Case No: C1/2011/2210

Neutral Citation Number: [2012] EWCA Civ 182
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: 23 February 2012

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

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Between:

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

(NUMBER 2)

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

Hearing date: 20 February 2012

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Judgment

The Master of the Rolls :

1. On 14 December we handed down judgments in which we directed the issue of a writ of *habeas corpus* against the Secretary of State for Foreign Affairs and the Secretary of State for Defence ('the Secretaries of State') in respect of Yunus Rahmatullah ('the applicant'). The circumstances and reasons giving rise to the decision to issue the writ are, I hope, clear from our judgments, [2011] EWCA Civ 1540, and need not be repeated.
2. When we handed down judgment, the return day was fixed for 21 December 2011, a week later. The hearing due that day was adjourned to 18 January 2012 on the basis that the Secretary of State for Defence had received a 'holding' response from the office of William Lietzau, the United States Deputy Assistant Secretary of State for Defence, to a formal letter of request dated 16 December seeking the release of the applicant to the British authorities.
3. The return date was then adjourned again, effectively to 20 February 2012, on the basis that Mr Lietzau's office indicated to the British Embassy in Washington DC that it was unlikely that a substantive response to the 16 December request would be forthcoming before 18 January.
4. On 8 February, Mr Lietzau responded in a letter, in which he made it clear that the applicant was, in the view of the US government, being 'properly detained by the United States consistent with the international law of armed conflict' and that he was being 'held by US military forces in accordance with Public Law 107-40 … as informed by the laws of war'. The letter went on to state that the US authorities 'seek appropriate security assurances when [they] transfer a detainee' such as the applicant, 'regardless of whether the transfer is to the detainee's home country or to a third country.' The letter also recorded that the government of Pakistan, the country of which applicant is a national, was seeking his return, and stated that the US authorities 'believe it may be more appropriate to discuss the conditions of transfer directly with the Government of Pakistan.'' The letter ended by saying that Mr Lietzau 'look[ed] forward to discussing this matter further'.
5. Mr Drew, the Director for National Security at the Foreign and Commonwealth Office ('the FCO'), in a witness statement dated 14 February, said that, by this letter, 'the US authorities, in suitably diplomatic language, have effectively declined the [UK government's] request that the [applicant] be transferred to UK custody in order to be released.' Mr Devine the Director of Operational Policy at the Ministry of Defence ('the MoD') has provided a brief witness statement agreeing with Mr Drew's statement.
6. At the hearing on 20 February, Mr Eadie QC, on behalf of the Secretaries of State, contended that, although they had been unable 'to produce the applicant's body', they had made a sufficient return to the writ so as to be discharged from all further liability thereunder. This was challenged by Ms Lieven QC, who argued that Mr Lietzau's 8 February letter left open the possibility of the US authorities returning the applicant to the UK government, and that we should at least require the Secretaries of State to write to Mr Lietzau asking for a 'straightforward yes or no' answer to the question whether the US authorities would return the applicant to the UK government.
7. Having heard the arguments, we indicated that we were of the view that the Secretaries of State were entitled to the relief which they sought, and said that we would give our reasons later. These are our reasons.

8. There can be no doubt but that the UK government made a bona fide request to the US authorities for the return of the applicant, which accorded with the terms of our judgment, and it had appended to it a copy of that judgment.
9. I turn, then, to the response of 8 February from Mr Lietzau. As I see it, the first problem for the applicant is that that letter makes it very difficult to contend that the UK government has 'custody' or '*de facto* control' of the applicant, as discussed in the cases considered at [2011] EWCA Civ 1540, paras 27-31, and if that is right, the uncertainty which gave rise to the issue of the writ has been answered, and sadly for the applicant, adversely to him.
10. The letter clearly maintains that the US authorities are entitled to continue to hold the applicant, that, if he is to be released to anyone, it should be to the Pakistani government, and the US authorities would not release him to anyone without what they regarded as appropriate safeguards. Whatever may be the legal right of the UK government and the legal obligations of the US Government, under the MoUs discussed in our earlier judgments at [2011] EWCA Civ 1540, paras 3-8 or under Geneva III or Geneva IV, as discussed at [2011] EWCA Civ 1540, paras 11-15, it seems clear that the US authorities are not prepared to hand over the applicant to the UK government in order for him to be released.
11. A further problem for the applicant is that, however a lawyer may be tempted to construe the 8 February letter, there is the unequivocal evidence of Mr Drew, supported by Mr Devine, that, in the world of international relations, the letter amounts to a refusal to hand over the applicant. While we are not bound to accept such evidence, it seems to me that it would be dangerous to reject it in a case, such as this, where it does not appear unconvincing and there is nothing to contradict it. The language of diplomats representing different states discussing a problem can, no doubt, be very different from that of lawyers representing different interests discussing a problem or even the same problem, particularly when, as here, the problem may be one of some sensitivity.
12. Accordingly, a judge, especially one sitting in a domestic court, should be wary of placing an interpretation on a letter such as that of 8 February, which differs from that proffered by a responsible person at the FCO, giving formal evidence on its behalf. Given that the US military authorities are holding the applicant, it is also significant that a responsible person at the MoD has the same view of the effect of the 8 February letter. The fact that the US authorities believe that they are entitled to continue to hold the applicant is plainly consistent with their maintaining a refusal to hand him over. And the closing observation in the letter referring to further discussions, which was relied on by Ms Lieven, cannot be said to amount to much of an indication that the US authorities would be prepared to hand over the applicant to the UK government.
13. Even if we were to accept Ms Lieven's contention that the 8 February letter left the door open, then, quite apart from the point made in para 9 above, it seems to me that it would be very doubtful whether a domestic court should start dictating to the FCO or the MoD as to how to communicate with a foreign government, and in particular how a letter relating to a potentially sensitive diplomatic issue should be expressed. Doing so would risk trespassing into the forbidden areas referred to at [2011] EWCA Civ 1540. As explained at [2011] EWCA Civ 1540, para 48, Mr Eadie did not suggest any such difficulty in relation to the original request, and that renders his reliance on the point at this stage that much more forceful.
14. Ms Lieven realistically did not seek to contend that we should hold that the US government, through Mr Lietzau, was refusing to comply with its obligations under the MoUs or Geneva III or Geneva IV. In the light of the issues we have to decide,

that is not a point which we need, or should, take any further than we have taken it in our earlier judgment at [2011] EWCA Civ 1540, paras 33-38. In any event, the US government is not a party to these proceedings.

15. It is right to mention that, bearing in mind the concern of the Secretaries of State to give full disclosure, Mr Drew, in his evidence, referred to three conversations after 16 December with US government employees, in which some reference was made to the UK government's request to hand over the applicant. Ms Lieven contended that the applicant's legal representatives should be shown notes of those meetings – appropriately redacted. I do not agree. What was said at the meetings, as reported by Mr Drew, appears to take matters no further, and Mr Eady confirmed that the legal representatives of the Secretaries of State had seen the notes and, so far as these proceedings are concerned, that they amounted to no more than what Mr Drew reported.
16. The melancholy truth is that the events since we handed down judgment appear to establish that (i) when the UK defence forces handed over the applicant to the US authorities in questionable circumstances in 2004 (see [2011] EWCA Civ 1540, para 9), they most unfortunately appear to have sold the pass with regard to their ability to protect him in the future, and (ii) Mr Parmenter of the MoD turns out to have been right when he said that he thought that the issue of a writ of *habeas corpus* would, in terms of its practical outcome for the applicant, be a 'futile course of action' (see [2011] EWCA Civ 1540, para 21).
17. That does not mean that the issue of the writ of *habeas corpus* was a pointless exercise in this case: it performed its minimum function of requiring the UK Government to account for its responsibility for the applicant's detention, and to attempt to get him released. This case is an illustration of (i) the court performing perhaps its most vital role, namely to ensure that the executive complies, as far as it can, with its legal duties to individuals, in particular when they are detained, and (ii) the limits of the powers of the court, as a domestic tribunal, in that its reach cannot go beyond its jurisdiction, and that jurisdiction does not extend to the US military authorities in Afghanistan.
18. As it is, for the reasons which I have given, it seems to me that we should make no further order on the writ, on the basis that the Secretaries of State have made a sufficient return to it.

Lord Justice Maurice Kay :

19. I agree.
20. Ms Lieven describes the letter from Mr Lietzau as "carefully crafted" .She suggests that, on close analysis, it is not an unequivocal rejection of the request to transfer Mr Rahmatallah to UK custody in order for him to be released and that, on the contrary, it leaves the door open to further discussions. It is on this basis that she seeks to resist finality in these proceedings at this stage. Whilst the submissions have their attractions, it seems to me that they have insufficient regard to their context. We have entered the thicket of diplomatic language. The evidence of Mr Drew, Director for National Security at the FCO, is that Mr Lietzau's letter is "a definitive statement of the US position" and that the US authorities "have effectively declined the … request", while drawing attention to "ongoing efforts being made to transfer [Mr Rahmatallah] to Pakistan". In my judgment, for this Court to take issue with Mr Drew or to go behind his interpretation of the diplomatic language and

communications would take us into the forbidden area. In the circumstances, there is nothing more that we can do.

Lord Justice Sullivan:

21. I agree with both judgments.