Neutral Citation Number: [2011] EWCA Civ 1540

Case No: C1/2011/2210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S DIVISION, DIVISIONAL COURT
Lord Justice Laws and Mr Justice Silber
Claim No CO/4247/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2011

Before:
THE MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY, VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)
and
LORD JUSTICE SULLIVAN

- -

Between:

YUNUS RAHMATULLAH	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS **(2) SECRETARY OF STATE FOR DEFENCE**	**Respondents**

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Nathalie Lieven QC, Ben Jaffey and Tristan Jones (instructed by **Leigh Day**) for the **Appellant**
James Eadie QC and Ben Watson (instructed by **the Treasury Solicitor**) for the **Respondents**

Hearing date: 23 November 2011

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Approved Judgment

The Master of the Rolls :

1. This is an appeal against the refusal of the Divisional Court (Laws LJ and Silber J) to grant a writ of *habeas corpus* against the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence (severally "the Secretaries of State"). The application for the writ was brought on behalf of Yunus Rahmatullah, a Pakistani national, who is currently detained by United States forces at Bagram Airbase in Afghanistan ('Bagram'). He has been held there without trial for over seven years, and is still being held despite it having been determined by the responsible US authorities that his continuing internment is unnecessary.

The factual background in summary

2. The factual background is fully set out in the judgment of Laws LJ at [2011] EWHC 2008 (Admin), paras 2 to 9, and in the next few paragraphs I shall attempt to summarise those facts.

3. Having been captured by British forces in Iraq in February 2004, Mr Rahmatullah ('the applicant') was handed over to US forces and transferred by them to Afghanistan, where, since June 2004, he has been held in Bagram. At the time that the applicant was captured, handed over, and transferred to Afghanistan, a Memorandum of Understanding (a 'MoU') was effective between the United Kingdom and the US Governments.

4. This, 'the first MoU', was signed on 23 March 2003, three days after military operations in Iraq had begun. It was headed 'An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of' the US, the UK, and Australia, and it was signed on behalf of the three States.

5. Clauses 1, 4, 5, 6 and 9 of the first MoU provided that

> '1. This arrangement will be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law.
>
> ……
>
> 4. Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power [the UK on the present facts] will be returned by the Accepting Power [the US on the present facts] to the Detaining Power without delay upon request by the Detaining Power
>
> 5. The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the Detaining Power and the Accepting Power.
>
> 6. The Detaining Power will retain full rights of access to any prisoners of war, civilian internees, and civilian detainees transferred from Detaining

> Power custody while such persons are in the custody of the Accepting Power.
>
> ….
>
> 9. The Detaining Power will be solely responsible for the classification under Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of potential prisoners of war captured by its forces. Prior to such a determination being made, such detainees will be treated as prisoners of war and afforded all rights and protections of the Convention even if transferred to the custody of an Accepting Power.'

7. From June 2004, there were negotiations to secure a fresh MoU, which achieved fruition in October 2008 (although it was not signed on behalf of the UK until 17 March 2009) in the form of 'the second MoU'. The heading of the second MoU described it as an understanding between the UK and the US Governments 'concerning arrangements for the transfer of captured persons in Iraq'.
8. Paragraph 4 of the second MoU provided that:

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

9. In February 2009, the Secretary of State for Defence admitted in the House of Commons that the applicant, whom he described as a member of a proscribed organisation with links to Al-Qaeda, had been moved from Iraq to Afghanistan by the Americans in 2004. He said that officials had been aware of the transfer in 2004, and 'in retrospect, it is clear to me that the transfer to Afghanistan … should have been questioned at the time'. In breach of clause 5 of the first MoU, apparently owing to an oversight, the UK Government had not been formally consulted about the transfer.
10. On 5 June 2010, a US Detainee Review Board determined that the applicant was 'not an enduring security threat', that his continued internment was 'not necessary to mitigate the threat he poses', and that he should be released to Pakistan. However, he remains at Bagram, which Laws LJ observed in his judgment, is 'a place said to be notorious for human rights abuses' - [2011] EWHC 2008 (Admin), para 2.

The Geneva Conventions

11. Section 1(1) of the Geneva Conventions Act 1957 ('the 1957 Act') renders it an offence if '[a]ny person, whatever his nationality, … whether in or outside the United Kingdom' 'commits, or aids, abets or procures the commission by any other person of a grave breach' of any of the Geneva Conventions set out in the schedules to the 1957 Act. For present purposes, there are two potentially relevant Geneva Conventions ('the two Conventions'), those relating to 'the treatment of prisoners of war' ('Geneva III'), and to 'the protection of civilian persons in time of war' ('Geneva IV'). These two Conventions are respectively set out in the third and fourth schedules to the 1957 Act. They both impose on each high contracting party (defined therein as a 'Party') an obligation to 'enact legislation' to 'provide effective penal sanctions' for those who

commit 'grave breaches' of those Conventions. The UK and the US are high contracting parties to both Conventions.

12. Article 4 of Geneva III states that the Convention protects 'prisoners of war' who are defined as 'members of the armed forces of a Party to the conflict' and certain members of militias. Article 12 of Geneva III includes the following:

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

The 'Protecting Power' is and was at all material times the International Committee of the Red Cross ('the Red Cross').

13. Article 84 of Geneva III provides for trial by military or civil court, which must offer 'essential guarantees of independence and impartiality'. Article 118 of Geneva III requires prisoners of war to 'be released and repatriated without delay after cessation of hostilities'. Article 130 identifies 'grave breaches' as involving certain acts including 'torture or inhuman treatment …. or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by this Convention'.
14. Turning to Geneva IV, Article 4 provides that it protects persons 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. Article 45 includes a provision in effectively identical terms to Article 12 of Geneva III, as quoted above.
15. Article 49 of Geneva IV forbids '[i]ndividual or mass transfers as well as deportations of protected persons from occupied territory', but it permits 'evacuations', but only on the basis that evacuees 'shall be transferred back to their homes as soon as hostilities in the area in question have ceased'. Article 132 of Geneva IV requires any internee held by a Detaining Power to be released 'as soon as the reasons which necessitate his internment no longer exist', and Article 133 requires internment to cease 'as soon as possible after the close of hostilities'. According to Article 146, 'grave breaches' of Geneva IV include 'unlawful deportation or transfer or unlawful confinement of a protected person'.

These proceedings

16. In May 2010, the applicant's cousin learned that he was detained at Bagram, and eventually spoke to him by telephone, through the agency of the Red Cross. The applicant then gave instructions that an application be made on his behalf, through the

agency of his cousin, for a writ of *habeas corpus*. That is the application which came before the Divisional Court.

17. In summary terms, the applicant's case was that (a) his detention was unlawful, (b) (i) although he was detained by the Americans, the Secretaries of State in fact enjoyed a sufficient degree of control over him to bring about his release, or (ii) there must, at best, be doubt as to the extent, if any, of the control over the applicant enjoyed by the Secretaries of State, so that (c) the writ of *habeas corpus* should issue (i) as of right in the normal way, or (ii) so that the question of the control exercised by the Secretaries of State may be tested.
18. The Secretaries of State resisted the application. In a nutshell, their case was that (a) the evidence established that they did not exercise control, or at any rate a sufficient degree of control, over the applicant to justify a writ of *habeas corpus* being issued, and (b) that this argument was supported by the fact that the issue of the writ would involve the UK Government making a request of the US Government, which would involve stepping into the field of foreign relations.
19. There was evidence on behalf of the Secretaries of State before the Divisional Court. It included two statements from Mr Damian Parmenter, Head of Operational Policy within the Operations Directorate in the Ministry of Defence. He stated that the first MoU was thought to be 'politically important' because the Ministry wanted 'if possible, to seek a commitment from the US about adherence to the Geneva Conventions' standards' owing to 'the known US position on the application of the Geneva Conventions'.
20. Mr Parmenter also said that there were 'indications that it may have been initially envisaged that [the first MoU] would only apply during the war fighting and occupation period' in Iraq, which ended on 28 June 2004. He explained that the first MoU was simply intended to regulate transfers between the three States' armed forces during operations in Iraq, and that the intention was that the second MoU would replace and supersede the first.
21. Mr Parmenter also made the point, which is common ground, that the two MoUs were not legally enforceable. He further observed that the 'considered view' of the Ministry of Defence was that 'making a request purportedly relying on the [first] MoU would be an inappropriate and futile course of action'.
22. In his characteristically lucid and incisive judgment, with which Silber J agreed, Laws LJ effectively accepted the first of the two arguments raised by the Secretaries of State as summarised in para 18 above, although his reasoning was, I think, influenced by their second argument.
23. The applicant now appeals to this court as of right.

Discussion: the issues before us

24. The arguments advanced by the parties in this court are very similar to those advanced below, save that Mr Eadie QC, for the Secretaries of State, reflecting the views of Laws LJ as I have explained, effectively contends that the two arguments he raised below could be elided. In other words, he argues that the very fact that a writ of *habeas corpus* would effectively require the UK Government to make a request of a foreign sovereign power was at least a factor, and he would say (at least in this case) a very powerful factor, against the court granting such a writ.
25. As Ms Lieven QC, who appears on behalf of the applicant, contends, the first step in her argument for the issue of the writ (as summarised in para 17 above) effectively succeeds by default, as the applicant has established, for the purpose of these

proceedings, that he is being unlawfully detained. That is because it is a fundamental principle of English law that, where an individual is detained against his will, it is for the detainer to show that the detention is lawful, not for the detainee to show that his detention is unlawful. There is, quite rightly, no challenge by the Secretaries of State, either as to that principle or as to the applicant's right to rely on it in this case.

26. I turn then to the question of control: is the applicant in the 'control' of the UK Government? On the face of it, particularly bearing in mind that the primary purpose of the *habeas corpus* writ is the physical production of the person concerned ('the applicant') before the court, the present application faces a problem because, given that he is detained by the US forces in Bagram, it appears that the applicant is in the control of the US Government rather than that of the UK. However, in reliance on the two Conventions and the first and second MoUs, the applicant's case is that he is sufficiently arguably in the control of the UK Government to support the issue of a writ.

The habeas corpus *cases on control*

27. In support of the contention that the applicant is sufficiently arguably in the control of the UK Government, Ms Lieven relies on two decisions of high authority. The first is *Barnardo v Ford* [1892] AC 326, where the facts were as follows (see [1892] AC 326, 327-9). A boy who had been 'found destitute and homeless' by a 'clergyman residing in Folkestone' had been placed in an institution run by Dr Barnardo, who said that he had handed over the boy to 'an American gentleman', who had taken him to Canada. A writ of *habeas corpus* against Dr Barnardo at the suit of the boy's mother was refused by Mathew J some three months after the boy had been handed over to the American. However, the Divisional Court granted the writ some six months later on a renewed application, and the decision was affirmed by the Court of Appeal, whose decision was in turn upheld by the House of Lords.
28. The reasoning of the House of Lords is well summarised in the speech of Lord Herschell at [1892] AC 326, 339. He said that a writ of *habeas corpus* should not be 'used as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it', but that where 'the court entertains a doubt whether' the respondent to the application has indeed 'ceased to have custody over the [person] alleged to be detained', then 'it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation and to require a return to be made to it.'
29. The second case relied on by Ms Lieven is *R v Secretary of State for Home Affairs ex p O'Brien* [1923] 2 KB 361, where the Court of Appeal, reversing the Divisional Court, decided to grant a writ of *habeas corpus*. In that case, the facts were as follows (taken from [1923] 2 KB 361, 362-369). The Secretary of State had arranged for Mr O'Brien, who was in England, to be removed to the newly formed Irish Free State ('IFS'), and interned. Mr O'Brien then applied from Mountjoy Prison on Dublin to the English court for a writ of *habeas corpus*. His application was resisted, *inter alia*, on the ground that, although there was an agreement with the IFS in place which appeared to enable the UK Government to demand Mr O'Brien's return, 'that agreement [was] not enforceable in any court of law' and the Secretary of State 'has ceased to have control' over him. However, shortly before the application, the Home Secretary had said in the House of Commons that in his 'opinion, the Government has not lost control' and that the IFS had 'undertaken', first, 'that internees should have every facility for a personal hearing before the Advisory Committee' and, secondly,

'that if the Advisory Committee decide that any person should not have been deported, he will be released'.

30. The Court of Appeal unanimously rejected the Home Secretary's argument. At [1923] 2 KB 361, 381, Bankes LJ accepted the Home Secretary's evidence that Mr O'Brien was under the control of the prison governor who was 'an official of the [IFS] and is not subject to his orders'. However, he considered that the question whether 'the Home Secretary no longer had power or control over' Mr O'Brien' could 'not be satisfactorily disposed of unless the [writ is granted] which will give the Home Secretary the opportunity, if he desires it, of making the position clearer than at present it appears to be', citing *Barnardo* [1892] AC 326.
31. At [1923] 2 KB 361, 391-2, Scrutton LJ took the same view for the same reasons, having first considered the different language used by different Judges to describe what I have described as the 'control' which a respondent has to have over an applicant before a writ of *habeas corpus* could issue. Atkin LJ also agreed, saying at [1923] 2 KB 361, 398-9, that 'the question is as to *de facto* control … the question is whether it exists in fact", and that, although control was denied through the Attorney-General, there were 'reasons for supposing that the Home Secretary is in a position by agreement to cause [Mr O'Brien] to be returned to England'. He added that the case to this effect was 'strengthen[ed] … by the reference to the debate in Parliament'.
32. An appeal to the House of Lords failed for want of jurisdiction (or because it was 'incompetent' to use the unfriendlier word in the report), for reasons given subsequently – [1923] AC 603. However, Lord Atkinson, who dissented on the issue of jurisdiction, appeared to approve the Court of Appeal's decision, saying at [1923] AC 603, 624, that '[i]t would be rather unfair to the [IFS] to assume gratuitously before hand that it would not keep the bargain made with it, simply because the bargain was not enforceable in law'. Following the decision of the House of Lords, the writ of *habeas corpus* was sealed and issued and 'the Home Secretary … produced the [presumably live] body of [Mr] O'Brien in Court' – [1923] 2 KB 361, 399-400.

Discussion: 'control', subject to the diplomatic issue

33. Shorn of the point that the issue of the writ in this case could be said to trespass into the diplomatic or foreign relations area, I would hold that there is sufficient uncertainty to justify an order for *habeas corpus.* The Secretaries of State suggest that Geneva IV applies to the applicant, which seems to me to be likely on the available evidence (although I think that it would make no difference to my basic reasoning if it was Geneva III which applied). Now that the US Detainee Review Board has made its determination and now that the Iraq war is ended it seems to me at least strongly arguable (and, at least on the evidence and arguments which we have heard, correct) that the applicant should have been released by virtue of the provisions of Articles 49, 132, and 133 of Geneva IV. Mr Eadie makes no submissions to the contrary on behalf of the Secretaries of State, and, as it is not represented in these proceedings, the US Government has not submitted to the contrary either.
34. If that is right, given that the applicant has not in fact been released, the UK Government is, again at least strongly arguably (and, at least on the evidence and arguments which we have heard, actually) entitled either to demand his release or to demand his return to UK custody under Article 45. (The point that the relevant information has not been communicated by the Red Cross is unattractive, given that the UK Government has all the relevant information, and there is no suggestion that it

challenges the correctness of the facts set out by Laws LJ or needs any further information from the Red Cross). It is unnecessary (and would be inappropriate) to address the question whether, by not taking that course, it might, conceivably, be said that as a result of the combination of section 1 of the 1957 Act and Article 130 of Geneva IV, the UK Government could be aiding or abetting a 'grave crime'.

35. I should emphasise that I am not suggesting that the conclusions discussed in the previous paragraph are certainly correct. What I am saying is that, in the light of Geneva IV, there is a substantial case for saying that the UK Government is under an international legal obligation to demand the return of the applicant, and the US Government is bound to accede to such a request.
36. If the first MoU still applies to the applicant, then that reinforces that conclusion, as that MoU clearly envisages, through what is said in paras 1 and 9, that the two Conventions will be adhered to, and, especially in para 4, it makes it clear that the UK Government can demand the return of a person such as the applicant, especially, one would presume, where he has been removed in breach of para 5. It is true that Mr Parmenter says that the Ministry of Defence believes that the first MoU is spent. However, in the light of the terms of the two MoUs, that expression of opinion is not enough to dissuade me that it is arguable that, if the first MoU applied to a person when he was handed over, it was not intended to be disapplied simply because the second MoU was entered into or because hostilities ceased. However, even if that were incorrect, para 4 of the second MoU appears to make it clear that it is intended that the rules of international law will apply, so that, one would have thought, the two Governments have agreed that the two Conventions will be adhered to. There is no suggestion to the contrary effect from Mr Parmenter – or from any other witness.
37. In this connection, the context in which the first MoU was signed is significant. Although both the UK and the US are parties to the two Conventions, the President of the US had announced on 7 February 2002 the US Government's view that the two Conventions did not apply to the conflict with Al-Qaeda. During 2002, there were allegations that detainees in Afghanistan had been mistreated, and it became public knowledge that detainees had been transferred to Guantanamo Bay. The first MoU was necessary because, in order to comply with Article 12 of Geneva III and Article 45 of Geneva IV (see paragraphs 12 and 14 above), the UK had to satisfy itself of the willingness of the US to apply the Conventions to any prisoners of war or protected persons transferred by the UK to the US. For this purpose, a right to require the return of the transferred prisoner of war or protected person was necessary. In those circumstances, it is difficult to see how, consistently with its obligations under the two Conventions, the UK could simply have allowed the first MoU to lapse, without any equivalent replacement, without risking effectively washing its hands of any obligation towards those persons it had transferred to the US in circumstances where, absent any MoU, the US might contend that the Convention did not apply to such persons.
38. The notion that the courts should take into account agreements such as the two MoUs, and, indeed, should assume that they will be adhered to, derives support from the decision of the House of Lords in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 192. In that passage, Lord Hoffmann made the point that 'far from being irrational', it was 'entirely reasonable' for a court considering an appeal by a person resisting removal to Algeria on the ground that his human rights would be infringed, to take into account an agreement made 'at the highest level' between the UK and Algerian governments that the appellant's 'human dignity would be respected under all circumstances'.

39. It is true that Mr Parmenter says that the Ministry of Defence considers that it would be 'futile' for the UK Government to request the US Government to return the applicant. However, I am unconvinced by the suggestion that this bald observation could justify the conclusion that there was little, let alone no, real possibility of a writ resulting in the applicant being handed over. If anything, the observation rather supports the proposition that there are grounds for doubt whether the Secretaries of State have lost control over the applicant, as in *Barnardo* [1892] AC 326 and *O'Brien* [1923] 2 KB 361. The observation was contained in a witness statement which ran to twenty pages (and Mr Parmenter made a second statement which was even longer). Yet there is no stated factual basis for the observation, which appears to be based, in large part, upon the Ministry's view that the first MoU is no longer extant and has no continuing relevance to the applicant, and upon the, undisputed, fact that the first MoU was not intended to create legally enforceable rights and obligations. There is no reference in the observation to the second MoU or to either of the two Conventions, and Mr. Parmenter does not grapple with the consequences, in terms of the UK's continuing obligation to comply with the Conventions, of the UK simply allowing the first MoU to lapse.
40. Mr Eadie points out that this is not a case where there is uncertainty as to the facts, as in *Barnardo* [1892] AC 326 or *O'Brien* [1923] 2 KB 361: it is a case where the facts are clear, but the legal and practical consequences are not. Accordingly, he argues, the reasoning in those two cases is inapplicable here. That point found favour with the Divisional Court (see at [2011] EWHC 2008 (Admin), paras 28-9), and it was, as I read the next five paragraphs of the judgment of Laws LJ, the basis upon which they refused to issue a writ.
41. I was initially attracted by the argument, but have concluded that it should be rejected. As Atkin LJ explained in *O'Brien* [1923] 2 KB 361, 398-9, where (as in that case, in *Barnardo* [1892] AC 326, and in this case) a respondent initially had control over an applicant, and subsequently claims to have lost control, the question whether he has in fact done so raises a factual issue. In this case, as I see it, while the Secretaries of State have implied in Mr Parmenter's brief 'futile' observation that they have indeed lost control, it seems to me quite wrong for a court simply to accept that indication in the context of a *habeas corpus* application, especially in the light of the approach adopted in *Barnardo* [1892] AC 326 and *O'Brien* [1923] 2 KB 361. The arguable effect of the two MoUs and the two Conventions, and the limited weight to be given to the observation by Mr Parmenter for the reasons given above, appear to me to indicate that the writ should issue, at least in the absence of any countervailing argument.
42. Indeed, I do not think that Laws LJ took a different view on the facts. He said that it was '*very far from clear* that the American authorities would accede to a request from the Secretar[ies] of State for [the applicant's] release. … The statement supplied by the US Department of Defense …, which asserts that [the applicant] "remains under US control, subject to further reviews by a board of officers..." *might suggest (I make no finding)* that they would not so release him' – [2011] EWHC 2008 (Admin), para 33 (emphasis supplied). In the following paragraph, he observed that it was 'impossible to say that the Secretar[ies] of State [are] in a position in effect to direct [THE APPLICANT's] delivery', but that is by no means the same as concluding that they were certainly not in a position to make a successful request for his delivery.
43. In this connection, while it is important not to be seduced by romantic notions or purple prose, it remains the fact that *habeas corpus* has, as Laws LJ said at 2011] EWHC 2008 (Admin), para 11 been described as '"perhaps the most important writ

known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement" (*O'Brien* [1923] AC 603 *per* Lord Birkenhead at 609), and as "the most efficient protection yet developed for the liberty of the subject" (*Ex p. Mwenya* [1960] 1 QB 241 *per* Lord Evershed MR at 292, citing Holdsworth, *History of English Law*, vol. 9 pp. 108-125)'.

44. Given the important principle established and applied in *Barnardo* [1892] AC 326, I would find it very unattractive to conclude that a writ in *habeas corpus* cannot issue where uncertainty as to the respondent's control over the applicant arises from the effectiveness and enforceability of certain agreements, even though such a writ can (and, absent any countervailing reasons, I think normally should) issue where the uncertainty arises from a need to investigate the facts. Indeed, I am inclined to think that such a distinction (i) does not work in theory (as, in the end, the effectiveness and enforceability in practice of an agreement is a matter of fact rather than law), and (ii) cannot really survive the decision and reasoning of this court in *O'Brien* [1923] 2 KB 361.
45. Mr Eadie also points out that this is not a case, like *O'Brien* [1923] 2 KB 361, where the respondent has made inconsistent statements as to whether he has control over the applicant. But it seems to me that the inconsistency was simply a factor which was taken into account by the court in *O'Brien* [1923] 2 KB 361 when reaching its conclusion to grant the writ. It was merely a supporting factor so far as Atkin LJ was concerned, and it does not seem to have played any part in the primary reasoning of Lord Atkinson in the House of Lords. In any event, it seems to me that the principle was laid down in *Barnardo* [1892] AC 326 and was applied *O'Brien* [1923] 2 KB 361, and a careful comparison of the precise facts in those cases and the case under consideration is unlikely to be helpful.
46. In reaching a contrary conclusion, Laws LJ relied on the reasoning in the judgments of Lord Evershed MR, Romer LJ and Sellers LJ in the Court of Appeal decision in *Ex p Mwenya* [1960] 1 QB 241. Before us, Mr Eadie did not place much weight on the reasoning in that case, and in my opinion he was right. It is clear that, although the question of control had been considered in the court below in *Mwenya* [1960] 1 QB 241, it was not the subject of argument or determination in the Court of Appeal. The Court of Appeal reversed the Divisional Court's decision that the court had no jurisdiction to issue a writ of *habeas corpus*, so it was unnecessary to decide the control issue – see at [1960] 1 QB 241, 280, and 290, in the summary of the argument and the judgment of Lord Evershed MR respectively.

Discussion: the diplomatic or foreign relations aspect

47. In *R (Abbassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2002] All ER (D) 70, para 106(iii), Lord Phillips MR, giving the judgment of the Court of Appeal, said that 'the court cannot enter the forbidden areas, including decisions affecting foreign policy'. (See also in that connection *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 289, [2008] QB 289, paras 131, 134). The only evidence to support the contention that the issue of a writ of *habeas corpus* in this case would cause any problems in the diplomatic field is in Mr Parmenter's observation that it would be 'inappropriate and futile' for a writ to be granted. I have already explained why it seems to me that the observation is of limited value so far as it is concerned with futility. Assuming (in favour of the Secretaries of State) that the characterisation 'inappropriate' is intended

to support the point that the court is being invited to enter a forbidden area, it takes matters no further forward on that issue than the submission itself.

48. As to that point, it may be said that the court should not issue a writ of *habeas corpus* in this case, as to do so would involve the court entering a 'forbidden area', because it would require the Foreign Office to make a request of the US authorities. As I understand it, however, that point is not advanced by Mr Eadie as a freestanding reason for dismissing the applicant's appeal. He contends that the point is really part of the case advanced on behalf of the Secretaries of State as to why the UK Government does not have control, or why it does not at least have sufficient control, over the applicant to justify a writ of *habeas corpus* being issued.
49. I must confess to some difficulty with that approach. If, without taking into account that point, the Government did not have sufficient control over the applicant, then his appeal would be dismissed, and there would be no need to consider it. If, on the other hand (as I have concluded), without taking into account that point, the Government does have sufficient control over the applicant, I find it hard to see why the point would justify reaching a different conclusion. The point (if correct) that the court would be wrongly trespassing into the area of foreign relations would, as I see it, not take the question of control any further: the point would simply serve to prevent the court from taking a course which it would otherwise take. On that basis, then, if the point is not being taken as a freestanding argument, it cannot stand in the way of the applicant's appeal succeeding.
50. An alternative view, I suppose, could be that the point really amounts to saying, at least in this case, that the difficulties of assessing the effectiveness of the MoUs, given that they are not legally enforceable, means that the court should not hold that there is a real prospect of the Secretaries of State being able to produce the applicant to the court. On that basis, I also consider that the point would take matters no further, as I have already taken it into account when considering the control issue.
51. At the moment, therefore, it appears to me that the foreign relations point does not assist the Secretaries of State. I draw some support for that conclusion from the fact that the point does not seem to have stood in the way of the court granting a writ of *habeas corpus* in *O'Brien* [1923] 2 KB 361. However, it is fair to say that it does not appear from reading the summary of the argument that the point was raised.
52. It is right to add that the notion that the issue of a writ of *habeas corpus* in this case would be inconsistent with the reasoning in *Abbassi* [2002] EWCA Civ 1598 would be hard to maintain. The argument in *Abbassi* [2002] EWCA Civ 1598, para 79, was that, as a result of legitimate expectation, 'the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf', whereas the argument here is simply that there is enough of a possibility that the Secretaries of State have control over the applicant to justify a writ of *habeas corpus*. It is important to have in mind that both *Abbasi* [2002] EWCA Civ 1598 and *Al-Rawi* [2008] QB 289 were, as observed above, applications for judicial review. There was as I understand it no suggestion in either case that a writ of *habeas corpus* might issue. As Laws LJ put it, at [2011] EWHC 2008 (Admin), paras 20 and 23, 'if in the present case I were to conclude that the Secretar[ies] of State [were] properly amenable to the writ, I would not withhold it on any grounds concerned with diplomatic relations. Nothing in *Abbasi* or *Al-Rawi* requires or commends such a course. The true question is whether on the facts the Secretar[ies] of State [are] properly amenable to the writ. … This central part of the case requires us to consider the use of *habeas corpus* as a vehicle for enquiry.'
53. Further, the claim in *Abbassi* [2002] EWCA Civ 1598 that the US authorities should be acting differently was based simply on the two Conventions: there was no

equivalent of the two MoUs. Indeed, the evidence, as discussed in para 37 above, suggests that the purpose of the MoUs was to ensure that people such as the applicant did not fall into the 'legal black hole' in which Mr Abbassi found himself - *Abbassi* [2002] EWCA Civ 1598, paras 22 and 64. In any event, the issue of a writ of *habeas corpus* would not require in terms the Secretaries of State to make a request to the US authorities, whereas the court in *Abbassi* [2002] EWCA Civ 1598 was being specifically asked 'to compel the Foreign Office to make representations on his behalf to the United States Government or to take other appropriate action or at least to give an explanation as to why this has not been done' - [2002] EWCA Civ 1598, para 2.

Conclusion

54. In all the circumstances, I would allow the applicant's appeal, and direct that a writ of *habeas corpus* be issued.

Lord Justice Maurice Kay:

55. I agree and have little to add. However, I wish to emphasise that the issue of a writ of *habeas corpus* in this case does not transgress or modify the principle of a "forbidden area" which is beyond judicial concern. I acknowledge that there are such areas and that, although they undergo reconsideration from time to time, there are still matters of foreign policy which are not susceptible to judicial review. *Abbasi* is perhaps the best example of both the continuing forbidden areas and the reduction of judicial non-intervention. The Court expressly rejected the proposition that there is no scope for judicial review of a refusal to render diplomatic assistance to a British subject who is suffering violation of a fundamental human right as a result of the conduct of the authorities of a foreign state: paragraph 80. However, the present case does not concern an application for judicial review and, as the Master of the Rolls has explained, Mr Eadie is seeking to rely on the "forbidden areas" jurisprudence in a more subtle way.
56. The circumstances of this case convince me that that reliance is misplaced. On the face of it, the applicant is being unlawfully detained and the Secretaries of State have procedures at their disposal, whether arising solely from the Geneva Conventions or from a combination of the Conventions and the MoUs, to enable them to take steps which could bring the unlawful detention to an end. Beyond the unamplified invocation of "inappropriateness" and "futility", it is not explained why use of such procedures would or might damage the foreign relations of this country. In my judgment, the Court should be studious to avoid a refusal to protect personal liberty by withholding a writ of *habeas corpus* on such flimsy grounds. I do not say that it will never be lawful to refuse to act by reference to state interest but I do not accept that it has been demonstrated here that inhibitions about so doing negate the element of "control".

Lord Justice Sullivan:

57. I agree with both judgments.