

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (Laws LJ, Silber J)

Ref No. 2011/2210

BETWEEN:

YUNUS RAHMATULLAH

Applicant / Appellant

- v -

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR DEFENCE

Respondents

RESPONDENTS' NOTE FOR THE RETURN DATE

1. Introduction

1.1. This Note:

- (i) summarises the Respondents' return to the writ issued by the Court on 14 December and served the same day;
- (ii) sets out the Respondents' proposed approach to the consequential matters now arising; and,
- (iii) outlines the Respondents' application for leave to appeal to the Supreme Court.

2. The return

2.1. As set out in the attached (third) witness statement of Mr Chanaka Wickremasinghe on behalf of the First Respondent (the contents of which are agreed and adopted where relevant on behalf of the Second Respondent):

- (i) it has not been possible to produce the body of Yunus Rahmatullah (YR) in accordance with the Court's order, YR remains detained by the US Department of Defense in Afghanistan;
- (ii) however, in obedience to the Court's writ, the Respondents have requested the return of YR to UK custody in order that he be released;

- (iii) the request was sent by letter to the US Department of Defence (YR's current custodian) on Friday 16 December 2011 [see CW/2], and was hand-delivered by British Embassy officials in Washington DC the same day;
- (iv) on Monday 19 December 2011, the US Department of Defence replied to the effect that no substantive response to the Respondents' request would be available prior to the return date set by the Court;
- (v) the US Department of Defense's reply went on to recall the circumstances of YR's current detention in similar terms to the response received on 22 June 2011 to earlier enquiries by the First Respondent as to YR's status (see Mr Wickremasinghe's second witness statement); and,
- (vi) in light of this reply, attempts have been to establish the likely timeframe for a substantive response, however the US authorities have made it plain that they are not in a position to give any such indication at present.

2.2. Notwithstanding their inability to produce the body, in the particular circumstances of this case the Respondents submit that the information summarised above constitutes a valid return to the Court's writ – at least for the time being (see below).

3. Consequential matters

3.1. The first consequential matter to note, although it will already be apparent to the Court, is that the Respondents accept that the Court's writ must run notwithstanding any appeal proceedings they might initiate, or even succeed in. That is the effect of section 15(4) of the Administration of Justice Act 1960 (emphasis added):

"15 Appeal in habeas corpus proceedings.

- (1) Subject to the provisions of this section, an appeal shall lie, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order.
- (2) *[repealed]*
- (3) *[no leave requirement in a criminal application for habeas corpus].*
- (4) Except as provided by section five of this Act in the case of an appeal against an order of the High Court on a criminal application, an appeal brought by virtue of this section shall not affect the right of the person restrained to be discharged in pursuance of the order under appeal and (unless an order under subsection (1) of that section is in force at the determination of the appeal) to remain at large regardless of the decision on appeal."

3.2. Secondly, the Respondents anticipate that, in light of the return summarised above, the Court may wish to re-list this matter, or provide a further timetable for the Respondents to seek to obtain a substantive response from the US authorities.

- 3.3. To that end, the Respondents note that it is open to the Court to enlarge the time to return the writ, see: the approach adopted by Lord Mansfield in *R v Clarke* (1762) 3 Burrow 1362: "... Lord Mansfield proposed to put this matter into another method; viz. to use this affidavit of Dr Monro's [the original return] as a reason for enlarging the time to return the writ, instead of actually filing the return at present. Accordingly, [...] the Court enlarged the time for making the return till the next term" (pp875-6); and the effect of the House of Lords' approach in *Barnado v Ford* [1892] AC 326 (HL) albeit on appeal: "the time for making the return to the writ of habeas corpus extended to three months from the date of this judgment. Lords' Journals 25th July 1892".
- 3.4. Therefore, in light of the contents of Mr Wickremasinghe's third witness statement, the Respondents invite the Court to enlarge the return date for a period of 28 days, to Wednesday 18 January 2012, or alternatively to the first day of next term, Wednesday 11 January 2012 (a period of 21 days).

4. Application for permission to appeal

- 4.1. Finally, the Respondents respectfully seek permission to appeal the Court's decision. For the reasons set out below, the Respondents submit that this case is one which warrants the attention of the Supreme Court, and is an appropriate one for this Court taking the exceptional step of granting permission itself.
- 4.2. First, the potential general ramifications of the Court's decision are of considerable significance for the UK's conduct of its foreign relations and, in particular, its military operations. It goes without saying that these areas of Government policy are not only matters of great sensitivity, but also areas in which clarity and legal certainty are of singular importance. The Court's decision is likely to be relied upon within the context of other military operations conducted by UK Armed Forces.
- 4.3. Secondly, it is evident from the Divisional Court judgment that the case permits of possible different answers. In light of the Divisional Court's reasoning and decision, the Respondents submit that there are proper grounds to suggest that the Supreme Court might differ from this Court's conclusions.
- 4.4. Thirdly, each of the legal issues at stake in these proceedings is also both of importance and of consequence, including in particular:
- (i) the proper scope of the concept of 'control' in *habeas corpus* proceedings;
 - (ii) the relevance, if any, of the non-justiciable territory of foreign relations to the issue of the writ; and,
 - (iii) the role of the writ in so-called 'doubtful control' cases (and the nature and extent of that category of case).

JAMES EADIE QC

BEN WATSON

20 DECEMBER 2011