



31 October 2012

PRESS SUMMARY

Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah (Respondent) and Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) v Yunus Rahmatullah (Appellant) [2012] UKSC 48 (Cross Appeal)

On appeal from [2011] EWCA Civ 1540; [2012] EWCA Civ 182

JUSTICES: Lord Phillips, Lady Hale, Lord Kerr, Lord Dyson, Lord Wilson, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEALS

Mr Rahmatullah, a Pakistani citizen, was transferred to US forces after being detained by British forces in February 2004 in an area of Iraq under US control. Shortly after that, the UK authorities became aware that US forces intended to transfer him out of Iraq. That transfer took place without the UK having been informed of it. By June 2004 UK officials knew that Mr Rahmatullah was no longer in Iraq. He had been taken to Afghanistan and was being held in a detention facility in Bagram Air Field and there he has remained. On 15 June 2010 the recommendation of a detainee review board of the US army that Mr Rahmatullah be released was approved by a senior officer but this has not taken place.

On 23 March 2003 a Memorandum of Understanding regarding the transfer of those captured in the fighting in Iraq was signed on behalf of the armed forces of the US, UK and Australia (“the 2003 MOU”). The 2003 MOU was to be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (GC3) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC4).

The 2003 MOU provided that any prisoners of war, civilian internees, and civilian detainees transferred by the UK would be returned by the US to the UK without delay upon request by the UK (‘clause 4’). It also provided that the removal of transferred prisoners of war away from Iraq would only be made by agreement between the UK and the US (‘clause 5’). The 2003 MOU was not legally binding. It was a diplomatic agreement between the countries concerned.

The Divisional Court refused an application made on Mr Rahmatullah’s behalf for a writ of habeas corpus requiring his release. On appeal, the Court of Appeal allowed Mr Rahmatullah’s appeal and issued a writ of habeas corpus requiring the UK to seek his return or at least demonstrate why it could not. The Secretary of State requested the US authorities to return Mr Rahmatullah. A letter was received in response from the US deputy assistant Secretary of State for Defense. The US authorities did not agree to return Mr Rahmatullah to the UK. The letter stated that the US had already received a request from the Government of Pakistan for Mr Rahmatullah’s repatriation, and that they considered it to be more appropriate to discuss the conditions of transfer directly with the Government of Pakistan. The Court of Appeal found that this letter was a sufficient response to the writ of habeas corpus and that was the end of the matter.

The Secretary of State appealed the decision of the Court of Appeal to issue the writ of habeas corpus and Mr Rahmatullah cross appealed the decision that the response by the US was sufficient to demonstrate that the UK could not secure his release.

JUDGMENT

The Supreme Court unanimously dismisses the appeal of the Secretary of State and by a majority of 5-2 (Lady Hale and Lord Carnwath dissenting) dismisses the cross appeal of Mr Rahmatullah.

REASONS FOR THE JUDGMENT

References in square brackets are to paragraphs in the judgment

Lord Kerr gave the leading judgment with which Lord Dyson and Lord Wilson agreed.

The UK does not need to have actual custody of Mr Rahmatullah to exercise control over his release as habeas corpus is a flexible remedy [42-43]. It is sufficient for the issuing of a writ of habeas corpus that there was material before the court suggesting that there was a reasonable prospect of the UK obtaining his release, *O'Brien [1923] AC 603* applied [46-48, 64].

The fact that the 2003 MoU was not legally binding does not reduce its significance. The UK needed the agreement to show that it had effectively ensured that the Geneva Conventions (“GC”) would be complied with. It provided the essential basis of control for the UK authorities over prisoners who had been handed over to the US [8-11]. The assertion by a witness for the Secretary of State that it would be futile to request Mr Rahmatullah’s return was not supported by any evidence. Such a claim was surprising given the nature and terms of the 2003 MoU [15].

Although the legality of Mr Rahmatullah’s detention did not need to be determined for the purposes of this appeal, there was clear prima facie evidence that he is detained unlawfully under the GC. The UK was under a duty to ensure that Mr Rahmatullah was not being held in breach of the GC or to request his return [22-40].

The issue of the writ was not an ‘instruction’ to the Government to act in any particular way or to engage in diplomacy. It merely reflected the fact that there were sufficient grounds for believing that the UK Government could obtain control over the custody of Mr Rahmatullah. What was required of them was to show whether or not control existed in fact [60]. The decision to issue the writ did not entail any intrusion in the area of foreign policy [68].

On the cross-appeal; the letter sent by the US authorities, while not explicitly referring to the 2003 MoU, did not suggest that it had not been considered. The US authorities had a copy of the Court of Appeal’s decision and were aware of the basis upon which it was made. It was clear from their response that the US authorities felt they were holding Mr Rahmatullah lawfully and were not willing to relinquish control of his detention to the UK [83-84].

Lord Phillips gives a short concurring judgment agreeing that there was sufficient evidence to suggest that the UK may be able to exert control over Mr Rahmatullah to issue the writ. He also considered that the issues of whether it mattered that Mr Rahmatullah had been handed over lawfully by the UK in the first place and whether Mr Rahmatullah could invoke in domestic proceedings the obligations of the UK under the Geneva Conventions had not been resolved in this case [100-107].

Lord Reed gives a concurring judgment. He agrees with Lord Kerr that the appeals should be dismissed but on the narrower ground that there was sufficient uncertainty as to whether the UK authorities had control of Mr Rahmatullah’s detention to justify the issue of the writ [111-114].

Lady Hale and Lord Carnwath give a short joint judgment concurring with the majority in relation to the Secretary of State’s appeal but dissenting on the cross appeal. The basis for issuing the writ was the UK’s apparent control provided by the 2003 MoU, supported by the UK’s continuing responsibility as detaining authority under the Geneva Conventions (GC4). The UK Government did not make it clear to the US that it had an unqualified right under Clause 4 of the 2003 MoU to require Mr Rahmatullah’s return. The US response similarly failed to deal with that central issue. In these circumstances, Lady Hale and Lord Carnwath found, the court should not rest on an inconclusive response, but should require resubmission of the request in firmer terms by the UK [125-131].

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html