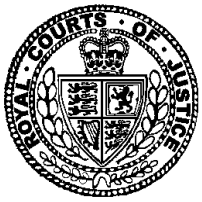

Neutral Citation Number: [2022] EWHC 2772 (Admin)

Case No: CO/2357/2022 and CO/2360/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2022

Before:

LORD JUSTICE LEWIS
MR JUSTICE JAY

- -

Between:

C3 and C4	**Applicants**
- and –	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH & DEVELOPMENT AFFAIRS	**Respondent**

- -
- -

Dan Squires KC and Professor Zachary Douglas KC, with Ayesha Christie and Jessica Jones (instructed by **Birnberg Peirce**) **for C3 and with Julianne Kerr Morrison and Isabel Buchanan** (instructed by **ITN Solicitors**) **for C4**
Sir James Eadie KC, Lisa Giovannetti KC, Guglielmo Verdirame KC, Jason Pobjoy and Emmeline Plews (instructed by **Government Legal Department**) **for the Respondent**

Hearing dates: 18th and 19th October 2022

- -

Approved Judgment

This Judgment was handed down by the Court remotely by circulation to the parties and their representatives by email and by release to The National Archives. The date and time for hand-down is deemed to be 11am on 2nd November 2022.

MR JUSTICE JAY:

Introduction

1. Anonymity orders have been made in these proceedings pursuant to CPR Rule 39.2. C3 and C4 also have the benefit of similar orders made in appellate proceedings before the Special Immigration Appeals Commission ("SIAC") . It follows that nothing may be disclosed or published which could lead to their identification.

2. These are applications for Habeas Corpus governed by CPR Part 87.

3. C3 and C4 are both held in Camp Roj in North East Syria, which is operated by the Autonomous Administration of North and East Syria ("AANES"). They were both born in the United Kingdom and according to the Secretary of State for the Home Department ("the SSHD") travelled to Syria some years ago now to align with the Islamic State in Iraq and the Levant ("ISIL", but also known as "ISIS" or "Daesh"). After ISIL's military defeats in 2016 and 2017, C3 and C4 were brought to Camp Roj (on dates more fully specified below) where they, together with a number of their respective children, remain. Conditions in the camp are dire. In 2019 the SSHD deprived C3 and C4 of their British citizenship under s. 40 of the British Nationality Act 1981, but in March 2021 SIAC held that she did not have power to do so because the decision, if maintained, would render them stateless. Consequently, C3's and C4's citizenship has now been restored.

4. C3 and C4 submit that the AANES has made it clear that these families will be released if an "official request" were made by the United Kingdom. What exactly is meant by that, and how release might be effectuated in these circumstances, is disputed. At all events, the Secretary of State for Foreign, Commonwealth and Development Affairs ("SSFCDA") has refused to make such a request, principally on the grounds that C3 and C4 travelled voluntarily to Syria and remain a threat to national security.

5. In a nutshell, C3 and C4 now contend that a writ of Habeas Corpus should issue pursuant to CPR Rule 87.5(a), either with an order that they be released forthwith (see Rule 87.5(g)) or with directions as to the Court or judge before whom, and the date on which, the writ is returnable (see Rule 87.8(2)).

The Evidence before the Court

6. C3 and C4 rely on the witness statements of the Rt Hon Andrew Mitchell MP (Co-Chair of the All-Party Parliamentary Action Group on Trafficked Britons in Syria ("APPG")), Anne McMurdie (C3's solicitor who has filed three statements), William Kenyon (C4's solicitor) and Maya Foa (joint Executive Director of Reprieve). There is also a report by an expert in Syrian law, Dr Hussein Bakri.

7. The SSFCDA relies on the two statements of Jonathan Hargreaves who is the UK Government's Special Representative for Syria.

8. Permission is required for reliance by the respective party on the second witness statement of Jonathan Hargreaves and the expert report of Dr Hussein Bakri. These applications have not been opposed and permission is granted.

A Factual Outline and Summary of Disputed Evidence

9. C3 was born in this country in 1990 and is a British citizen by birth. In July 2014 she travelled to Syria with her children. Since then, further children have been born in that country. The SSHD's deprivation decision made on 8th November 2019 stated that C3 was a threat to national security on account of her voluntarily aligning with ISIL. The merits of that contention have not been tested before SIAC because on 1st April 2021 the SSHD reinstated her citizenship following the decision on the preliminary issue of statelessness. For completeness, both C3 and C4 deny that they represent a threat to the national security of the UK.

10. It is not clear exactly when C3 was first held in Camp Roj but it is understood that this probably was in October 2017. It is said on behalf of C3 that the Camp Roj authorities have informed the SSFCDA that "she is not an extremist and does not agree with the ideology of Islamic State (Daesh)", but in the absence of CLOSED material it is neither possible nor necessary to reach any conclusion about this.

11. C4 was born in the UK in 1992 and is also a British citizen by birth. In 2015 she left the UK to travel to Syria with her child. It is contended on her behalf that this was at the behest of her then husband whom she later divorced. Later, she had further children. In early 2019 C4 was held at Al-Hoj and at some point in 2021 she was transferred to Camp Roj where she has been held ever since. C4 was deprived of her British citizenship on the same day as C3, and thereafter the proceedings before SIAC took an identical course.

12. It is not in dispute that the occupants of Camp Roj are not permitted to leave. The camp is secured and has a perimeter fence to prevent camp residents from leaving without authorisation. The camp is patrolled by the armed guards of the Syrian Democratic Forces ("SDF"). SIAC has held in an appeal raising similar issues that conditions in the camp are so poor that a violation of article 3 of the ECHR would be made out, assuming that it applies.

13. It is convenient at this stage to summarise the SSFCDA's evidence relating to background circumstances in Syria and the creation of detention camps. This may be drawn from the first witness statement of Mr Hargreaves.

14. The British Embassy in Damascus closed in March 2012. In June 2014 ISIL proclaimed a caliphate across areas spanning Iraq and Syria. Since 2013 over 900 UK-linked individuals of national security concern have travelled to the region. Of these, approximately 25% have been killed in the conflict and just under half have returned to this country. A significant number remain alive in the conflict zone.

15. In Syria the military fight against ISIL has primarily been undertaken by the Coalition-backed SDF, an alliance of Arab and Kurdish armed groups. It is the armed counterpart of the Syrian Democratic Council, the governing element of the AANES.

16. Since 2012 the AANES has acquired *de facto* autonomy in administering North-eastern territories in Syria. It is not a State but has its own constitution, provides quasi-governmental services to the local population, and engages in international relations with, amongst other countries, the UK.

17. The military defeats of ISIL have led to the capture of tens of thousands of individuals, including women and children. The largest proportion of women and children are located in Al-Hol (55,000 residents) and Camp Roj IDP camp (approximately 2,400 residents).

18. The SSFCDA's view, shared it is understood by the SDF, is that there is a continuing non-international armed conflict ("NIAC") in North-East Syria between the SDF and ISIL, with the latter surviving through a network of sleeper cells, carrying out attacks from time to time and whenever it can. Mr Hargreaves cautions that this is a "partial picture only" based on information in the public domain. The absence of a CLOSED material procedure, at least at this stage, precludes further elaboration.

19. On 25th October 2021 the Co-Chairs of the APPG wrote to the AANES seeking confirmation that they would, at least in principle, release detained British women and children if requested by the UK Government. It is pointed out on behalf of these detainees that many countries, including Germany, Belgium, Denmark, Sweden and the United States have made such requests, and their nationals or citizens have been released. On 30th October 2021 Dr Abdulkarim Omar, the then Co-Chair of the Department of Foreign Relations of the AANES, confirmed in reply that:

> "… each country must bear its own responsibility, and repatriate its citizens …
>
> …
>
> … we are ready to provide unconditional assistance and co-operation with the UK to hand over its citizens, if we receive an official request on this matter."

20. On 14th February 2022 the APPG Co-Chairs wrote to the SSFCDA 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."

21. On 24th March 2022 the Minister of State with responsibility for Asia and the Middle East replied on behalf of the SSFCDA. She pointed out that women who 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. Further:

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

22. On 28th March 2022 solicitors for C3 and C4 wrote separately to the Minister of State clarifying that what was being sought was "not in reality" consular assistance but "simply asking that an official request be sent to the AANES" for release.

23. Some space has been covered in the parties' written submissions dealing with the meaning of "consular assistance". In my view, this means no more than "assistance to British nationals abroad". It may take a variety of forms depending on what is sought, and what can and should be provided.

24. On 17th June 2022 the Government Legal Department wrote to those representing C3 and C4 in these identical terms:

> "**Your Client [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] [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."

C3 and C4 have not sought to challenge these decisions by way of judicial review. The SSFCDA did not deal in terms with the request to provide travel documents but that has been addressed subsequently.

25. In his first witness statement Mr Hargreaves has explained that: "… [t]here are significant practical barriers, diplomatic implications and financial considerations to providing consular assistance", including "the personnel risks associated with any deployment to Syria and reliance on the AANES for security and logistical support".

26. It was always the SSFCDA's understanding that an individual would only be released from detention following a request of the UK Government if the latter would also facilitate repatriation itself. On 23rd August 2022 Mr Hargreaves met Dr Omar and

asked him to clarify what was meant by the final paragraph of the 30th October 2021 letter. In short:

> "25. … He confirmed that handing over of a British national would only take place following close co-ordination and in the knowledge that the Government had issued all documentation needed to allow for the repatriation of the individuals involved. He stated that the FCDO's understanding that the AANES would not release an individual unless they were going to be repatriated was "*100% right"*." [emphasis in original]

27. Given that the UK Government has already made it clear that it is not willing to take steps to repatriate the Applicants to the UK on national security grounds, Mr Hargreaves adds:

> " 26. … [i]n those circumstances, there is no reasonable prospect that the Secretary of State can procure the release of the Applicants. Absent a commitment to repatriate, which the Government has already refused to do, the AANES will refuse to release the Applicants."

Putting to one side the possible inherent circularity in this statement, what is clear is that in Mr Hargreaves' view the UK Government would need to make a commitment to repatriate.

28. There was some discussion at the hearing as to whether the final sentence of §25 of Mr Hargreaves' witness statement left open the possibility that repatriation could be effectuated by a third party such as Reprieve. In my judgment, taking the whole of §§24-26 in context drives the reader to the conclusion that Mr Hargreaves was saying the AANES would insist that repatriation be organised by the UK Government.

29. In the light of this evidence, C3 and C4 now rely on the witness statement of Ms Foa made on 29th September 2022. She states that Reprieve, on account of its eight trips to the region, has developed "strong and trusted relationships" with various groups including the AANES and the SDF. Consequently, Reprieve has access to the camps as well as experience of the necessary security arrangements and transport logistics. Ms Foa confirms that she is aware of a number of repatriations of detainees "organised by entities other than governments of nationality", and informs the Court that in 2019 Mr Clive Stafford Smith, Reprieve's founder, organised the repatriation of two Trinidadian children from North East Syria to Trinidad. Furthermore, Peter Galbraith, a former American diplomat with extensive experience in the region, has been involved in the repatriation of several individuals. Accordingly, states Ms Foa:

> "I can confirm on behalf of Reprieve that if the UK Government requested the release of the Applicants, and issued the travel documentation required to allow for their repatriation, Reprieve would be willing to organise and carry out the Applicants' repatriation to the UK. Reprieve would be willing to keep all relevant UK Government bodies informed of travel plans and movements."

30. Ms Foa has not given evidence that the UK Government in particular has allowed a third party such as Reprieve to organise the repatriation of any of its citizens. I might add that the precise role performed by Mr Galbraith in bringing about the repatriation of individuals (and only two Canadian citizens have been identified) is not clear.

31. In his second witness statement Mr Hargreaves indicates that the issue is not so simple. Mr Hargreaves does not have personal knowledge of the specific case of the two children mentioned by Ms Foa although he is aware of reports of the Government of Trinidad and Tobago being closely involved. It is his understanding, however, that the AANES requires the UK Government to take responsibility for, and be involved in, any repatriation arrangements involving British nationals, which is what has occurred in all such arrangements to date. The British Embassy in Damascus closed in March 2012. The making of repatriation arrangements involves in particular, the UK Special Representative to Syria, or his deputy, being required by the AANES to travel to the handover point to oversee the operation, officially to "receive" the individuals, and sign the relevant paperwork. Making the arrangements would require careful planning with authorities in Syria, Iraq and other neighbouring countries, and "extensive multi-agency co-ordination" would also be required within the UK. This degree of co-ordination, both national and international, could only be taken forward by the Government. Furthermore, given the dangers on the ground and the need to safeguard the security of personnel, confidentiality would have to be maintained in order to avoid compromising any individual operation.

32. In these circumstances:

> "Of central importance are operational channels and the relationships which these departments and officials have with the UK's international partners. Extensive negotiations are necessary to agree the timings of a repatriation and the handover point at which the individual is transferred into the Government's care. The pace and complexity of those negotiations is affected by the nature of the relationships at the relevant time. Consequently, the process of planning can take many months."

33. More specifically:

(1) The SSFCDA is not obliged to issue an emergency travel document; it is within his discretion to do so. In the cases of C3 and C4, extraordinary arrangements would be required outside the Government's standard policy, because they cannot first travel to a neighbouring country to collect the document in person, and the SSFCDA has "declined to provide travel documents in these consular assistance decisions [i.e. the cases of C3 and C4], having taken account of all relevant circumstances".

(2) Extensive diplomatic engagement would be required both within Syria and with neighbouring countries, in the context of persons who have been assessed by the relevant Secretary of State as constituting a threat to national security. These countries would require guarantees from the UK Government taking responsibility for these individuals while on and within their territory, and that consular and security staff will accompany them at all times.

(3) If a third party attempted to carry out the repatriation, the diplomatic engagement and assurances of the UK Government would still be required by neighbouring countries. In the absence of such assurances, it is likely that C3 and C4 would be arrested.

34. In short:

> "… a non-UK Government body undertaking the facilitation of a repatriation also carries the following significant additional risks to UK national security and humanitarian interests. As well as repatriations, the Government's relationship with the AANES and transit countries includes key issues of political, national security and humanitarian concern …
>
> There are significant restrictions on the Government's ability to share relevant, sensitive security information with the third party, such as Reprieve, about national security considerations. Sharing such information would be necessary for the organisation and security arrangements for any repatriation operation.
>
> …
>
> … [the UK Government] is likely to be held accountable to some degree if any aspect of an operation involving UK nationals goes wrong.
>
> I would finally caution that third party involvement, with a non-UK Government body liaising with the relevant authorities on some cases, could also complicate work on other consular cases in North-East Syria that the Government may be working on at any time.
>
> For all the above reasons, even if the AANES was willing to allow Reprieve to repatriate the Applicants – which I do not believe to be the case – I consider that there are multiple risks and difficulties in Reprieve's offer, which ultimately render it unrealistic."

35. In my judgment, Ms Foa's evidence is too vague and unspecific to contradict Mr Hargreaves' statement that the AANES would expect the UK Government to occupy centre stage in any repatriation. In addition, I also accept the evidence of Mr Hargreaves that the SSFCDA would not wish to lose control over any repatriation operation, for the reasons that he gives. It would not be in the public interest to allow Reprieve to take responsibility, and in any case it would be surprising indeed if the UK Government would be prepared to let C3, C4 and their families leave the camp without officials being personally satisfied of their identities.

36. I do not propose at this stage to summarise the evidence of Dr Bakri save to note his opinion that under Syrian law detention in these circumstances is unlawful.

Three Preliminary Issues?

37. In the SSFCDA's skeleton argument it was contended that three preliminary issues arise for prior determination each of which is independently sufficient to dispose of the applications. These are:

    (1) the Habeas Corpus jurisdiction is not engaged where a person is detained in a foreign territory, the UK Government did not capture or detain the detainee, and there is no basis for alleging that any civil wrong has been committed by the UK under English law;

    (2) the Habeas Corpus jurisdiction cannot be used to bypass decision-making on issues of foreign relations and national security; and

    (3) it is not the proper function of an English court in a Habeas Corpus petition to rule on the lawfulness of conduct of a foreign detaining authority.

38. In my view, as I tentatively suggested during the course of a directions hearing in July this year, to attempt to partition the case in this fashion is not the correct approach. The essential question is whether, in all the circumstances of this case, including the obvious consideration that C3 and C4 are outside the jurisdiction, the SSFCDA as Respondent to the application must be regarded as having sufficient control over their detention so as to be able to "produce the body" of C3 and C4 to the Court, provide an account of the legal basis for detention and then, if appropriate, effect their discharge. An examination of all the circumstances of the case, many of whose factual ingredients are in my view inextricably bound, does not favour an approach which seeks to elevate certain factual features above others. The entire case must be seen in the round.

39. At the start of his oral argument Sir James Eadie KC did not seek to support the approach that had been prefigured. He focused on the issue of control. It follows from what I have already said that this was both realistic and correct.

The Case for C3 and C4

40. Mr Dan Squires KC for C3 and C4 submitted that Habeas Corpus is a generous and flexible non-discretionary remedy which can be issued in connection with the detention of an applicant anywhere in the world. It is not concerned with past illegality. The central issue is that of "control", and on the facts of the present case the SSFCDA has the power to determine whether C3 and C4 may be released or held in continued custody because he can as a matter of fact decide whether or not C3 and C4 are to be released. At its very lowest, there is sufficient doubt here for the issue to be tested. This is because the AANES have made it clear that they have no wish to maintain the detention of C3 and C4, and that all that is required is the making of an official request for their release. The practical means of securing release raises issues of mechanics and practicalities which are distinct from the anterior question of principle, namely the question of control. Moreover, the SSFCDA has put forward no evidence and no plausible legal basis to suggest that detention in these circumstances could be lawful under Syrian law or otherwise. That is sufficient to advance a *prima facie* case.

41. Mr Squires' review of a number of authorities, which I will be considering below, led him to submit that the correct legal test could be straightforwardly formulated. Would

the issue of the writ be "proper and efficient" in the sense that there is a reasonable prospect that it might "secure [the applicant's] production to the court"? The answer to these questions raises matters of factual assessment of all the available evidence rather than the erection of a series of legal obstacles and preconditions. For example, there is no requirement that prior detention by the respondent or any informal arrangement with the entity in actual control or custody of the applicant is required. These are simply the factual features of a number of cases where control has been found to exist.

42. An important plank of Mr Squires' argument was the identification of the true ratio of the decision of the Supreme Court in *Rahmatullah v Defence Secretary* [2012] UKSC 48; [2013] 1 AC 614. The parties did not disagree that this is an important exercise which must be undertaken.

43. Mr Squires' response to the evidence of Mr Hargreaves was that the SSFCDA cannot place unlawful impediments in the way of effectuating release. For example, C3 and C4 have the right of abode in this country, and the SSFCDA cannot pray in aid any practical issues relating to the issue of emergency travel documents which would serve to frustrate the issue of the writ and be contrary to the rule of law.

44. In his reply Mr Squires reiterated his contention that the AANES had made an unconditional offer which was highly likely to be honoured, and he helpfully distilled his argument into these three steps. First, if the conditions are part of what he called the "exercise of control", they fall within the Habeas jurisdiction. Mr Squires placed the obtaining of travel documents and the taking of practical steps to effectuate the release of C3 and C4 into this category. Given that they were within the ambit of Habeas Corpus, the Court was not required to decide whether their non-fulfilment would be unlawful: short of practical impossibility, compliance with the writ was mandatory. In oral argument, and at my prompting, Mr Squires adapted this slightly and advanced the submission that all these practical steps fell within the power of the UK to fulfil rather than anyone else. Secondly, and in the alternative, it would be unlawful to refuse to issue a travel document in these circumstances if the writ were issued. That would be to frustrate the rule of law, and the issue may be tested within the parameters of Part 87 rather than those of judicial review. Thirdly, in the event of uncertainty or dubiety any issues, including those bearing on practicability, may be addressed on the return of the writ.

45. Finally, Mr Squires advanced a number of submissions on articles 1 and 5 of the ECHR which in my view take his case no further forward. Either the test for meeting these articles is the same as that for Habeas Corpus or it is stricter: see *R (Al-Saasdoon and others) v Secretary of State for Defence* [2016] EWCA Civ 811; [2017] QB 1015, per Lloyd-Jones LJ at §105.

The Submissions on Behalf of the SSFCDA

46. In his oral submissions Sir James sought to boil his client's case down somewhat, helpfully narrowing the focus of the skeleton argument which I have, of course, studied carefully.

47. Sir James submitted at the outset that the circumstances in which the writ of Habeas Corpus may issue where the applicant is outside the jurisdiction are limited. He

observed that Mr Squires' submissions amounted to a very considerable extension of what is already an exceptional category.

48. Sir James identified five factual hallmarks of the present case which, taken alone or in combination, must lead to the conclusion that the writ should not issue in these circumstances. These are:

(1) C3 and C4 have never been detained in the UK.

(2) C3 and C4 have never been detained by British forces overseas.

(3) There can be no question of any transfer to a foreign power.

(4) There is no agreement or arrangement between the UK and the foreign detaining power giving the UK the power or ability to call for transfer or release.

(5) There is no question of any illegality by the UK Government in relation to detention or transfer.

49. Sir James submitted first of all that Mr Squires has not been able to cite any authority which supports a principle as broad as he advances. Secondly, he submitted that the issue for present purposes is who controls the custody of C3 and C4 and the conditions surrounding their release. In previous cases where the writ has issued, the conditions were put in place before the respondent to the writ relinquished custody whereas in the instant case the AANES have the power to decide the fact of release and the conditions that must be fulfilled. To the extent that it lies within the power of the UK Government to fulfil them, the latter's decision-making engages discretionary issues which are not apt to be determined within the scope of a habeas application as opposed to judicial review.

50. Thirdly, Sir James submitted that the remedy of Habeas Corpus requires the person having control to justify the legality of its conduct. In a case such as *Rahmatullah* the UK Government could give the relevant explanation without having to encroach on the legality of detention by a foreign power. Put another way, the straightforward question was whether the UK Government had acted unlawfully by failing to take steps required by international law. Sir James drew attention to §53 of Lord Kerr's judgment in *Rahmatullah* which supports the proposition that the failure by the UK authorities to take steps under international law meant that there was *prima facie* evidence that the applicant was unlawfully detained by the British. In the present circumstances, however, it is inevitable that a justification would have to be given as to the legal basis under Syrian law of detention in this camp.

51. Fourthly, Sir James submitted that the broad test advanced on behalf of C3 and C4 would lead to the consequence that the Court becomes drawn into impermissible areas such as foreign Act of State and, perhaps more compellingly, the need to examine discretionary decision-making in sensitive areas, including national security. Such an approach fails to respect the proper constitutional boundaries and also draws the Court into examining issues which are only properly the scope of judicial review.

52. Fifthly, Sir James submitted that one cannot avoid or circumvent these difficulties by supposing that all the conditions which would have to be fulfilled before release are

somehow part and parcel of the writ, and may therefore be compelled. That, he submitted, would be to put the cart before the horse.

53. Sir James elaborated on these points in oral argument, and it is unnecessary to set out all the detail. He emphasised that a number of his submissions were interconnected. In answer to a question I posed which sought to highlight the point that there may be a difference between unlawful detention when the applicant was in the physical custody of the respondent, and unlawfulness after detention was relinquished, Sir James on my understanding placed more emphasis on the latter.

Discussion

54. That C3 and C4 are said to be a threat to the national security of the United Kingdom is not a basis for the Court refusing to issue the writ, and Sir James did not suggest that it was. Furthermore, C3 and C4 have the right of abode in this country and cannot be excluded or exiled by prerogative power. On the other hand, there are obvious practical difficulties in effectuating their return to the UK and these cannot be made to disappear by the invocation of their basic rights.

55. It is well established that the issue of the writ does not depend on the nationality status of an applicant. In my judgment, the status of C3 and C4 as British citizens is only contingently relevant to whether the SSFCDA has control over their detention. I express myself in that way because it is inconceivable that the AANES would be requiring an "official request" from the UK Government in respect of an alien. However, the bare fact that C3 and C4 are British does not add to their argument that the SSFCDA has the necessary control. That issue must be determined by reference to other factors.

56. This is not a further opportunity to repeat or restate the general principles applicable to the ancient writ of Habeas Corpus. That exercise has been conducted on a number of occasions, mostly recently by Lord Kerr of Tonaghmore JSC in *Rahmatullah*, at §§41-44.

57. The opening sentence of §45 of Lord Kerr's judgment pinpoints the central issue:

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

58. In my opinion, these are not formulations of a test governing the circumstances in which control should be found to exist. Rather, at this stage of his judgment Lord Kerr was identifying the basic concept of control and explaining at a high level of generality what the term means in this context. That observation equally applies to the dictum of Vaughan Williams LJ in *R v Earl of Crewe, ex parte Segkome* [1910] 2 KB 576, 592 ("[the writ] may be addressed to any person who has control over the imprisonment that he could order the release of the prisoner") and that of Lord Evershed MR in *Ex parte Mwenya* [1960] 1 QB 241, 303, where the principle was articulated even more widely in terms of what was "proper and efficient". In the same case, Sellers LJ went perhaps even further (at 309) in referring to "an order which can be enforced".

59. As my Lord Lewis LJ observed in argument, these statements of principle, without more, do not really assist. What is required is an examination of how they 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.

60. Sir James placed some reliance on *Segkome* and drew attention to the fact that it was endorsed by Lord Reed JSC in *Rahmatullah*, at §109. The applicant had been detained pursuant to powers conferred by Order in Council and one of the issues in the case was whether the writ could be directed against the Secretary of State for the Colonies, who was not in actual control of the gaol. In my view, Vaughan Williams LJ's formulation must be seen in context. If it laid down some sort of test or precondition to the issue of the writ, Mr Rahmatullah's case would not have advanced beyond first base.

61. There have only been three previous reported occasions on which the Court has issued the writ notwithstanding that the "body" is beyond the Court's jurisdiction.

62. First, in the *locus classicus* of *Barnardo v Ford* [1892] AC 326, there was doubt as to whether Dr Barnardo still held the child or, alternatively, had transferred him to the custody "of someone who was really the agent of the legal wrongdoer": see the speech of the Earl of Halsbury LC, at page 333. On this second hypothesis it was relevant that Dr Barnardo clearly at one stage had control over the child, and the issue was whether he had relinquished it.

63. Secondly, in *R v Secretary of State for Home Affairs, ex parte O'Brien* [1923] 2 KB 361, an order was wrongfully made under regulation 14B of the Defence of the Realm Consolidation Regulations as applied to Ireland by separate Order in Council that Mr O'Brien, who was in London at the time, be interned in the new Irish Free State. Compliance with the Order meant that he would have to be arrested and detained in this jurisdiction. He was then conveyed to Dublin under an agreement, not legally binding, between the Secretary of State and the Irish Free State that if an advisory committee advised the former that he should not have been interned the latter would release him. Although Mr O'Brien was outside the jurisdiction when the application was made, the Court of Appeal held that the Respondent had sufficient *de facto* control over him to justify the issue of the writ. Such control flowed from the arrangements I have referred to, and in particular the lack of clarity as to what would or might happen if the Home Secretary were to enlist the assistance of the Irish Free State to bring about Mr O'Brien's return to this country. As Scrutton LJ observed, at page 50:

> "It may be that on hearing that in the opinion of this Court the order was issued without legal authority, the Home Secretary with the assistance of the Irish Free State Government will produce the body, as it is hardly in the interests of either Government to act illegally."

O'Brien was appealed to the House of Lords but the majority of their Lordships held that there was no jurisdiction to entertain it ([1923] AC 603). Lord Atkinson dissented on that question and upheld the Court of Appeal's decision on the merits, at 624:

> "[the writ] 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 obligations 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."

64. As in *Barnardo's* case, the real question in *O'Brien* was whether the Home Secretary had retained control over him in the light of (a) the initial detention in this country (as it happens, unlawful) and (b) the informal arrangements made with the Irish Free State as a precondition to transfer. Put in these terms these factors are joined at the hip. But had the transfer taken place without any sort of agreement or arrangement, the outcome of the case would have differed for the straightforward reason that prior illegality is insufficient.

65. As Lord Kerr put it in *Rahmatullah*, at §52:

> "… The suggestion [in *Zabrovsky v General Officer Commanding Palestine* [1947] AC 246] that the central feature of O'Brien was that there no effective legal order is open to serious question. A critical, if not the central, issue in that case … is that there was reason to conclude that the Home Secretary had control over Mr O'Brien's release. Habeas Corpus was issued in his case not simply because it was held that he had been deported and interned on foot of an order which, it was found, had not been lawfully made. The issue of the writ depended crucially on the finding that it was likely that the Home Secretary could procure Mr O'Brien's release."

66. Thirdly, in *Rahmatullah* itself the applicant was captured by British forces in Iraq in 2004. He was a prisoner of war and there was no suggestion that his detention was unlawful. At that point, the UK owed obligations to him under the Geneva Convention relative to the Treatment of Prisoners of War ("GC3") and the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("GC4"). Under arrangements made in 2003 involving amongst others the UK and the USA ("the MoU 2003"), the applicant was transferred into the custody of US forces in Iraq. Thereafter, and without the knowledge of the UK, the applicant was moved to Bagram airbase in Afghanistan in breach of article 49 of GC4.

67. It was common ground that the MoU 2003 was not legally binding. By clause 4 the USA undertook to return prisoners of war to the UK "without delay upon request". If the detaining power "fails to carry out the provisions of the present Convention in any important respect", article 45 of GC4 required the UK to take "effective measures" either to correct the situation or request the return of the detainee.

68. In these circumstances, the question for the Supreme Court was, as Lord Kerr said at §45, whether there was a reasonable prospect of the respondent being able to exert control over Mr Rahmattulah's custody to secure his production to the court.

69. The Supreme Court, constituted as a seven-judge panel, was agreed that the answer was in the affirmative (in the sense that there was sufficient reason to believe that the US authorities would accede to a request made under clause 4 of the MoU 2003) but was not in complete agreement as to the saliency or otherwise of the factual elements of the case which determined the outcome. For Lord Phillips of Worth Matravers and Lord Reed there was also an "unexplored issue" which might have led to a different conclusion had it been tested: viz. the fact that British forces had committed no civil wrong against Mr Rahmatullah when he was in their actual custody. It had been a feature of both *Barnardo* and *O'Brien* that wrongdoing either had or may have been perpetrated.

70. In my judgment, the "unexplored issue" may continue to remain that way, and – to the extent that he still pressed it in oral argument - Sir James' invitation that we should resolve it must be declined. The endeavour must be the more modest one of seeking to identify exactly why it was that the writ was issued in these particular circumstances.

71. In the view of Lord Kerr (with whom Lord Dyson MR and Lord Wilson JSC agreed), the critical features of this factual structure were article 45 of GC4 and clause 4 of the MoU 2003. The UK was bound under international law to take the steps mandated by the former as reflected in the latter. Moreover, to issue the writ did not require the UK authorities to take any particular steps; "what it required of them was to show, by whatever efficacious means they could, whether or not control existed in fact" (at §60). Nor did it require the UK authorities to engage in a process of persuasion (at §63).

72. As Lord Kerr explained in two passages:

> "The essential underpinning of the [Court of Appeal's] conclusion was that there was sufficient reason to believe that the Government could obtain control of Mr Rahmatullah. It might well prove that the only means of establishing whether in fact it could obtain control was for the Government to ask for his return but that remained a matter for the ministers concerned. (§60)
>
> …
>
> In the present case, the Secretaries of State were not required to make any particular diplomatic move. (§70)"

73. By way of summary:

> "In this case there was ample reason to believe that the UK Government's request that Mr Rahmatullah be returned to UK authorities would be granted. Not only had the 2003 MoU committed the US armed forces to do that, the government of the US must have been aware of the UK government's view that Mr Rahmatullah was entitled to the protection of GC4 and that, on that account, it was bound to seek his return if (as it was bound to do) it considered that his continued detention was in violation of that Convention." (at §64)

74. There was some discussion with counsel as to whether Lord Carnwath JSC and Baroness Hale of Richmond JSC decided the appeal on a slightly different basis. It is true that they were "not unduly concerned" by "the unexplored issue", and it is possible to discern a difference in emphasis between §123 of their joint judgment and §53 of Lord Kerr's judgment on the issue of the ramifications of the inaction by the UK authorities in relation to their obligations under GC4. In my view, that slight tension need not be resolved. What is more important is that the combined effect of §119, §122 and §123 of their joint judgment is that the UK as the original detaining power had continuing obligations under GC4 which were reflected in clause 4 of the MoU 2003.

75. Lord Phillips agreed with Lord Kerr in the result, holding that it was proper to apply the *O'Brien* approach to resolve the uncertainty as to whether the US authorities would respond to a request to release the applicant (§98). Subject to "the unresolved issue" he agreed with Lord Kerr.

76. Given the emphasis that Sir James placed on it, I draw attention to §105 of Lord Phillips' judgment:

> "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."

77. In my view, and contrary perhaps to the interpretation placed on it by Lord Carnwath and Baroness Hale at §122, this passage must be read in conjunction with Lord Phillips' concurrence at §98 in the judgment of Lord Kerr, including the latter's reasoning that in *Rahmatullah* the UK Government was not being required to make a diplomatic move. Interpreted in this fashion, this passage is valuable in the context of the present case because it indicates that in the absence of some additional factor (e.g. a MoU) it would require an extension of the bounds of the writ to encompass situations of mere ability to prevail upon or persuade.

78. For completeness, I note what the Federal Court of Australia said in *Hicks* in the context of an application for summary judgment, but in my opinion that advances Mr Squires' argument only a very short distance.

79. Finally, Lord Reed shared Lord Phillips' doubts about "the unexplored issue" although he formulated it slightly differently. In his view, it was important that Mr Rahmatullah was originally detained by British forces. I observe that if he had not been detained and then transferred, no issue under GC4 could ever have arisen. Further, in rejecting the contention that the issue of the writ would lead to an impermissible interference in foreign relations, Lord Reed added:

> "The purpose of issuing the writ was to obtain clarification of the extent, if any, of the United Kingdom's ability to exercise control

> over the detention of Mr Rahmatullah. It did not entail that the United Kingdom must demonstrate its lack of control by means of a practical test." (at §114)

80. In my judgment, Mr Squires cannot avoid the fact that in *Rahmatullah* there was unanimity of view in the Supreme Court that the essential question was whether the UK authorities, having originally detained the applicant, retained sufficient control over him on account of their obligations under GC4 as reflected in the MoU. All of this important history is singularly absent from the facts of the instant case. So Mr Squires is constrained to argue, as he does, that the present case is not an exemplification of persuasion or the taking of diplomatic moves but of the coercive power of the law, as applied through the portal of Habeas Corpus and nothing else, compelling the SSFCDA to react to the unilateral offer, as he would put it, made by the AANES.

81. Having considered the three cases where a writ has been issued in the context of an applicant located overseas, it is opportune to touch on two authorities where it was not.

82. First, in *Ex Parte Mwenya* the applicant had been required by the Governor of Northern Rhodesia to remain within a particular district. His application for Habeas Corpus was brought against the Governor and a local official, as well as the Secretary of State for the Colonies. The first preliminary objection was whether the High Court had jurisdiction to issue the writ against the Crown (in right of the United Kingdom) in these circumstances. The Court of Appeal, differing from the Divisional Court on that question, held that there was jurisdiction. The principles set forth by Lord Evershed MR and Sellers LJ, to which I have already referred, were expressed in the context of that jurisdictional question and not the separate question of control. In my judgment, these citations do not really assist.

83. Sir James drew attention to a short passage in the judgment of Romer LJ, at page 305, that:

> "… the writ would not issue into, for example, the United States of America for the purpose of inquiring into the detention of a British subject there."

For him, what was determinative was the power and control that the Crown possessed over a British Protectorate. To be fair to Mr Squires, I consider that Romer LJ's statement is too broad not least because, if correct, it would have been a complete answer to *Rahmatullah* where there could be no suggestion that the Crown had "displaced the sovereign power".

84. On the separate preliminary issue of control, the Divisional Court (Lord Parker CJ, Slade and Winn JJ) held that it was clearly lacking, and that *O'Brien* was distinguishable. On the facts of *Mwenya,* the restriction orders were not made by the Secretary of State, he played no political role in the detention, and there was no other evidence that he played any part in it. Although this reasoning does not provide a complete answer to Mr Squires' argument, it serves to reinforce the point that the essential feature of *O'Brien* was the original detention in this country and "the strong grounds for thinking", as Lord Parker put it, that the Irish Free State would deliver up the body.

85. Secondly, in *In re Sankoh* [2000] 119 ILR 386, the applicant was arrested and detained in Sierra Leone. Although there was a British peacekeeping force present in that country, its involvement in the relevant events was limited to air-lifting Mr Sankoh by helicopter from the barracks to another airfield where he was held under Sierra Leone police guard. Elias J dismissed the application for Habeas Corpus, stating that any exercise of political influence over the Government of Sierra Leone was insufficient to amount to control, and that there was no agreement between the two Governments under which the UK was entitled to require his release. This conclusion was upheld in robust terms by the Court of Appeal.

86. Laws LJ said, at §9:

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

87. Drawing all these various strands together, I consider that it is not necessarily a complete answer to this application for Habeas Corpus that C3 and C4 are unable to bring this case anywhere near the type of situation where the writ has issued. It is true that they cannot show that any UK authority originally had actual custody, in which circumstances the issue could be expressed in terms of whether, having relinquished actual custody, there was sufficient residual control to found the writ. Connectedly, they are unable to point to the existence of any prior arrangement with the entity with actual custody which could justify the reasonable belief that the latter would comply with a request for return or release.

88. The reason for my disinclination to decide this application on this straightforward basis is that I take Mr Squires' point that Habeas Corpus is a flexible remedy which must adapt to changing circumstances. It may be advancing a step too far, in my judgment, to hold that the essential features of the trilogy of cases I have examined should be regarded as legal requirements. They were the defining features of those cases inasmuch as they were the reason the writ issued, but I would hesitate before deciding that, in their absence, the writ could never issue.

89. However, I arrive at the same conclusion by a slightly more circuitous route. Before the AANES announced their policy, keen as they no doubt were to clear these camps, it has not been suggested that the SSFCDA had control of C3 and C4. It is said that the making of this "unilateral offer" is transformative. From that point in time, so it is contended, there was shared control because, although the UK authorities had to respond to that offer, it was now squarely in their power to bring about the release of C3 and C4. Everything else, including all the practical difficulties set out by Mr Hargreaves, is said to be adjectival.

90. In my judgment, to acquiesce in the argument that control should be held to exist in these circumstances would amount to an unworkable and unprincipled extension of the

writ of Habeas Corpus. That argument must be rejected for the following three reasons which are to some extent interconnected.

91. First, the making of the "unilateral offer" amounted to the exercise of control by the AANES over the custody of C3 and C4. It was, and remains, within their power to decide whether C3 and C4 should be released and, if so, on what terms and conditions. None of these matters fall within the province of the SSFCDA. The most that he can do is to react and respond to those conditions, if so advised. The notion that control is conferred by the making of the so-called "unilateral offer", and nothing else, seems to me entirely to mischaracterise what is happening. The correct analysis is that control remains four-square within the detaining authority, and the very making of the offer is a manifestation of that control.

92. Additionally, and consequently, the SSFCDA's response, whatever it might be, cannot sensibly be envisaged as the exercise of control. It is exactly the converse. The AANES's offer was not unconditional in the sense that once it was accepted by the SSFDCA the "agreement" was fully constituted and control could be seen as shared. The offeror made it clear that release was contingent on C3 and C4 being repatriated. On the findings I have already made, the AANES insist that an official of the UK Government arrive at an agreed hand-over point and take responsibility for these detainees. It is only then that the terms have been complied with and control of custody could pass. Although compliance with the AANES's conditions requires the SSFCDA rather than anyone else to take certain steps, and in that narrow sense it is within the latter's power to take them, the fact remains that the piper calling this particular tune is not the UK Government.

93. My preferred analysis is that the SSFCDA would be providing "consular assistance" to C3 and C4 by taking a range of practical steps to bring about their repatriation. However, the outcome would be the same even if the high watermark of Mr Squires' case were right and all that the SSFCDA was being asked to do was to make an "official request" and provide emergency travel documents, leaving the discharge of all the remaining practical arrangements to Reprieve or some other third party. Even on that hypothesis, and regardless of whether the label of "consular assistance" remains apposite, the SSFCDA could not be envisaged as exercising control. The conditions set by the AANES would have to be fulfilled by someone.

94. The present case is plainly distinguishable from *O'Brien* and *Rahmatullah* because in those cases the conditions were set, or at the very least agreed, by the UK Government as a precondition to transfer. Enforcement of those conditions, by whatever means were thought to be appropriate, amounted to the exercise of control at that point in time because the respondent to the applications had dominion over a process contained in a framework that already existed.

95. It is unnecessary to decide whether §53 of *Rahmatullah* represents an additional hurdle for C3 and C4. This is the suggestion that the UK authorities were responsible for unlawfully detaining him in Afghanistan because of their failure to take steps under GC4. The far simpler point is that the UK authorities had continuing responsibilities under international law, and those, in combination with the MoU 2003, founded the requisite control (see §§64, 98, 114 and 122-123).

96. Secondly, it is clear that the issue of the writ would not simply be to require the SSFCDA to "show, by whatever efficacious reasons [he] could, whether or not control existed in fact" (see *Rahmatullah,* at §60). In the light of the analysis I have already set out, the issue of the writ would serve no purpose because the SSFCDA could properly say in response to it that as matters currently stand he does not control the custody of C3 and C4 (I am not overlooking that §26 of Mr Hargreaves' first witness statement goes further, but that was unnecessary). However, there is to my mind the further difficulty that the issue of the writ would require the SSFCDA "to act in a particular way" (see *Rahmatullah,* at §60), and/or to "make [a] particular diplomatic move" (*loc. cit.* at §70), and/or require the UK authorities to "demonstrate its lack of control by a practical test" (*loc. cit.* at §114). This is all in the context of Habeas Corpus being a remedy as of right with any writ that is issued being in imperative, peremptory terms. On the foot of Mr Hargreaves' evidence, which I accept, a considerable number of interlocking steps would have to be taken and diplomatic engagement with the AANES would be required. In my opinion, that the first move has been made by the AANES does not answer this objection.

97. It follows that the SSFCDA's response to the writ, if issued for the purpose of testing whether control exists, would not be simple, straightforward and speedy. This is a separate and freestanding objection to this relief being granted: I have already said that requiring the SSFCDA to respond, whether under CPR r.87.5(g) or 87.8(2), would not be to ascertain whether control exists at this stage but whether it would be possible to acquire control at some unspecified point in the future. On Mr Squires' analysis, the Court would presumably have to monitor the position over the coming months in order to satisfy itself that the SSFCDA is acting expeditiously. None of this, it seems to me, falls within the proper ambit of Habeas Corpus.

98. In these circumstances, I can discern no material difference between the present case and the persuasion cases referenced in *Rahmatullah*. The facts may not be as stark as in *In Re Sankoh*, where the executive was being required to initiate a dialogue, but that in my judgment is a matter of fact and degree, and not of kind. The key point is that the executive is being compelled on Mr Squires' approach to engage in a diplomatic exercise. Who started the ball rolling does not alter the position.

99. The third objection to the issue of the writ is very much linked to the second. The SSFCDA has made it clear through Mr Hargreaves that he has no intention of issuing emergency travel documents and liaising with the AANES over the release of C3, C4 and their families. Putting to one side for the time being the submission that in so doing the SSFCDA's refusal to issue a travel document would be unlawful, it is established principle that political and policy decisions taken by the executive in its dealings with foreign States (and that in my view must include the AANES) are not justiciable: see *Rahmatullah,* at §§66 and 70, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76, at §106, and *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279; [2008] QB 148, per Laws LJ at §108).

100. On any view, in my judgment, the proper scope for any discussion about this lies within the parameters of a judicial review application and not Habeas Corpus. Lord Kerr made it clear in *Rahmatullah,* at §70 that the issue of the writ in the circumstances of that case would not require the UK Government to justify a decision in political terms not to

resort to the MoU 2003 in order to request the applicant's return. But that is precisely what the SSFCDA would be required to do here.

101. The case of C3 and C4 is not improved by the argument that the SSFCDA has acted unlawfully in refusing to issue emergency travel documents. Although it may be possible to envisage cases in the context of Habeas Corpus where a blank refusal by the executive to act in a particular way would frustrate the rule of law, this in my judgment is not one of them. The SSFCDA could not refuse a travel document on national security grounds if C3 and C4 presented themselves at the nearest British Consulate, but that is not the position here. By some means these documents would have to be conveyed to an agreed hand-over point and their identities verified. That raises a whole raft of issues which are caught by the principles explained in *Abbasi* and *Al Rawi*. It follows that this is a submission which may only be advanced in judicial review proceedings.

102. For all these reasons I accept Sir James' fundamental submission that the confines of the doctrine cannot be set as wide as Mr Squires would have it. Relaxing the ambit of the writ would lead to the very difficulties that the Supreme Court identified in *Rahmatullah*. Or, put another way, ensuring that the writ is kept within those principled limits ensures that those difficulties do not arise.

103. It is unnecessary to address Sir James' subordinate submissions on foreign Act of State. I recognise their force but consider that there are already sufficient grounds to dismiss this application. For the avoidance of doubt, this must be the outcome even on the premise that there is *prima facie* evidence of unlawful detention.

104. I should not be interpreted as overlooking the human tragedy of this case. For a number of reasons it would be wrong to say anything either way about the position of C3 and C4. What I can properly say is that their children are entirely blameless. The SSFCDA's letters of 17th June 2022 make it clear that she would have been prepared to consider repatriating the children with their mothers being left behind. The practical difficulties and sensitivities explained by Mr Hargreaves are therefore not insurmountable. Accepting all of that does not, however, make the present case fit for the issue of a writ of Habeas Corpus.

105. If my Lord agrees, I would refuse this application.

LEWIS LJ:

106. I agree that these applications should be refused for the reasons given by Jay J. In summary, the writ of Habeas Corpus is a means of securing the release of a person who is being detained unlawfully. The writ may be issued against the person who has custody of the individual being detained. The person may have physical custody of the detained individual or may be in a position to control the custody of the individual. If so, and if it appears that the detention may be unlawful, that person must then justify the lawfulness of the detention and, if the detention is not lawful, the person detained will be released.

107. In the present case, the two applicants, C3 and C4, were captured and detained in Syria by a foreign authority. The Secretary of State was not involved in the capture or detention of C3 and C4. He has never had physical custody of the applicants. The Secretary of State cannot, as a matter of fact, dictate whether, or in what circumstances,

the applicants will be released from the camp. It is the AANES authorities who have physical custody of C3 and C4. They will determine whether they are prepared to release C3 and C4 from the camp and, if so, in what circumstances. It is the AANES authorities, therefore, who control the custody of the applicants.

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 at paragraph 91 and following of his judgment, 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.

110. For those reasons, which in essence reflect the reasons set out in detail by Jay J, I too would refuse these applications for Habeas Corpus.