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Important Information

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No. VID403/2023

Federal Court of Australia
District Registry: Victoria
Division: General

SAVE THE CHILDREN AUSTRALIA
Applicant

MINISTER FOR HOME AFFAIRS and another
Respondents

RESPONDENTS' WRITTEN SUBMISSIONS

A. INTRODUCTION

1. The respondents (together, **the Commonwealth**) contend that the originating application should be dismissed, with costs.

2. The Commonwealth will rely on five affidavits:

   2.1 Affidavit of Kathleen Logan affirmed 6 September 2023;

   2.2 Affidavit of Rear Admiral James Riley Lybrand affirmed 6 September 2023;

   2.3 Affidavit of Ciara Joanna Spencer affirmed 1 September 2023;

   2.4 Affidavit of Scot Ging You Wu affirmed 7 September 2023;

   2.5 Affidavit of Josefina Wellings Booth affirmed 28 July 2023.

3. STCA has required Ms Logan, Rear Admiral Lybrand and Ms Spencer for cross-examination.

4. The key issue for STCA's claim for habeas corpus concerns the Commonwealth's amenability to the writ of habeas corpus, as the Commonwealth does not put forward any argument as to the legality of the women and children's detention and does not seek to rely on the act of state doctrine.

5. Within this key issue are some sub-issues.

6. Who has the onus of proof and what is the standard of review? The Commonwealth submits that STCA has the onus of proving de facto control on the balance of probabilities.

Filed on behalf of the Respondents | File ref: 23003641

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7. Does the Commonwealth have de facto control over the detention of the women and children because (a) the Commonwealth can ask the Autonomous Administration of North and East Syria (**AANES**) to release them to the Commonwealth; and (b) the AANES is likely to say "yes" with respect to some or all of the remaining women and children, subject to the Commonwealth agreeing to certain conditions stipulated by the AANES? The Commonwealth submits that the women and children are not within the Commonwealth's de facto control. What STCA seeks is an order for the Commonwealth to bring them within its control. What it seeks is for the Commonwealth to negotiate with the AANES with respect to their repatriation.

8. Take a person held hostage whose freedom could be purchased for a ransom. Does the Commonwealth have de facto control over them because it could pay the money? On STCA's case, the answer must be "yes". That answer cannot be correct.

9. Is the Commonwealth otherwise a party to some "Arrangement" with the AANES through the Coalition to repatriate the women and children? The Commonwealth submits "no".

10. The Commonwealth submits that the claim for judicial review fails for fundamental reasons. *First*, STCA will fail to prove that a decision not to repatriate the women and children has been made. *Second*, if one has been made (which is denied) then STCA will fail to prove the full reasons for that decision, absent which it will inevitably fail to show jurisdictional error. *Third*, in so far as STCA challenges the failure to make a decision, the absence of any obligation to make a decision is fatal.

B. HABEAS CORPUS: THE EVIDENTIARY CASE

B.1 Summary of the Commonwealth's evidence

11. Ms Logan gives evidence of the capacity for the Australian Government to request the AANES to permit the repatriation of Australian women and children,[1] whether release would be permitted is ultimately a question for the AANES[2] and the considerable practical arrangements for undertaking a repatriation, including securing the agreement of other foreign governments and non-state actors.[3]

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[1] Logan Affidavit, [24]-[34].
[2] Logan Affidavit, [69]-[70].
[3] Logan Affidavit, [35]-[64].

12. Ms Logan's evidence is that there was (and possibly is) a unilateral offer by AANES of the terms upon which it would permit people to be repatriated.[4] Australia could seek to accept those terms, but it would remain within the AANES's sole discretion whether to permit the release of the woman and children.[5] Ms Spencer's evidence is to similar effect.

13. Ms Logan also gives evidence about the Commonwealth's ability to repatriate the women and children should they be released by the AANES. She states that any repatriation can only be effected with their consent and that she is not aware of any legal power of Australian officials to detain the woman and children.[6] Prior repatriations of women and children from Al-Roj also required the cooperation of other foreign governments.[7]

14. Rear Admiral Lybrand's evidence is that there is no whole-of-Coalition influence or relationship with the SDF[8] and that Australia's military contribution in Syria is minimal.[9] Rear Admiral Lybrand is not aware of any formal arrangement between the Coalition and the AANES or the SDF, including any arrangement by which Australia could require the repatriation of Australians.[10] He is also not aware of the Department of Defence and the Australian Defence Force having **any** influence over the AANES and/or the SDF.[11]

15. The documentary evidence held by the Department of Home Affairs indicates that the Australian women and children who are recorded as leaving Australia[12] did so for the purposes of holidays or visiting friends or relatives.[13] There is no evidence that they were compelled by the Commonwealth to travel to Syria. Their travel occurred despite Australian Government warnings not to travel there.[14]

B.2 Uncontentious, incontrovertible and contested facts

16. The Court might gain the impression that there is some heated factual dispute between the parties from the fact that the Commonwealth is likely to have substantial objections to STCA's evidence and the applicant has foreshadowed an intention to cross-examine three of the respondents' witnesses. But there is little separating the parties on some key issues.

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4 Logan Affidavit, [45], [67].
5 Logan Affidavit, [69].
6 Logan Affidavit, [52].
7 Logan Affidavit, [48].
8 Lybrand Affidavit, [12].
9 Lybrand Affidavit, [16]-[27].
10 Lybrand Affidavit, [31]-[33].
11 Lybrand Affidavit, [35].
12 Some of the children were born outside of Australia and therefore have no outgoing passenger declarations.
13 See Wu Affidavit.
14 Logan Affidavit, [20].

17. There is and could be no dispute that:

    17.1 the AANES is detaining the women and children in its own right and not as the agent of the Commonwealth;

    17.2 the Commonwealth did not hand the women and children to the AANES;

    17.3 the Commonwealth did not have them in its custody beforehand.

18. The evidence is clearly to the effect that:

    18.1 there is no existing arrangement with the AANES for the repatriation of the women and children;

    18.2 the Commonwealth could request the AANES to free the women and children;

    18.3 the AANES is likely to agree to that request with respect to some or all of the remaining women and children, subject to conditions;

    18.4 the AANES can nominate those conditions and the Commonwealth could agree to them if it wished to do so or otherwise seek to negotiate them;

    18.5 considerable planning would be needed to ensure that any repatriation occurred safely and successfully, including seeking to engage with other governments.

19. The ambition of STCA's evidentiary case is that it seeks to establish that the Commonwealth is involved in the women and children's detention at a factual level pursuant to some "Arrangement" via the Coalition.

20. That evidentiary case will fail. For example, there will be no evidence of the Commonwealth funding the Al-Roj camp or assisting in its maintenance or upkeep, the Commonwealth exercising any military influence over the AANES through the Coalition or any ongoing "arrangement" pertaining to repatriation from Al-Roj at all.

C. IS THE COMMONWEALTH AMENABLE TO THE WRIT

C.1 Principles and the meaning of "de facto control"

21. "[Q]uite apart from the question of the legality or illegality of the detention" is "the question of amenability to the writ".[15] If a person is being unlawfully detained, it does not follow that the person they have sued is an appropriate person to whom to issue the writ.

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[15] *Plaintiff M68* (2016) 257 CLR 42 at [165] (Gageler J).

22. The relevant principle to be applied is as stated by Gageler J in *Plaintiff M68*: "Amenability to the writ is determined solely as a question of whether the person to whom the writ is addressed has de facto control over the liberty of the person who has been detained, in relation to which actual physical custody is sufficient but not essential".[16]

23. That statement of principle directs attention to what is meant by "de facto control".

24. A useful starting point is the pinpoint citations chosen by Gageler J in the accompanying footnote (see also **AS [69]**, which notes Gageler J's citations without scrutinising them carefully).

25. The first case his Honour cited was *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361 at 391, 398 (***O'Brien***).

 25.1 At 391, Scrutton LJ said:

> Now it has been laid down by the House of Lords in *Barnardo v Ford* that if the Court is satisfied that the body whose production is asked is not in the custody, power or control of the person to whom it is sought to address the writ, a writ of habeas corpus is not the proper remedy, though there was an original illegal taking and detention. The object of the writ is not to punish previous illegality, but to release from present illegal detention. I do not wish to tie myself to the exact degree of power over the body which justifies the issue of the writ, for various high authorities have used different words. Lord Herschell's language is "custody, power or control"; Lord Macnaghten's "under control or within each"; Lord Halsbury's "wrongful detention by himself or his agent".

 25.2 At 398, Atkin LJ said:

> I think the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. "Custody" or "control" are the phrases used passim in the opinions of the Lords in *Barnardo v Ford*, and in my opinion are a correct measure of liability to the writ. … in testing the liability of the respondent to the writ the question is as to de facto control. …

26. The Commonwealth submits that Gageler J should be understood to have cited these passages for the proposition (appearing in the last part of the passage extracted above from his reasons in *M68*) that de facto control is sufficient quite apart from physical custody. What is said in them is otherwise too general to shed light on the meaning of "de facto control".

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16 *Plaintiff M68* (2016) 257 CLR 42 at [165].

27. The second case his Honour cited was *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614 at 636 [43], 653 [109] (***Rahmatullah***).

27.1 At [43], Lord Kerr said:

> The effectiveness of the remedy would be substantially reduced if it was not available to require someone who had the means of securing the release of a person unlawfully detained to do so, simply because he did not have physical custody of the detainee—"actual physical custody is obviously not essential" per Atkin LJ in *Ex p O'Brien* [1923] 2 KB 361, 398 and Vaughan Williams LJ in *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, 592, stating that the writ "may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner".

27.2 At [109], Lord Reed said:

> As Lord Phillips of Worth Matravers has explained, the writ of habeas corpus requires a respondent who is detaining a person ("the prisoner") to produce him before the court and to justify his detention. If the respondent cannot justify his detention of the prisoner, he will be ordered to release him. His failure to comply with such an order will fall within the scope of the court's jurisdiction to deal with contempt. It follows that the appropriate respondent to the writ is in principle the person who has custody or control (or, as it has sometimes been put, actual custody or constructive custody) of the prisoner: that is to say, either the actual gaoler, or some other person who has "such control over the imprisonment that he could order the release of the prisoner": *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, 592, per Vaughan Williams LJ. As Scrutton LJ said in *R v Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361, 391, if the court is satisfied that the body whose production is asked is not in the custody, power or control of the person to whom it is sought to address the writ, a writ of habeas corpus is not the proper remedy.

28. There are two points common to these passages of *Rahmatullah*.

28.1 Consistently with *O'Brien*, actual physical custody is not essential.

28.2 De facto control will exist where the proposed respondent "could **order** the release of the prisoner" (our emphasis).

29. The Commonwealth emphasises the second point. It directs attention to the proposed respondent having some right or entitlement to have the detainee released (one that is sufficient to sustain an "order" or command). De facto control can be found to exist where the proposed respondent has some right or entitlement that they can seek to rely upon in order to obtain custody of the person. It does not exist where there is no such right or entitlement.

30. That analysis necessarily presupposes some correlative "duty" upon the person having actual custody. However, the right or entitlement or correlative duty need not be

enforceable. If the proposed respondent calls upon that right or entitlement in response to the writ issuing and the counterparty reneges on its concomitant duty, then the proposed respondent has done what it can and that is a sufficient return to the writ. But the right or entitlement must at least exist.

31. This understanding of de facto control is consistent with what Lord Kerr said elsewhere in *Rahmatullah* (in a passage which was **not** in any event cited by Gageler J in *Plaintiff M68*). Lord Kerr said this: "It is not simply a question of the legal enforceability of any right to assert control over the individual detained".[17] The right need not be **enforceable** in some forum because (as the cases discussed further below illustrate) arrangements sufficient to constitute control sometimes involve agreements between polities (where the notion of enforceability, in a Court, is notoriously difficult[18]). But to have some basis for thinking that a proposed respondent has de facto control over a person, it is not enough that they can ask the person actually detaining them to release the person. There must be some existing right or entitlement which can be called upon to require that to occur, even if the right or entitlement could not be enforced if the actual detainer declines to do so.

32. Of course, de facto control is a question of fact. A right or entitlement to call for production of the person may exist by reason of an arrangement, undertaking, contract or situation of agency. But merely being able to ask for a person's release and having high hopes that the request will be successful is not enough. Still more is it not enough if release is not unconditional, but is, rather, contingent upon the proposed respondent agreeing to conditions set by the detainer.

C.2 De facto control and the case law

33. The Commonwealth's submissions in [29]-[32] are supported by the case law.

34. It is convenient to start with the three cases upon which STCA places chief reliance, before turning to the cases which are clearly against STCA.

C.2.1 *O'Brien* [1923] 2 KB 362

35. Mr O'Brien sought a writ of habeas corpus against the Secretary of State for Home Affairs seeking his release from detention in the Irish Free State. Mr O'Brien had been arrested

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17 *Rahmatullah* [2013] 1 AC 614 at [48].

18 See eg *The Railways Standardisation Case* (1962) 108 CLR 130.

and detained in London under order of the Secretary (which was later found to be invalid) and was conveyed to Dublin where he was interned.[19]

36. The Court of Appeal held that that there was sufficient doubt about whether the Secretary retained control over Mr O'Brien (notwithstanding his transfer to Ireland) as to warrant the issue of the writ to permit the Secretary to explain the full position upon the return.[20]

37. The important facts going to control were as follows.

38. The Secretary told the House of Commons that "In my opinion the Government has not lost control" and "I maintain that with those undertakings given to me by the Free State Government, we have a complete control over the position in which the internees are placed".[21] The Court was told the arrangement was "oral".[22] And the order under which he was interned itself relevantly provided for the order to be revoked or varied by the Secretary.[23]

39. These facts showed the existence of a present arrangement (constituted by the giving of undertakings) which the respondent to the writ could call upon. The Court was actually informed that such an arrangement existed. That fact was no doubt fortified by the Secretary's confident remarks in the House to which the Court referred, and by the terms of the order which contemplated an ongoing role for the Secretary.

40. That arrangement may not have been legally enforceable in any forum. Indeed, according to Lord Kerr in *Rahmatullah* the arrangement was not legally enforceable.[24] But the important point is that the arrangement existed and the Secretary could seek to rely upon it so as to give the colour of having de facto control over Mr O'Brien.

41. The reasoning in this case does not support any approach to habeas corpus which would see the writ issue to a person merely because they could ask the detainer to release the person with some likelihood of a positive response, let alone where there is some doubt as to that matter. Were that to be the case, the writ would have a radically enlarged reach: it would be available in respect of almost every case of foreign detention of an Australian citizen or permanent resident, which would undermine the conduct of foreign relations in the very way the cases deny. Still less does this case support an approach that would see a

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19 *O'Brien* [1923] 2 KB 362 at 373 (Bankes LJ).
20 *O'Brien* [1923] 2 KB 362 at 381 (Bankes LJ), 392 (Scrutton LJ), 399 (Atkin LJ).
21 *O'Brien* [1923] 2 KB 362 at 392 (Scrutton LJ).
22 *O'Brien* [1923] 2 KB 362 at 392 (Scrutton LJ).
23 *O'Brien* [1923] 2 KB 362 at 399 (Atkin LJ).
24 *Rahmatullah* [2013] 1 AC 614 at [48].

person being held to have de facto control over a person where the detainer can and will impose conditions upon the release of the person.

C.2.2 *Rahmatullah* [2013] 1 AC 614

42. Mr Rahmatullah was taken into custody by British forces within an area of Iraq within US control. He was then transferred to US Forces in accordance with the terms of a memorandum of understanding between the US, UK and Australia signed on 23 March 2003 (**2003 MOU**).[25] Mr Rahmatullah was then removed to Bagram Air Field without the UK's knowledge.[26]

43. That 2003 MOU reflected that "the UK needed to have in place an agreement which it could point to as showing that it had effectively ensured that the Geneva Conventions would be complied with in relation to those prisoners it had handed over to the US".[27] If the US failed to meet the Geneva Conventions, the UK "must take effective measures to correct the situation or request the return of the transferred person".[28] To that end, cl 4 of the 2003 MOU provided:[29]

> Any prisoners of war, civilian internees, and civilian detainees transferred by a detaining power [the UK] will be returned by the accepting power [the US] to the detaining power without delay upon request by the detaining power.

44. Separate to the 2003 MOU, the UK was required by international law to take such steps as were available to it to ensure that Mr Rahmatullah was treated in accordance with the requirements of the Geneva Conventions, and to demand his return if necessary.[30]

45. The Court dismissed the appeal from the Court of Appeal directing the issue of the writ of habeas corpus to the Secretaries of State.

46. Lord Kerr (Lord Dyson and Lord Wilson agreeing) held that habeas corpus could issue to a person who had "the reasonable prospect of being able to exert control over his custody or to secure his production to the court"[31] or where there were "reasonable grounds on which it may be concluded that the respondent will be able to assert that control".[32]

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[25] *Rahmatullah* [2013] 1 AC 614 at [3].
[26] *Rahmatullah* [2013] 1 AC 614 at [4].
[27] *Rahmatullah* [2013] 1 AC 614 at [11].
[28] *Rahmatullah* [2013] 1 AC 614 at [8].
[29] *Rahmatullah* [2013] 1 AC 614 at [8].
[30] *Rahmatullah* [2013] 1 AC 614 at [18].
[31] *Rahmatullah* [2013] 1 AC 614 at [45].
[32] *Rahmatullah* [2013] 1 AC 614 at [64].

47. STCA relies upon these statements of principle: **AS [53], [56]**. But STCA fails to confront **why** Lord Kerr found that the facts satisfied these statements of principle so as to justify the issue of the writ in that case. It is necessary to do that to appreciate what his Lordship meant by the open textured language used.

48. Lord Kerr found de facto control because the Secretaries could rely upon the 2003 MOU, regardless of whether it was legally enforceable, which committed the United States to return Mr Rahmatullah upon request.[33] That is, because there was an arrangement in existence which allowed the Secretaries to require the country detaining him to release him. That is consistent with the Commonwealth's exposition of principle above.

49. Lord Kerr's conclusion that the United States was likely to adhere to its reciprocal obligations under that arrangement (notwithstanding the fact it was a political arrangement) was reinforced by the fact that the Geneva Conventions required the Secretaries to request his return, and the United States could be expected to respond favourably given their close alliance.[34] This case is distinguishable in that regard. There is no obligation upon the Commonwealth to request the repatriation of the women and children, and on the facts there is no alliance between the AANES and Australia.

50. Lord Phillips framed the amenability of a respondent to the writ in terms of "a defendant who is himself detaining the prisoner" as well as "a defendant who holds the prisoner in his custody or control through another".[35] In terms, that is redolent of habeas corpus issuing where, in effect, a respondent detains a person through an agent.

51. By virtue of Lord Phillips' concurrence in the judgment of Lord Kerr (subject to one reservation) it is apparent that this statement of principle could be applied to justify the issue of the writ in a case where there was "a memorandum of understanding with [the detainer] under which [the detainer] agreed to hand [the detainee] back to the United Kingdom if requested to do so".[36] For present purposes, what is important is, again, the existence of some right which the respondent to the writ could rely upon to seek to require delivery up of the person.

52. Lord Reed concurred in the result but upon narrower reasons (which, notably, were cited by Gageler J in *Plaintiff M68*). As a matter of principle, Lord Reed said the writ would

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[33] *Rahmatullah* [2013] 1 AC 614 at [64], [75].
[34] *Rahmatullah* [2013] 1 AC 614 at [64], [76].
[35] *Rahmatullah* [2013] 1 AC 614 at [91].
[36] *Rahmatullah* [2013] 1 AC 614 at [98].

issue to a person "who has custody or control (or, as it has sometime been put, actual custody or constructive custody) of the prisoner: that is to say, either the actual gaoler, or some other person who has 'such control over the imprisonment that he could order the release of the prisoner'".[37] See also [27.2] above. That is, in terms, consistent with the Commonwealth's contentions, and is the approach which Gageler J has endorsed as the correct approach for an Australian court to adopt.

53. Lord Reed went on to say that there was no de facto control if "all that could be said was that there was a possibility that [the detainer] might accede to a request".[38] But Lord Reed said the trial judge erred in finding a possibility only on the basis that the 2003 MOU "was not enforceable in law" because that "did not entail that it was not enforceable de facto".[39] Lord Reed said the writ could issue because:[40]

> In terms of the 2003 MoU, in particular, the United Kingdom and the United States had agreed that persons such as Mr Rahmatullah, who had been detained by British force and transferred to the custody of the United States, would be returned upon request. On its face, that agreement gave the Secretaries of State de facto control over Mr Rahmatullah's detention, on the reasonable assumption that the United States would act in accordance with the agreement it had entered into. …

54. It is clear that the existence of the 2003 MOU was critical for Lord Reed, because his Lordship stressed that the issue of the writ "did not entail that the United Kingdom must demonstrate its lack of such control by means of a practical test".[41] That is to say, what was required was not some freewheeling factual enquiry.

55. Finally, Lord Carnwath and Baroness Hale agreed with Lord Kerr's statement of principles.[42] But in point of application, they were adamant that "[o]n the issue of control, in our view, the effect of the two MoUs concluded in 2003 and 2008 is crucial".[43]

56. STCA draws attention to their statement that control "turn[s] on the realities of the relationship between the UK and the USA as the currently detaining power" (**AS [60]**). But what was "central" for them was cl 4 of the 2003 MOU, which "was designed specifically to ensure that the UK did retain control over the continuing legality of the detention".[44] For them, it was not just that "the UK might be in a position to persuade the

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37 *Rahmatullah* [2013] 1 AC 614 at [109].
38 *Rahmatullah* [2013] 1 AC 614 at [111].
39 *Rahmatullah* [2013] 1 AC 614 at [111].
40 *Rahmatullah* [2013] 1 AC 614 at [112].
41 *Rahmatullah* [2013] 1 AC 614 at [114].
42 *Rahmatullah* [2013] 1 AC 614 at [116].
43 *Rahmatullah* [2013] 1 AC 614 at [118].
44 *Rahmatullah* [2013] 1 AC 614 at [119].

US to release the applicant".[45] What they emphasised was that "the UK was the original detaining power, that as such it has continuing responsibilities under C4, and that it entered into an agreement with the USA giving it the necessary control for that purpose".[46] In contrast, the Commonwealth has never had custody of the women and children.

57. That is to say, for Lord Carnwath and Baroness Hale, what was critical was an existing right or entitlement to call for production of Mr Rahmatullah.

C.2.3 *Plaintiff M68* (2016) 257 CLR 42

58. This case concerned the validity of the plaintiff's detention in Nauru. She alleged that the Commonwealth was involved in her detention and that its involvement had to comply with the requirements in *Chu Kheng Lim*, which, she alleged, it did not.

59. That argument was rejected by a majority of the Court. It was an argument that had nothing to do with habeas corpus, and nothing said by the joint judgment touched upon the subject. Accordingly, the Court will not be assisted by **AS [64]-[65]**.

60. In answering the question of validity, Gageler J **did** deal with habeas corpus, and for that reason it is of utility to examine what his Honour said. The Commonwealth has addressed his Honour's statement of principles at [22]-[27] above and they need not be repeated. But it is important to add the following points.

61. *First*, it is of critical importance to appreciate **why** Gageler J was examining the law on habeas corpus. His Honour was doing so because his Honour considered that the Commonwealth executive's obligation to comply with *Chu Kheng Lim* was coextensive with its amenability to the writ of habeas corpus. Put another way, if the writ could issue to the Commonwealth because it had "de facto control" over the person's detention, then it had to comply with *Chu Kheng Lim* in respect of that person's detention. In that way, the limits of the writ coincide with the constitutional limits on executive power.

62. Pause there for a moment and the large implications of STCA's argument will become apparent. If STCA is right then, on Gageler J's approach and despite the critical factual differences between the present case and *Plaintiff M68* described below at [105], the Commonwealth will be acting unconstitutionally in being "involved" in the detention of the women and children unless an exception to the *Lim* principle is found, despite the Commonwealth having had no involvement in the women's choice to travel to Syria and

45 *Rahmatullah* [2013] 1 AC 614 at [122].
46 *Rahmatullah* [2013] 1 AC 614 at [122].

no involvement in the establishment and running of the Al-Roj camp. That startling result shows that STCA's position must be flawed.

63. *Second*, it is useful to look at why Gageler J held that the Commonwealth had to comply with the *Lim* principle in that case (which means that his Honour would have held that the Commonwealth had de facto control for the purpose of habeas corpus). His Honour found that the plaintiff was held in custody by Transfield and Wilson Security as agents for the Commonwealth.[47] That is distinguishable from the present facts.

C.2.4 *Mwenya* [1960] 1 QB 241

64. In *Ex parte Mwenya*,[48] the Governor of Northern Rhodesia made restriction orders pursuant to the *Emergency Powers Regulations 1956* which required Mr Mwenya to remain in the district of the Chief Mporokoso.[49]

65. Mr Mwenya sought habeas corpus against, among others, the Secretary of State for the Colonies on the basis that the Order in Council under which the Regulations were made was invalid.[50]

66. Lord Parker CJ for the Court delivered reasons for concluding that the Secretary did not have sufficient control over Mr Mwenya to justify the writ of habeas corpus.

67. Lord Parker CJ distinguished *O'Brien*, observing that the restriction orders were not made by the Secretary of State and that the Secretary had no custody of Mr Mwenya in any form.[51] Lord Parker CJ observed that:[52]

> ... The fact, however, that he can advise and attempt to persuade Her Majesty to cause the body to be brought up does not mean that he has such a control as will enable the writ to issue. Nor is it in our view relevant that if the writ were issued the Secretary of State might well feel it proper to influence the production of the body. … we can find nothing in the facts of this case which would justify us in calling upon him to produce the body.

68. This is thus an example of a case where de facto control was not found on the basis of a mere ability to attempt to influence, absent some existing right or entitlement to require production of the person.

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47 *Plaintiff M68* (2016) 257 CLR 42 at [173].
48 *Ex parte Mwenya* [1960] 1 QB 241 (***Mwenya***).
49 *Mwenya* [1960] 1 QB 241 at 265.
50 *Mwenya* [1960] 1 QB 241 at 264-265.
51 *Mwenya* [1960] 1 QB 241 at 279-280.
52 *Mwenya* [1960] 1 QB 241 at 280.

69. *Mwenya* was distinguished but not disapproved in *Rahmatullah*.[53] The point of distinction must have been the absence there of something equivalent to the 2003 MOU.

C.2.5 *Sankoh* [2000] EWCA Civ 386

70. Mrs Sankoh sought a writ of habeas corpus against the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence for the release of her husband, Saybana Sankoh, who was the leader of the Revolutionary United Front in Sierra Leone.[54] He was arrested in Sierra Leone and detained there. Her claim was that "there is material tending to show that he is within the custody or control of the British authorities".[55] The evidence appears to have been that the British Armed Forces gave certain support to the Sierra Leone police and that the UK Forces had at one point air-lifted Mr Sankoh to the United Nations Headquarters' Helicopter Landing Site. Mr Sankoh was thereafter moved by the Sierra Leone police without assistance from the UK forces.[56]

71. The primary judge had held:[57]

> I quite accept that the United Kingdom Government may have political influence and perhaps significant political influence with the Government of Sierra Leone, but that, in my view, falls very short of constituting the kind of de facto control necessary for a writ of this kind to be issued.

72. Laws LJ held that:[58]

> In my judgment there is not the whisper of an objective basis for the suggestion that the Secretary of State has now, or had at any time from July 2000 onward, anything amounting to a degree of control over Mr Sankoh such as might justify the issue of a writ of habeas corpus. The case on its facts is wholly unlike the case of *O'Brien*, to which, as I have said, much reference was made.

73. This is another case that illustrates the absence of de facto control where there is no legal right or entitlement to call for production of the person.

74. *Sankoh* was not disapproved in *Rahmatullah*. In fact, it was referred to with evident approval, but distinguished on the facts.[59]

53 [2013] 1 AC 614 at [55]-[60] (see particularly how *Mwenya* was explained to sit with *O'Brien* at [57]).
54 *Re Sankoh* [2000] EWCA Civ 386 (***Sankoh)*** at [2].
55 *Sankoh* [2000] EWCA Civ 386 at [2].
56 *Sankoh* [2000] EWCA Civ 386 at [4].
57 *Sankoh* [2000] EWCA 386 at [7].
58 *Sankoh* [2000] EWCA Civ 386 at [12].
59 [2013] 1 AC 614 at [61]-[62].

C.2.6 *C3 and C4* [2022] EWHC 2722 (Admin) and [2023] EWCA Civ 444

75. The most closely analogous case is *C3 and C4 v Secretary of State for Foreign, Commonwealth & Development Affairs* (***C3 and C4***).[60] In that case, two British citizens detained in Al-Roj by the AANES sought a writ of habeas corpus directed to the UK Secretary of State for Foreign, Commonwealth & Development Affairs.

76. At first instance, the Divisional Court (Jay J; Lewis LJ agreeing) refused to issue the writ because the Secretary did not have de facto control over C3 and C4.

77. That the AANES had set terms which the United Kingdom could choose to agree to did not mean that the Secretary had control. "It is exactly the converse. Although compliance with the AANES's conditions requires the [Secretary] rather than anyone else to take certain steps, and in that narrow sense it is within the latter's power to take them, the fact remains that the piper calling this particular tune is not the UK Government".[61]

78. A different way to notice that there was no de facto control was to observe that the Secretary could not simply cause C3 and C4's release in response to the writ. "[T]he executive was being required to initiate a dialogue" and "engage in a diplomatic exercise".[62]

79. Another way to see it is that release would require further additional exercises of power by the Secretary (for example, the issue of travel papers).[63] That is relevant to control in this way. Suppose a respondent is subject to a writ of habeas corpus, the respondent approaches the detainer and the detainer says "I will give you the person so long as you pay me $1,000,000" or "so long as you exchange that political prisoner in *your* custody". Why cannot the respondent say no? That is probably subject to judicial review, but what then are the judicial standards by which jurisdictional error is to be identified? And if no jurisdictional error is identified, on what basis can the respondent be made to do more? If the answer is "they can't be" then how is there de facto control? There is no satisfactory answer to these questions.

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60 [2022] EWHC 2722 (Admin) (first instance) and [2023] EWCA Civ 444 (appeal).
61 [2022] EWHC 2722 (Admin) at [92].
62 [2022] EWHC 2722 (Admin) at [98].
63 [2022] EWHC 2722 (Admin) at [100]-[101].

80. C3 and C4 then appealed to the Court of Appeal. That appeal was unanimously dismissed, for reasons given by Underhill LJ (Holroyde and Elisabeth Laing LJJ agreeing) which "essentially accord with those of the Divisional Court".[64]

81. Underhill LJ emphasised that it was of "fundamental importance" that the United Kingdom had no role in C3 and C4's original detention.[65] The same is true here.

82. Consistently with the Commonwealth's contentions about de facto control, Underhill LJ accepted that "such control over the Applicants' detention as the AANES's offer gave him was qualified and conditional", which is not sufficient to warrant a finding of de facto control.[66] "As a matter of principle, it can only be because a respondent has an unconditional power (*de facto* if not *de jure*) to obtain the applicant's (re-) transfer to their custody that it would be right to treat them as custodians".[67]

83. Underhill LJ also emphasised the "artificiality of fitting the present situation into the framework of habeas corpus" by considering what would occur if the Secretary accepted the AANES offer.[68] C3 and C4 would be released from the custody of the AANES at the moment of hand-over somewhere in its territory, but it was not clear that they would then be in the custody of the UK Government or that the Secretary could be expected to justify their production to the Court on the return date. The same questions arise here as the Commonwealth has not identified any lawful means to effect production to the Court.[69]

C.3 Control and the onus and standard of proof

84. The Commonwealth submits that STCA has the onus of proving that the Commonwealth has de facto control over the detention of the women and children.

85. It is well established that the onus of proving detention lies with the applicant for the writ of habeas corpus.[70]

86. What the applicant must show is not only the fact of detention but also that **the named respondent** is detaining them (that is, that the party named in the writ has control). Because correct identification of the respondent is rarely in issue, the cases are not always

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64 [2023] EWCA Civ 44 at [61].
65 [2023] EWCA Civ 444 at [49]-[52]. See also *Rahmatullah* [2013] 1 AC 614 at [104]-[105] (Lord Phillips).
66 [2023] EWCA Civ 444 at [53].
67 [2023] EWCA Civ 444 at [54].
68 [2023] EWCA Civ 444 at [57].
69 Logan Affidavit, [52].
70 See, eg, *Yoxon v Secretary to the Department of Justice* (2015) 50 VR 5 at [34] (T Forrest J); *Taniora v Commonwealth* [2016] FCA 1253 at [28(a)] (Griffiths J).

explicit about this.[71] But it follows as a matter of principle. It is for an applicant to name the correct respondent.

87. In the tort of false imprisonment, the plaintiff must prove detention by the defendant.[72] On this issue, the allocation of the onus for the writ of habeas corpus is the same as in the tort of false imprisonment.[73] There is no basis for a different allocation.

88. Being a civil action, the standard of proof for the applicant is "on the balance of probabilities".[74] Thus, the applicant must prove that the Commonwealth has de facto control over the detention of the women and children on the balance of probabilities. If the applicant fails to do so, the originating application should be dismissed.

89. Contrary to **AS [7]-[8]**, the Commonwealth has no onus of showing that it "cannot secure their release". To proceed as if the Commonwealth has the legal burden on the issue of control over the women and children's detention is to ignore the well-established position that is for an applicant to prove the fact of detention.

90. And contrary to **AS [26]-[29]**, it is not sufficient for an applicant merely to show that there is a "prima facie case" that the person they have sued is controlling detention of the women and children. Importantly, STCA's references to the judgments in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* are to passages about the onus of proof in respect of the issue of the **lawfulness of detention**, not the **fact of detention**. In short, STCA has misread *McHugh* and ignored that that the passages they cite were about the onus of proof as to legality, not as to the fact of control of detention by the respondent.

91. If STCA were correct, then all a plaintiff suing for damages for false imprisonment would need to show is detention on a prima facie basis. That is obviously not the case.

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71 See, summarising the relevant authorities, *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [103(1)] (Anderson J) (overturned on appeal, but not on this point).

72 *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 599 (Murphy J); *Carnegie v Victoria* (Unreported, Supreme Court of Victoria (Full Court), 14 September 1989); *Ferguson v Queensland* [2007] QSC 322 at [14] (Lyons J); *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [153]-[154] (Wigney J); *Ruddock v Taylor* (2005) 222 CLR 612 at [140] (Kirby J); *Ryan v Bunnings Group Ltd* [2020] ACTSC 353 [473]-[475] (Loukas-Karlsson J) (appeal dismissed: [2022] ACTCA 29); *Cubillo v Commonwealth* (2001) 112 FCR 455 at [262] (Sackville, Weinberg and Hely JJ); *TD v New South Wales* [2010] NSWSC 368 at [49(2)] (Hall J).

73 As to the tort of false imprisonment, see *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [24] (Gageler J); *AKW22 v Commonwealth* [2023] FCAFC 71 at [38]-[42] (Rares, O'Sullivan and Feutrill JJ).

74 *Evidence Act 1995* (Cth) s 140(1).

92. *AKW22 v Commonwealth* is instructive.[75] The appellant in a habeas corpus case submitted that it was enough for him to prove the fact of detention without needing even to contend that the detention was unlawful because the onus of proving lawfulness lay on the detainer.[76] The appellant made that submission based on an asserted analogy between the onus of proof for habeas corpus and the onus of proof for false imprisonment. In the latter, there is no obligation on an applicant to show a prima facie case of unlawfulness to shift the legal onus of proving detention to the detainer. So the appellant said that there was similarly no such obligation when seeking a writ of habeas corpus.

93. The Full Court rejected that argument, holding that habeas corpus actually required an applicant to prove not only the fact of detention (as in the tort of false imprisonment) but also a prima facie case of unlawfulness. The latter was an **additional** requirement. "[P]roving the fact of imprisonment is not the same as proving in *habeas corpus* proceedings that there is a "case fit to be considered" so as to oblige the detainer to demonstrate the lawfulness of the detention at the time of the application and or hearing".[77] This is instructive because it shows that the requirement for a prima facie case of unlawfulness is a constraint on habeas corpus, not just some liberating standard.

94. STCA's error then flows through to **AS [30]**. A respondent need not adduce "strong, clear and cogent evidence" in respect of the fact of detention. STCA cites Allsop CJ in *McHugh* at [50], who was expressly dealing with the lawfulness of detention, and Clark and McCoy, who also say "[t]here must be clear and cogent evidence of **the lawfulness of the detention**" (emphasis added).[78]

95. Nor is it enough for STCA merely to show "sufficient doubt" about whether the Commonwealth is controlling detention of the women and children if that is to suggest something other than proof by STCA on the balance of probabilities: **cf AS [33], [79]**. Of course, a tribunal can have a doubt and still be persuaded of a matter on the balance of probabilities. But to repeat, the legal onus of proving control of detention is on the applicant and the standard of proof is the balance of probabilities.

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75 [2023] FCAFC 71.
76 [2023] FCAFC 71 at [32]-[33].
77 [2023] FCAFC 71 at [40].
78 *Habeas Corpus: Australia, New Zealand and the South Pacific* (2nd ed, Federation Press, 2018) at 238.

96. If STCA were correct, it would appear that the Commonwealth would have to prove that it did not have control *beyond a doubt*, which is the criminal standard of review on a matter upon which STCA carries the legal onus. That cannot be so.

97. The language of a "prima facie" case was used in *Rahmatullah*, but that was in respect of the lawfulness of detention not the fact of detention.[79] Importantly, no member of the Supreme Court held that the writ should issue because there was a prima facie case that the requisite degree of control had been shown. Each held that the requisite degree of control had in fact been proved.

98. In *O'Brien*, the Court of Appeal made absolute the writ of habeas corpus to allow the Home Secretary to clarify whether there was control or not because the Court was in "doubt" about it. That should not be understood to mean that all an applicant for habeas corpus must show is "doubt" about the fact of their detention. So much is clear from Lord Kerr's discussion of *O'Brien* in *Rahmatullah*.

99. It will be recalled that Lord Kerr said, in a passage **not** cited by Gageler J in *Plaintiff M68*, that the writ can issue to a person who has "either actual control of the custody of the applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court".[80] Lord Kerr said of *O'Brien* that "the Court of Appeal in effect held that there was a reasonable prospect that the Home Secretary could exert sufficient control over the custody of Mr O'Brien to justify the issue of the writ".[81] Lord Kerr referred to "the conclusion that there was at least a reasonable prospect that the Home Secretary could procure Mr O'Brien's return to England".[82]

100. Mapped against what Lord Kerr said control means (actual custody or the reasonable prospect of exerting control over custody), it is apparent that Lord Kerr explained what happened "in effect" in *O'Brien* on the basis that the Court of Appeal actually found that there was control as that concept was understood by Lord Kerr. Lord Kerr did **not** say that *O'Brien* proceeded on the basis that the writ could issue because there was a prima facie basis for showing a reasonable prospect of exerting control.

101. In *Barnardo v Ford*, the House of Lords affirmed the issue of the writ of habeas corpus in circumstances where there was a doubt as to whether the appellant had relinquished

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79 See [2013] 1 AC 614 at [36], [40], [53] (Lord Kerr), [87], [95] (Lord Phillips).
80 [2013] 1 AC 614 at [45].
81 [2013] 1 AC 614 at [46].
82 [2013] 1 AC 614 at [48].

control as he asserted.[83] But no clear statement of principle emerges from the separate speeches as to how this doubt flows through to questions of onus and standard of proof.

102. This Court should adopt the following approach. Where a court is satisfied that the applicant has shown detention on the balance of probabilities and the prima facie unlawfulness of detention has not been positively disproved by the respondent, the Court can either order release or, if there is some doubt about control, order a formal return to the writ. The existence of such doubt does not mean that the applicant has failed in its onus, because doubt as to control can co-exist with proof on the balance of probabilities of detention. The existence of such doubt, though, justifies a court in ordering a formal return rather than simply ordering release.

103. In any event, the questions of onus and standard of proof will not ultimately be determinative here. Whoever the onus is on and whatever the standard of proof, the Court will not find control to the requisite degree as explained below in Part C.4. On the Commonwealth's primary position, STCA will not show de facto control on the balance of probabilities. If it is sufficient for STCA to show a prima facie case of de facto control, that burden will not be discharged. And if it is for the Commonwealth to prove that it does not have control on the balance of probabilities, or indeed to the (criminal) standard of beyond a reasonable doubt, then it has discharged that burden.

C.4 No de facto control over the detention of the women and children

C.4.1 Asking without a power, right or entitlement is not control

104. The uncontroversial or incontrovertible facts that (a) the Commonwealth could request the AANES to release the women and children and (b) the AANES would likely say "yes" to releasing some or all of the women and children, subject to the Commonwealth complying with certain conditions does not amount to de facto control.

105. That is the effect of the legal submissions above. It is a result that is squarely supported by *C3 and C4* and by the appellate court decisions in *Mwenya* and *Sankoh*. It distinguishes *O'Brien*, *Rahmatullah* and *Plaintiff M68* on a principled basis.

106. In short, this outcome is consistent with the entire body of case law, and with principle. A respondent does not have control over the detention of a person merely because the respondent can request that the detainer hand them over and acquiesce to whatever

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[83] [1892] AC 326.

conditions the detainer chooses to impose. A person is not in control of a situation because they can agree to do whatever the armed intruder directs them to do.

C.4.2 Citizenship does not demonstrate control

107. STCA contends that the courts in *C3 and C4* overlooked the fact that they were British citizens (**AS [89]**) and relies more generally it seems upon the fact that the women and children are or are entitled to become Australian citizens (**AS [90]-[92]**).

108. The first point is wrong. The Divisional Court expressly considered that fact.[84]

109. The second argument could not assist in showing control. Any suggestion otherwise overlooks the fact that the authorities have required some form of correlative right/duty (even if not enforceable) as between the respondent and the person with actual custody of the plaintiff, which is lacking here. Citizenship, or an entitlement to citizenship, cannot bridge that gap: it could say nothing as to the position of the person with actual custody.

110. But, even putting that to one side, the argument is wrong on its own terms. The sweeping submissions in **AS [90]-[92]** reduce to a proposition that the Commonwealth is involved in the detention of an Australian citizen abroad simply by virtue of not asking for their release and then taking steps to achieve their return (**AS [92]**). That could only be possibly so if there was some duty upon the Commonwealth to assist a citizen return to Australia. Yet the fact that they have a right to return[85] does not mean they have a legal right to be assisted to do so, as COVID-19 border lockdowns illustrated powerfully. A threshold problem for STCA is that there is no basis for a contention that there is some legal duty (let alone a constitutional one as they suggest at **AS [93]-[94]**) to assist a citizen to return).

111. And suffice it to say, whatever rights a person has at international law are not actionable as a matter of domestic Australian law unless incorporated into it (**cf AS [94]**).

112. All this being so, an omission to facilitate return to Australia cannot be converted into a positive contribution to someone else's detention.

C.4.3 The nature and role of judicial power

113. STCA seeks to distinguish *C3 and C4* on the basis of our separation of powers under the Constitution (**AS [80]**) and the role of the judiciary in guarding liberty (**AS [93]**).

84 [2022] EWHC 2722 (Admin) at [55].

85 See *Potter v Minahan* (1908) 7 CLR 277 at 295 (Griffith CJ), 305 (O'Connor J); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [31], [74] (Kiefel CJ, Keane and Gleeson JJ).

114. The point of distinction is unsound. The UK judiciary is just as zealously protective of liberty as the Australian judiciary, and our written constitution does not bear upon that.

115. The point of principle also points against STCA. Accept that Ch III is an important safeguard of liberty, it is relevantly liberty against executive detention, which may, in turn, require consideration of the *Lim* exceptions (see above). Where the executive had no role in the person's original detention, no role in their ongoing detention and no arrangement in respect of the person's detention or repatriation, it is unsurprising that concerns about the executive's conduct are not enlivened.

116. To the contrary, a close consideration of the allocation of responsibilities between the branches of government suggests powerfully that where what is needed is for the executive to negotiate with the detainer to achieve the person's release, engage with other foreign states and actors, and deploy Commonwealth officials, then that is something which it is for the executive and not the courts to do.

C.4.4 The status of the AANES

117. STCA criticises *C3 and C4* on the basis that the AANES is not a sovereign state (**AS [81]-[86]**). The status of the AANES did not meaningfully bear on the extent of the UK's control, nor does it meaningfully bear on the extent of the Commonwealth's control.

118. While not altogether clear, it seems that STCA contends that one should not look for any kind of intergovernmental arrangement in order to conclude that a respondent has "control" where the person detaining is not a foreign government: **AS [85]**. There are a number of difficulties with this submission.

119. *First*, the fact is STCA has pitched its case in terms of there being an "Arrangement". Whether or not STCA is right that one is not needed, the case it has propounded is that one exists. That is the case the Commonwealth comes to meet.

120. *Second*, for reasons already given the existence of a right or entitlement is important whenever one person has physical custody of a person and habeas corpus is sought against another person. The status of the person with physical custody does not change that.

121. *Third*, *Barnardo* is no authority for the proposition that an arrangement is unimportant when dealing with a detainer who is not a government. No reading of that case would regard it as standing for such a sweeping proposition.

122. Further, it should not go unnoticed that it will very often be the case that the detaining party is not a nation state. Take, for instance, a governor of an Australian jail. That the

AANES is not a sovereign state does not make this case extraordinary, or bear upon the question of control in any meaningful way.

123. For the avoidance of doubt, **AS [82]-[84]** may be put to one side, because the Commonwealth does not rely on the act of state doctrine in this case.

C.4.5 Involvement in the detention

124. As noted at [19] above, STCA seeks to establish that the Commonwealth is involved in the women and children's detention through some "Arrangement". In that way STCA contends that *C3 and C4* can be distinguished (**AS [75]-[79]**).

125. The evidence will not establish any involvement of the Commonwealth in the detention of the women and children pursuant to the alleged "Arrangement". The Commonwealth will address this in greater detail in closing.

126. For present purposes, the following should be noticed. STCA's contention is that the Commonwealth is involved in their detention because the Coalition is so involved. To the extent STCA's evidence about the Coalition survives objection, it will not establish the facts they seek in any event.

127. *First*, STCA depends upon an elision, or uncritical conflation, of the Coalition and the Commonwealth. The evidence will not show that anything "the Coalition" does should be attributed to the Commonwealth in fact or in law.

128. *Second*, the evidence of Real Admiral Lybrand will establish that the Commonwealth's involvement in the Coalition does not warrant any conclusion that the Commonwealth is involved in their detention.

129. *Third*, STCA's own evidence does not establish any greater involvement by the Commonwealth in the detention at Al-Roj.

130. Former Ambassador Galbraith's evidence is that "al Roj is a prison camp operated under the authority of the [AANES]".[86] It is the SDF who "guard the perimeter" and it is the YPJ who provide most of the security within it.[87]

131. Professor Newton's evidence is that "[t]he detention facilities are not operated by U.S. Armed Forces, nor do U.S. Armed Forces operate directly within the facilities".[88] If the

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86 Affidavit of Peter Woodward Galbraith sworn 26 July 2023, PWG-1 (**Galbraith Report**) at 7.
87 Galbraith Report at 7.
88 Affidavit of Michael Anthony Newton affirmed 25 July 2023, MAN-1 at 9.

United States does not, it is improbable that Australia does given the centrality of the United States' involvement in the Coalition on STCA's evidence.

132. *Fourth*, STCA's witnesses purport to give evidence about the United States' activities. The United States is not the Commonwealth.

133. *Fifth*, STCA's expert witnesses do not have responsibility for or operational insight into Australia's activities in northeast Syria. Any opinions that survive objection will be entitled to very little weight.

C.4.6 Previous repatriation

134. STCA also argues that *C3 and C4* is distinguishable because the Commonwealth has repatriated people from northeast Syria in the past (**AS [75]**). That fact does not demonstrate present control over the women and children. That the Commonwealth acquiesced in demands once in order to effect the release of one group of people does not mean the Commonwealth now has control over those not within that previous group.

D. HABEAS CORPUS: OTHER MATTERS

D.1 Standing

135. The Commonwealth accepts that STCA has standing to seek habeas corpus on behalf of those women and children who have expressly authorised it to do so on their behalf. In respect of those individuals, STCA brings this proceeding as their agent.

136. As to women and children who have not expressly authorised STCA to seek relief on their behalf, STCA does not have standing. In *Clarkson,* Crockett J said that standing was confined to situations where "it appears that the person who sought the liberation of a detainee has been permitted to do so because that person had some entitlement to the custody of the detainee, or at least to seek the release from detention of a person detained by reason of some special circumstance that elevated him above the status of a mere stranger or volunteer."[89]

137. STCA does not claim to be entitled to custody of the Australian women and children who have not authorised it to bring these proceedings.

138. Nor is there any basis to conclude that STCA is in some elevated position above that of a stranger or volunteer. Given that STCA has been able to procure evidence of the authorisation of some women and children within Al-Roj, no inference can be drawn that

[89] *Clarkson* [1986] VR 464 at 465.

STCA is incapable of obtaining the same for the other women and children detained in the same location.

D.2 Procedure

139. If the Court rejects the Commonwealth's submissions and determines to make orders, then it would be inappropriate to order release because it will not be open to conclude without a doubt that the Commonwealth has the women and children in its control. Accordingly, the appropriate order would be for a formal return to the writ to be programmed. The Commonwealth will seek an opportunity to be heard on the form of any orders at the time of judgment.

E. JUDICIAL REVIEW: NO NON-REPATRIATION DECISION HAS BEEN MADE

140. STCA's case is that "it may be inferred that the First Respondent, or another officer of the Second Respondent, has decided not to make a further repatriation decision for the remaining Australian women and children" (Concise Statement at [6]), and it is in respect of that decision that declaratory relief is sought (Originating Application, Order 3).

141. Whether a decision-maker has made a decision is a question of fact.[90] STCA has made no attempt in its submissions to justify its contention that a decision not to repatriate the women and children has been made. The contention is entirely without foundation.

142. The highest STCA's case gets is its unilateral declaration, by letter of 19 May 2023, that "If you do not communicate a decision either <u>to make</u> a further repatriation decision, or <u>to not make</u> a further repatriation decision, by that day [being 26 May 2023], STCA will infer, having regard to the time you have had to make such a decision, that you have decided to not make a further repatriation decision".[91] Suffice it to say, a prospective litigant cannot bootstrap itself into a finding that a decision has been made simply by dictating terms upon it will regard a decision to have been made.

143. The Acting Deputy Counter-Terrorism Coordinator responded on 26 May 2023, saying in part: "While I am unable to respond to your request within the requested timeframe, I can assure you that your correspondence remains under careful consideration".[92] He also said "If I have any update to provide to you about your request, I will endeavour to do so

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90 *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 at [51] (Kerr J), [141]-[143] (Moshinsky and Derrington JJ).

91 Tinkler Affidavit at 6.

92 Tinkler Affidavit at 404.

promptly".[93] The letter is not evidence of a decision having been made and shows only that the matter remains under consideration.

144. STCA seems to rely upon the fact that it has been agitating for a decision for some time such that the "delay" in making a decision can ground an inference that an adverse decision has been made. That inferential reasoning should be rejected.

145. It is only meaningful to speak of "delay" if there is a duty to consider making a decision to repatriate the women and children. As submitted at Part G below, there is no such duty.

146. Finally, Ms Logan and Ms Spencer both give evidence that they are not aware that a decision not to repatriate the remaining Australian woman and children has been made.[94]

F. ALTERNATIVELY, NO ERROR IN THE NON-REPATRIATION DECISION

147. If the Court finds that a Non-repatriation Decision has been made, it does not follow that relief should be granted. STCA must still show jurisdictional error in any such decision. Its written submissions do not condescend to explain how that can be done.

148. In the circumstances, the Commonwealth focuses upon one point fatal to STCA's argument. The Commonwealth submits that the Court does not have the reasons for any Non-Repatriation Decision (alternatively, does not have the full reasons), absent which STCA will not be able to prove any jurisdictional error as a matter of fact.

149. It is well established that identification of the reasons for a decision is a question of fact.[95]

150. The Court should not find that the letter from the Acting Deputy Counter-Terrorism Coordinator dated 26 May 2023 is a statement of reasons. It does not purport to be a statement of reasons. It has neither the look nor the feel of such a statement. And there is no obligation to have given reasons. Had such an obligation existed, that would provide powerful inferential support for treating this letter as a statement of reasons.

151. If the Court finds that this letter is a statement of reasons (which it is not), then the Court could not find that it is an exhaustive statement of reasons. If a document is provided which (a) does not purport to be reasons and (b) is not provided pursuant to an obligation to provide reasons, then a Court should be slow to infer anything from an omission from the document.[96] In circumstances where the Court cannot be sure of the reasons for

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93 Tinkler Affidavit, MT-3.

94 Logan Affidavit [65]; Spencer Affidavit [9].

95 *Long v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 610 at [32] (Carr J; Merkel and Hely JJ agreeing).

96 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25].

decision, and in the absence of a statutory framework confining the governmental power being exercised, the Court will not find a jurisdictional error established.

152. With respect to the alleged prohibited consideration and the alleged improper purpose, it is alleged that the Commonwealth cannot, consistently with the Constitution, "participate in maintaining the unlawful detention of Australian citizens by a foreign power outside Australia, for the purpose of protecting the safety and security of other Australian citizens".[97] No submissions have been made in support of this contention.

153. The argument depends upon proof that the Commonwealth <u>is</u> participating in their detention. But the evidence demonstrates that the Commonwealth is not responsible for the women and children being in Al-Roj and the Commonwealth has not supported the operation of Al-Roj.[98] A mere failure to request a person's release does not amount to positive participation in their detention, especially absent a duty to request their release. It follows that if the Court reject the arguments that the Respondents have a duty to return the Australian women and children, or finds that no Non-repatriation Decision has been made, then the arguments about consideration of an alleged mandatory irrelevant consideration or acting for an ulterior purpose must also fail.

G. NO DUTY TO MAKE A FURTHER REPATRIATION DECISION

154. STCA's originating application seeks a declaration that "in failing to make a further repatriation decision, the First Respondent or the Second Respondent acted for an ulterior purpose, or acted unreasonably" (Originating Application, Order 4).

155. In its concise statement, it contends, somewhat differently, that "in all the circumstances, they are required to properly consider the request in the 19 May 2023 and 23 May 2023 letters from the Applicant, and to make a decision whether or not to make a further repatriation decision" (Concise Statement [25]).

156. In its written submissions, STCA merely baldly submits that "the Court will be asked whether the respondents erred in failing to decide whether or not to request AANES release the remaining women and children according to law, in circumstances where it was incumbent on the respondents to do so" and that "it will be relevant for the Court to consider the resulting injustice and any breach of rights of the women and children by the failure of the respondents to make any further repatriation decision" (**AS [105]**).

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97 Concise statement, [24(4)].
98 Lybrand Affidavit, [34].

157. At the heart of these contentions, as STCA recognises in **AS [105]**, is an unsubstantiated contention that the respondents have a duty to make a further repatriation decision.

158. That should be rejected. The cases in **AS fn 191** are not authority for any such duty.

159. *Hicks v Ruddock* merely summarised Mr Hicks' argument that the Australian government owes a "duty" of protection.[99] Whether such a duty existed was not decided on the summary judgment application. *C3 and C4* at [59] is no more than an observation by Underhill LJ that there "may" be a case that difficulties concerning repatriations and national security issues could not justify a decision of the Secretary not to secure the applicants' repatriation. *C3 and C4* did not decide the point, as judicial review was not sought.

160. STCA otherwise advances no argument in its submissions for why this Court should find that any non-repatriation decision was made or why any such decision is affected by error.

H. NO DUTY TO MAKE A DECISION WITHIN A REASONABLE TIME

161. In so far as STCA's real argument is or includes a contention that there has been unreasonable delay in making a further repatriation decision,[100] this depends upon there being an express or implied obligation to make a decision within a reasonable time.

162. For example, it has been said that "[a] statutory power … conditioned upon the occurring of a certain event … will often be subject to an implied requirement that it be exercised within a reasonable time".[101]

163. A non-repatriation decision would be made in the exercise of non-statutory executive power under s 61 of the Constitution. There is no basis to find, as a matter of constitutional construction, that there is any duty to make a decision to ask the AANES to do anything within a reasonable time. It follows that there is no basis to contend that there has been any failure to do so.

Date: 21 September 2023

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99 (2007) 156 FCR 574 at [61].

100 *ASP15 v Commonwealth* (2016) 248 FCR 372 at [23].

101 *Kardas v Australian Securities Commission* (1998) 53 ALD 303 at 313 (Heerey J).