detention had not been authorised by the Regulations and that the writ should issue. As regards the latter decision, it held that it was at least arguable that the Home Secretary retained control over the applicant's custody notwithstanding his transfer to Ireland, and accordingly, applying *Barnardo v Ford*, that the writ should issue in order that that question should be fully explored. A note in the King's Bench reports records that the applicant was on the return date duly produced to the Court and discharged.

30. As regards the nature of the requisite "control", the fullest account is in the judgment of Atkin LJ. He said, at p. 398 (I italicise three propositions of particular importance):

> "I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. *Actual physical custody is obviously not essential*. 'Custody' or 'control' are the phrases used passim in the opinions of the Lords in *Barnardo v Ford,* and in my opinion are a correct measure of liability to the writ. It was said that the applicant was in a dilemma, for having relied on the absence of control as constituting the invalidity of the order, he is said to debar himself from asking that the writ should go to the Home Secretary as having control, and the Attorney-General relied upon the absence of control as fatal to the applicant's motion for the writ. In truth there seems to be no dilemma. In testing the validity of the order the question is as to the legal right to control; *in testing the liability of the respondent to the writ the question is as to de facto control*. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; *the question is whether it exists in fact*. In the present case there may be some doubt. The Home Secretary by the Attorney-General alleged that he has no control; on the other hand the applicant by his affidavit submits reasons for supposing that the Home Secretary is in a position by agreement to cause him to be returned to England, while the answer of the Home Secretary does not in terms deny that he is in such a position; and refrains from stating that he has no control.
>
> The affidavit states that the applicant is in the control of the governor of the prison, and is not subject to the Home Secretary's orders, but this is by no means inconsistent with an agreement with the Free State Government to return on request."

As regards the potential agreement with the Free State Government referred to in the final sentence of that passage, Atkin LJ relied also on a statement made by the Home Secretary in the House of Commons in which he said that "undertakings given to me by the Free State Government" gave him "complete control over the position in which the internees are placed".

31. Bankes and Scrutton LJJ adopted essentially the same analysis. Bankes LJ described the question requiring further exploration as being "how far, if at all, by arrangement with the Free State Government the body of the applicant is under the control of the Home Secretary" (p. 381). Scrutton LJ referred in particular to the Home Secretary's statement in the House of Commons which I have quoted above (see p. 392).

32. In the interval between the decision of the Court of Appeal and the return date of the writ the Home Secretary appealed to the House of Lords, and there was an expedited hearing. The majority held that it had no jurisdiction to entertain the appeal, but in his dissenting speech Lord Atkinson observed, as part of his reasons for concluding that the House did have jurisdiction, that (p. 624):

> "Neither can, I think, the order [sc. for the issue of the writ] be treated as an abortive order. It 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* [my emphasis]."

33. So far as relevant for our purposes, *O'Brien* is authority for three propositions, all established by the passage in the judgment of Atkin LJ which I have quoted (reinforced as regards the third by the dictum of Lord Atkinson):

(a) habeas corpus will lie in circumstances where there is a doubt whether the applicant is in the respondent's custody in the relevant sense;

(b) actual physical custody is not essential so long as the respondent has "control" over the applicant's custody; and

(c) the control in question need not necessarily consist in an enforceable legal right to procure the applicant's release but need only exist *de facto*.

The first two of those propositions at least were already established by *Barnardo v Ford*, but *O'Brien* is important not simply because of their clear articulation by Atkin LJ but also because of their application in circumstances where the applicant was in the actual physical custody of a foreign government outside the jurisdiction and the alleged control consisted in the right to invoke an inter-governmental agreement which was legally unenforceable.

Rahmatullah

34. In *Rahmatullah* the applicant was a Pakistani national who had been captured by British forces in Iraq. Under the terms of a Memorandum of Understanding ("the MoU") between the British and the US armed forces he was transferred to the custody of the US; but cl. 4 of the MoU, reflecting article 45 of the Fourth Geneva Convention ("GC4"), required the US to return him on request. (There was a later MoU but it is immaterial for our purposes.) He was subsequently taken to Bagram airbase in Afghanistan, where he was held in custody by the US. He brought proceedings for habeas corpus against the Foreign and Defence Secretaries on the basis that his continuing detention was unlawful and that, although he was no longer in the custody of British forces, he was under the control of the UK Government because it had the right under the MoU to require his return. As to the allegation of unlawfulness, it was not part of his case that his initial detention by UK forces was unlawful; rather, he relied on the fact that article 49 of GC4 prohibits the removal of a detained civilian to a different country, so that his transfer to, and detention in, Afghanistan was unlawful.

35. That application was dismissed by the Divisional Court, but the Court of Appeal held that the writ should issue on the basis, following *O'Brien*, that it was necessary in order to resolve the question of what control over the applicant's detention the UK Government in fact had ([2011] EWCA Civ 1540, [2012] 1 WLR 1462). I will refer to that as "the first CA decision".

36. On the (adjourned) return date before the Court of Appeal the Secretaries of State informed the Court that a formal request had been made to the US Government requesting the return of the applicant to UK custody but referred it to a letter from the US Deputy Assistant Secretary of State for Defense, Mr Lietzau, which it submitted amounted to a definitive refusal of the request. The Court accepted that submission and held that in those circumstances it could make no further order ([2012] EWCA Civ 182, [2012] 1 WLR 1462, at pp. 1491-4): I refer to this as "the second CA decision".

37. The Secretaries of State appealed to the Supreme Court against the first CA decision, and the applicant cross-appealed against the second decision. The case was heard by a panel of seven justices. Although both the appeal and the cross-appeal were dismissed, those conclusions were not reached by the same route by all the members of the Court. The position can be summarised as follows:

- Lord Kerr delivered a judgment, with which Lord Dyson and Lord Wilson agreed, in favour of dismissing both the appeal and the cross-appeal. In bare outline, as regards the appeal he concluded that there was clear *prima facie* evidence that the applicant's detention in Afghanistan was unlawful, because his transfer from Iraq to Afghanistan was a breach of GC4; and that the terms of the MoU gave reason to believe that the US would return him to the custody of the UK if asked, so that the case fell squarely within the principle established by *O'Brien*, which he endorsed (see paras. 45-64). As regards the cross-appeal, he found that the Court of Appeal had been entitled to regard Mr Lietzau's letter as a definitive refusal.

- Lord Phillips agreed with Lord Kerr's reasoning and conclusion on both the appeal and the cross-appeal, subject only to a question which had not been argued and on which he reserved his position ("the unexplored issue"). That issue was

whether *O'Brien* should be distinguished on the basis that neither the applicant's initial detention by UK forces nor his transfer to the custody of the US was unlawful: the only criticism of the Secretaries of State was that they had not sought his return under the MoU when it became clear that he was being unlawfully held by the US. He discusses that question at paras. 100-107 of his judgment: I shall return to one part of his reasoning below.

- Lord Reed agreed that the cross-appeal should be dismissed. As for the appeal, he agreed that it should be dismissed but for reasons which he described as narrower than Lord Kerr's. He made two further points (see para. 115). The first was that it was "important that the applicant was initially detained by British forces, with the consequence that the question was whether the Secretaries of States' control over him had been relinquished" because otherwise it was unclear why the Court would have jurisdiction. The second was that, like Lord Phillips, he reserved his position on the unexplored issue.

- Lord Carnwath and Lady Hale delivered a joint judgment agreeing that the appeal should be dismissed. Although they gave reasons of their own, it does not appear that they were intended to, or did, differ from Lord Kerr's. They did not accept that the unexplored issue gave rise to any difficulty. They dissented on the cross-appeal on the basis that Mr Lietzau's response was insufficiently explicit about the US Government's unwillingness to return the applicant.

It is clear from that analysis that Lord Kerr's judgment contains the majority ratio as regards both the appeal and the cross-appeal.

38. *Rahmatullah* is important because it gives the authority of the Supreme Court to the decision and reasoning in *O'Brien*. But the Applicants also relied on paras. 41-44 of Lord Kerr's judgment, where he makes some introductory observations about the remedy of habeas corpus before going on to consider the issue of "control". These read:

> "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. …"

Ms Kaufmann drew our attention in particular to the points made in para. 41, about habeas corpus not being a discretionary remedy, and in para. 42, about its flexibility.

<u>*Mwenya* and *Sankoh*</u>

39. In *Mwenya* a politician detained by the authorities in Northern Rhodesia applied for habeas corpus both against the Governor and against the Secretary of State for the Colonies. There was an issue about whether the English courts had power to issue habeas corpus against the Governor: that turned on the status of Northern Rhodesia as a protectorate and is not material for our purposes. As regards the claim against the Secretary of State, the applicant's case, relying on *Barnardo v Ford* and *O'Brien*, was that he had *de facto* power to procure his release.

40. The Divisional Court rejected that argument. Lord Parker CJ, after referring to the facts of *O'Brien*, said, at p. 279:

> "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."

This appears to be the origin of the phrase "constructive custody" as a label for the basis on which habeas corpus was held to lie in *O'Brien*. Lord Parker continued, 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."

The final two sentences illustrate that the concept of "*de facto* control" does not extend to the ability to take steps which might influence or persuade the actual detainer to release the applicant.

41. In *Re Sankoh* an opposition leader detained by the Government of Sierra Leone sought habeas corpus against the Foreign and Defence Secretaries on the basis that there was evidence that British forces operating in Sierra Leone were assisting the government, and might indeed have assisted in his detention, and that the UK Government might therefore have *de facto* power to obtain his release, so that the writ should issue in order to allow that question to be determined. Elias J dismissed the application on the basis that there was no evidence that the UK Government had any control over the applicant's custody: the evidence was that he had not been originally arrested by British forces, nor was he at any time in their custody or control. It might have significant political influence but that was not enough: in that regard he cited *Mwenya*.

42. Elias J's decision and reasoning were upheld by this Court. Laws LJ said, at para. 9:

> "It seems to me … 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."

Consular assistance

43. The principles governing the obligations of the UK Government to take steps to seek to procure the release of a person detained by a foreign government are conveniently summarised in the decision of this Court in *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 159. The claimant was a British citizen detained by the US in its detention facility at Guantanamo Bay. He sought judicial review of the refusal of the UK Government to make representations to the US Government, or take other appropriate steps, to attempt to secure his release. The Court of Appeal upheld Richards J's dismissal of his claim. At para. 106 of the judgment of the Court, delivered by Lord Phillips MR, the effect of the relevant case-law was summarised as follows:

> "(i) It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.
>
> (ii) Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.
>
> (iii) However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.
>
> (iv) It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.
>
> (v) The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case."

44. Assistance of the kind being sought in *Abbasi* no doubt goes beyond the more usual examples of "consular assistance", but the label does not seem to me inapt.

DISCUSSION AND CONCLUSION

45. Ms Kaufmann submitted that the habeas corpus authorities summarised above clearly establish that the writ should be issued in the circumstances of the Applicants' case. The AANES's offer means that the Foreign Secretary has control over their custody in the sense established by *O'Brien* and endorsed in *Rahmatullah*, namely that he has the *de facto* power to effect their release. There is every reason to suppose that the AANES would indeed release the Applicants on receipt of an official request, consistently with the many other cases in which they have released detained women and children to their governments. Even if there were any doubt about the matter, the authorities establish that habeas corpus will lie in order for that doubt to be resolved.

46. The starting-point in considering that submission is that the passages about control – and more particularly *de facto* control – on which the Applicants rely in *O'Brien* and *Rahmatullah* must be read in the context of the issues in those cases. As Jay J says at para. 59 of his judgment below, "what is required is an examination of how [the statements of principle] were applied in individual cases and an identification of the particular features of those cases that either led to the issue of the writ, or not". In both cases the UK Government was responsible for the original detention of the applicant but had transferred him to the custody of a foreign government on the basis (it appeared) of agreements which entitled it to require his re-transfer to its custody on request – that is, in *O'Brien*, the undertakings which the Home Secretary told Parliament that he had had from the Free State and, in *Rahmatullah*, cl. 4 of the MoU. The observations in both Courts about *de facto* control were made in that context, and more particularly in response to an argument that the agreements in question did not create enforceable legal rights. They cannot fairly be read as authority for a general proposition that in any case where A is being *prima facie* unlawfully detained by B habeas corpus will lie against C if there is reason to believe that C is for any reason able to procure A's release. (I would add that such a reading would be inconsistent with both *Mwenya* and *Sankoh*.) The factual context here is different. The UK Government was not responsible for the Applicants' detention and accordingly no question of an agreement to re-transfer on request arises.

47. I therefore do not believe that the outcome of this case is determined by the outcome in *O'Brien* and *Rahmatullah*. I have focused on those cases because the discussion of "control" was more developed there; but the same goes for *Barnardo v Ford*, where Dr Barnardo was the child's original custodian.

48. It is accordingly necessary to consider whether as a matter of principle the effect of the AANES's offer is to give the UK Government control over the Applicants' detention in the sense necessary for habeas corpus to lie. I do not believe that it is. My reasons fall under two heads, though they overlap to some extent.

49. First, it is in my view of fundamental importance that the UK Government not only does not have actual custody of the Applicants but had no involvement in their original detention. For a writ of habeas corpus to issue in those circumstances would be unprecedented. In the course of his discussion of the "unexplored issue" in *Rahmatullah* Lord Phillips said (at paras. 104-105):

> "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* … . 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."

50. Lord Phillips is in that passage contemplating precisely the circumstances of the present case – that is, that the UK Government had nothing to do with the original detention but was, or might be, nevertheless in a position to procure their release. His observation that it is "at least questionable" whether habeas corpus would lie in such circumstances falls short of a definitive view on the question, but it carries real weight. (It may also be supported to a limited extent by Lord Reed's statement that it was important that Mr Rahmatullah was initially detained by British forces; but it is fair to say that that statement is on its face directed to a different question.) The emphasis placed in *Sankoh* on the fact that the UK Government had no involvement in the applicant's detention points in the same direction, though it may not be part of the ratio.

51. In my view the absence of any case in this jurisdiction[1] in which the writ has issued in circumstances of this kind reflects a general understanding that it lies only against those responsible for the original detention. I believe that that understanding accords with the nature of habeas corpus as a remedy for unlawful detention. Where B has first detained A but has passed actual custody to C, it is fair to regard B as responsible for A's continuing unlawful detention if in practice they have the power to procure his or her release by C: it was B who created the "detention situation" (if I may be forgiven the phrase) in the first place. But the case is different where B had nothing to do with the original detention. It is hard to see why in that case the fact that they may have, for an unconnected reason, *de facto* power to procure A's release justifies subjecting them to a peremptory remedy for a situation which they have done nothing to create. That is all the more so given that if the writ is available at all it issues as of right, leaving no room for any exercise of discretion by the Court. B may of course in

---

[1] Ms Kaufmann did not seek to rely on the Australian case mentioned by Lord Phillips, *Hicks v Ruddock*, no doubt because the decision was only that the applicant's claim for habeas corpus should not be struck out.

particular circumstances, as discussed in *Abbasi*, be under a public law duty to take steps to try to procure A's release, but that is not the same thing as treating them as a constructive custodian for the purpose of habeas corpus.

52. Ms Kaufmann submitted that it should make no difference in principle whether B was responsible for the original detention: all that matters is whether they in fact have the power to procure A's release. For the reasons given above I do not accept that. She also emphasised that, as Lord Kerr said in *Rahmatullah*, habeas corpus is a flexible remedy. That is no doubt the case, but it does not justify extending the scope of the remedy outside its principled boundaries.

53. Second, acceptance by the Foreign Secretary of the AANES's offer would not by itself be effective to procure the Applicants' release or their transfer to his custody. In the first place, the offer was not simply to release them: as Mr Hargreaves makes clear, they would be released only on the basis that the UK undertook to repatriate them. Secondly, that condition could only be satisfied by the Foreign Secretary taking the steps set out at para. 17 above – requiring, among other things, the transporting of the Applicants from Syria into Iraq or Turkey, with the permission of the government in question, in order to get them to an airport from which they could be flown to the UK. I would thus accept the Foreign Secretary's submission that such control over the Applicants' detention as the AANES's offer gave him was qualified and conditional.

54. I do not believe that a power to procure the release of a detainee which is qualified in that way is sufficient to justify the issue of a writ of habeas corpus. I believe that it is a necessary part of the rationale underlying *O'Brien* and *Rahmatullah* that the control enjoyed by the constructive custodian is unqualified. As a matter of principle, it can only be because a respondent has an unconditional power (*de facto* if not *de jure*) to obtain the applicant's (re-) transfer to their custody that it would be right to treat them as custodians. That was the basis of the claim in both *O'Brien* and *Rahmatullah*. In *O'Brien* the Home Secretary had told Parliament that the undertakings that he had been given by the Free State Government gave him "complete control"; and in *Rahmatullah* the right to require transfer in cl. 4 of the MoU was apparently unqualified. In neither case was there a need for the Government to take any steps of the kind necessary in this case in order to resume custody of the applicant if its request was acceded to: Mr O'Brien and Mr Rahmatullah would simply have been transferred from the custody of the one government to the other at the relevant port or airport[2].

55. Ms Kaufmann's initial position before us was that it did not matter that the AANES's offer was conditional: if it was in the power of the UK Government to comply with a condition of release required by a detainer it had *de facto* control of the detention and

[2] It does not appear from the note in the King's Bench reports exactly how Mr O'Brien's return from Dublin to London was handled, but this must have been the nature of the arrangement in principle. As for Mr Rahmatullah, the situation never arose; but, again, there would have been no difficulty about putting him on a plane from Bagram to London. (In practice he might have preferred to be sent back directly to Pakistan: that could no doubt have been achieved by agreement, but not on the face of it by the use of habeas corpus.) We can ignore any niceties about whether the transfer of custody would occur at the place of embarkation or arrival: what matters is that the applicant would be in the custody of one or other government throughout.

should be treated as a constructive custodian against whom habeas corpus would lie. Holroyde LJ put to her a case where a foreign organisation unlawfully detained a British citizen and offered to release them on payment of £10m – i.e. a hostage situation; other examples can readily be devised, such as release of prisoners or publication of a terrorist manifesto. She at first accepted that it followed from her position that in such a case habeas corpus would lie against the Government, who would accordingly be required to pay the ransom in order to bring the detainee before the Court. But on reconsideration she modified her response. She accepted that a conditional offer of release would normally not be sufficient to make the offeree a constructive custodian, but she said that the present case was different because the only condition imposed by the AANES was that the UK Government should arrange the repatriation of the Applicants, which was no more than the writ required in any event.

56. Ms Kaufmann denied that that argument was circular; but, whether it is or not, I would not accept it. The nature of the condition goes beyond a simple requirement to admit the Applicants to the UK. It requires the UK Government to take the various steps identified above, which, as the Foreign Secretary contends, involve the deployment of significant resources in terms of personnel, cost and diplomatic capital. That may not be as stark as making a payment of £10m, but the principle is the same. A decision on the part of the UK Government whether to take steps of the kind required in this case to procure the release of a British citizen held abroad involves an exercise of judgment which may be challengeable on the basis of the principles identified in *Abbasi* but which cannot simply be bypassed by the issue of a writ of habeas corpus.[3]

57. I would add that the artificiality of fitting the present situation into the framework of habeas corpus is illustrated by considering the Applicants' position if the Foreign Secretary accepted the AANES's offer. They would be released from the custody of the AANES at the moment of hand-over somewhere in its territory. But it is not clear to me in what sense they could be regarded as being thereafter in the custody of the UK Government. No doubt in practice they would in their own interests consent to being accompanied by its representatives on the journey back to the neighbouring country and until they had received their travel documents, and probably also as far as the airport; but that would be a matter of choice rather than compulsion. On arrival in the UK they would on the face of it be free to go wherever they liked (unless arrested on some lawful basis). That being so, I do not see what detention on his part the Foreign Secretary could be expected to justify on their production (actual or notional) to the Court on the return date. It may be that some analysis could be found that would cover the situation; but the difficulty of doing so reflects the fact that the relief that the Applicants really seek in their case is not simply their release from unlawful detention by the AANES but their repatriation.

---

[3] It may be instructive to consider a case from recent history. In 1975 Mr Denis Hills, a British citizen resident in Uganda, was sentenced to death, patently unjustly, for defaming the notoriously erratic and dictatorial President of Uganda, Idi Amin Dada. After a number of exchanges with the British Government the President said that he would be prepared to pardon and release Mr Hills on condition that the Foreign Secretary flew to Kampala to collect him, which is what happened. But the operation involved serious risks, both personal and diplomatic, and the outcome involved a great deal of negotiation. It is inconceivable that a writ of habeas corpus would have lain against the Foreign Secretary if he had not been prepared to accept the President's offer.

58. In response to the Foreign Secretary's skeleton argument in this Court the Applicants submitted a Supplemental Note in which they advanced a fallback argument which was not part of their case in the Divisional Court. This is that even if it was not enough to show that the Foreign Secretary had *de facto* power to procure their release, he should nevertheless be treated as having constructive custody on the basis that he was "responsible for" their continuing detention. The Court sought to explore the basis of this submission with Ms Kaufmann in her oral submissions. In the end she summarised her case as being that habeas corpus should lie because of what she described as a unique combination of four circumstances – (1) that the Foreign Secretary was in reality the only person who could bring about the Applicants' release, because, given the conditions in North East Syria, the AANES could not responsibly release them except to the UK Government, which could arrange their and their children's repatriation; (2) the shocking conditions of their detention; (3) the fact that the real reason for his unwillingness to make the request was his concerns about national security; and (4) that his conduct deprived them of their fundamental rights as citizens to enter the UK – she submitted that if the Applicants were able to present themselves at a consulate in Iraq or Turkey the Foreign Secretary would not be entitled to refuse to issue them and their children with passports. She acknowledged that "responsibility" might not be an apt label for that combination of factors and that she was in truth basing her case on the requirements of justice and humanity.

59. It is impossible not to feel the force of that appeal. The Applicants' current situation is indeed dire, however much it may be the result of their own choices; and it is made worse that it is shared by their innocent children. There may be – though we are not in a position to form a view – a powerful case that neither the difficulties about the repatriation arrangements described by Mr Hargreaves nor (which appears to be the essential point) the Foreign Secretary's concerns about the risk that the Applicants pose to national security can justify his refusal to take steps to secure their release and repatriation. But it is essential to remember the limited scope of the issue before us: see para. 6 above. I do not see how the factors relied on by Ms Kaufmann could justify granting the remedy of habeas corpus in circumstances where the Foreign Secretary does not have the necessary control over the Applicant's detention. As already indicated, I believe that the only proper vehicle for such a case is a claim for judicial review, in which the Court would consider the lawfulness of the Foreign Secretary's refusal of assistance in accordance with the principles in *Abbasi*.

60. Ms Kaufmann invited us, if that was the view that we took, not to dismiss the present proceedings but to remit them to the Divisional Court to be pursued as a claim for judicial review. I see no advantage in that course. The case would in practice have to be re-pleaded from the start, and supported by up-to-date evidence. It is in my view more straightforward for the Applicants, if so advised, to start fresh proceedings.

61. For those reasons, which I believe essentially accord with those of the Divisional Court, I would dismiss this appeal.

Holroyde LJ:

62. I too would dismiss this appeal, for the reasons given by Underhill LJ.

Elisabeth Laing LJ:

63. I agree.