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SUPREME COURT REAFFIRMS ANCIENT RIGHT TO LIBERTY

Today, in a unanimous decision, the Supreme Court reaffirms the importance of the ancient common law writ of habeas corpus.

Mr Rahmatullah, was captured by UK forces in Iraq and handed over to US forces in 2004, in accordance with a Memorandum of Understanding between the UK and the US governing the transfer of prisoners. He was detained at Bagram Airbase in Afghanistan, where he continues to be held today. The Court of Appeal granted a writ of habeas corpus in 2011, which required the Foreign Secretary to write to the US Government requesting information about his continued detention. Although the Court of Appeal discharged the writ after diplomatic exchanges between the UK and the US, the Supreme Court was asked by the Government to rule that the Court of Appeal had no jurisdiction to act at all.

Lord Kerr, giving the lead judgment, roundly rejected the Government's case:

> Memoranda of Understanding or their equivalent, Diplomatic Notes, are therefore a means by which courts have been invited to accept that the assurances which they contain will be honoured. And indeed courts have responded to that invitation by giving the assurances the weight that one would expect to be accorded to solemn undertakings formally committed to by responsible governments. It is therefore surprising that in the present case [the Government] asserted that it would have been futile to request the US Government to return Mr Rahmatullah…this bald assertion was unsupported by any factual analysis. No evidence was proffered to sustain it. (paragraph 15).

The Court concluded that for the purposes of habeas corpus, the UK does not need to have physical custody of the person concerned. It is sufficient that there is material before the Court which supports the conclusion that is the UK has a reasonable prospect of securing release. In this case, the international obligations of the UK under the Geneva Conventions and the terms of the Memoranda of Understanding between the UK and the US were sufficient to justify the issue of the writ by the Court of Appeal.

Had the Government's case succeeded, habeas corpus could have become irrelevant for any persons transferred outside the direct custody of UK Government agencies. It would have significantly reduced the power of UK courts to require full and effective justification when our Government has been involved in the detention of individuals, both at home and overseas.

Angela Patrick, Director of Human Rights Policy at JUSTICE said:

That the UK Government relies on these diplomatic notes to justify deportation where there is a risk of torture but considered them effectively irrelevant in this case is a near perfect example of legal 'having your cake and eating it'.

The Supreme Court's strong judgment reaffirms the importance of the common law guarantee of the right to liberty for all.

For further comment, please contact Angela Patrick on 020 7762 6415 (direct line) or apatrick@justice.org.uk

Notes to Editors

1. The text of the Supreme Court decision in *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah (Respondent),* is available here: http://www.supremecourt.gov.uk/news/latest-judgments.html. The Press Summary is here: http://www.supremecourt.gov.uk/decided cases/docs/UKSC_2012_0033_PressSummary.pdf. The lead judgment is given by Lord Kerr. The other Supreme Court Justices sitting in the case were Lord Phillips, Lady Hale, Lord Dyson, Lord Wilson, Lord Reed and Lord Carnwath. Lord Phillips expressed some reservations, but supported the lead judgment.

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2. JUSTICE intervened as a third party in this case, in favour of an interpretation of the law which would allow our domestic courts – on a case-by-case basis – to explore the degree of control which the UK in fact exercises over persons detained overseas, subject to our international legal obligations and the diplomatic commitments made in assurances from other States and in memoranda of understanding. Giving the keynote address at the JUSTICE Annual Human Rights Conference, Lord Kerr welcomed the "powerful and significant" contribution made by JUSTICE to this case. The JUSTICE/Sweet & Maxwell Annual Human Rights Conference 2012 was held on 24 October 2012 in London.

3. The majority in the Supreme Court also rejected a cross-appeal by Mr Rahmatullah, which argued that the writ made by the Court of Appeal should not have been discharged, as the Secretary of State for the Foreign and Commonwealth Office had not done enough to dispel the conclusion that the UK had sufficient control over his treatment to secure his release. Baroness Hale and Lord Carnwath, in a minority judgment, would have granted this appeal. JUSTICE did not intervene on this issue.

4. JUSTICE was represented *pro bono* by Tom de la Mare QC and Fraser Campbell of Blackstone Chambers and Allen & Overy. A full copy of JUSTICE's submission to the Court is available on request from admin@justice.org.uk.

5. Selected passages from the judgment follow:

Lord Kerr

Memoranda of Understanding or their equivalent, Diplomatic Notes, are therefore a means by which courts have been invited to accept that the assurances which they contain will be honoured. And indeed courts have responded to that invitation by giving the assurances the weight that one would expect to be accorded to solemn undertakings formally committed to by responsible governments. It is therefore somewhat surprising that in the present case [the Government] asserted that it would have been futile to request the US government to return Mr Rahmatullah. As the Master of the Rolls pointed out in para 39 of his judgment, this bald assertion was unsupported by any factual analysis. No evidence was proffered to sustain it. (paragraph 15)

Quite independently of the 2003 MoU, the UK remained under a continuing obligation, by virtue of GC4, to take such steps as were available to it to ensure that Mr Rahmatullah was

treated in accordance with the conventions' requirements and, if necessary, to demand his return. It is not necessary to decide whether this circumstance would be sufficient to give rise to uncertainty as to whether the UK could obtain control of Mr Rahmatullah. It seems to me, however, that it might well be enough. The UK and the US were allies. If it was demonstrated that a failure to return Mr Rahmatullah might involve the UK being in breach of its international obligations, it is surely at least possible that its ally, the US, would return Mr Rahmatullah, upon request, in order to avoid that eventuality. (paragraph 18)

There can be no plausible argument, therefore, against the proposition that there is clear prima facie evidence that Mr Rahmatullah is unlawfully detained and that the UK government was under an obligation to seek his return unless it could bring about effective measures to correct the breaches of GC4 [the fourth Geneva Convention] that his continued detention constituted. It is for that reason that I am of the view that the real issue in this case is that of control. But before examining that issue, it is necessary to say something about the nature of habeas corpus. (paragraph 40)

The most important thing to be said about habeas corpus, at least in the context of this case, is that entitlement to the issue of the writ comes as a matter of right. "The writ of habeas corpus issues as of right" per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 at 111. It is not a discretionary remedy. Thus, if detention cannot be legally justified, entitlement to release cannot be denied by public policy considerations, however important they may appear to be. If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified. (paragraph 40)

The existence of the 2003 MoU and, in particular clause 4 of that document, provided more than sufficient reason to conclude that the UK government could expect that, if it asked for it, Mr Rahmatullah's return by US forces would occur. This is quite unrelated to the question of the legal enforceability of the MoU. The Court of Appeal had to make an assessment of what was likely to happen as a matter of factual prediction. The only countervailing argument to the claim that the US should be expected to adhere to the commitment that it had made was [the] suggestion that to make the request would be futile. But, as I have pointed out, this bald claim was not supported by anything beyond the suggestion that the 2003 MoU was nothing more than a political arrangement. Just because it was a political arrangement, should it be assumed that it would not be fulfilled by the US? I can think of no reason that such an assumption should be made.

Moreover, the US authorities must have been aware that the UK considered that GC4 applied to Mr Rahmatullah. On that basis, it ought to have anticipated that the UK would ask for his return, whether or not the 2003 MoU had been superseded. At the time that the Court of Appeal considered the matter, there was no reason to suppose that the US, a close ally of the UK, would be unheeding of such a request. I therefore consider that the Court of Appeal was justified in its conclusion, on the evidence then available to it, that there was every reason to believe that the US would respond positively to a request by the UK that Mr Rahmatullah should be returned. I would therefore dismiss the Secretaries of State's appeal. (paragraphs 75 – 76)

Lord Reed

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. Ultimately, however, if control existed, the court's obligation to order the release of someone whose detention was unlawful under English law (if that were established) could not be deflected by considerations of diplomacy. (paragraph 114)

Lady Hale and Lord Carnwath

The case does not (and could not in our view) rest on the "simple ground" that the UK might be in a position to persuade the US to release the applicant (per Lord Phillips, paragraph 105). It rests on the much stronger basis that the UK was the original detaining power, that as such it has continuing responsibilities under GC4, and that it entered into an agreement with the USA giving it the necessary control for that purpose. (paragraph 122)