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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	11/09/2023 4:05:35 PM AEST
Date Accepted for Filing:	11/09/2023 4:05:42 PM AEST
File Number:	VID403/2023
File Title:	SAVE THE CHILDREN AUSTRALIA v MINISTER FOR HOME AFFAIRS & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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Federal Court of Australia
District Registry: Melbourne
Division: General

No: VID403/2023

Save the Children Australia
Applicant

Minister for Home Affairs and Another
Respondents

Applicant's Outline of Opening Submissions

A. Overview

'Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.'[1]

1. Australian **women and children**[2] are detained outside Australia and its external territories, by a non-state organisation, specifically: in Al-Roj camp, in North-East Syria, by the Autonomous Administration of North and East Syria (the **AANES**) and its military wing, the Syrian Democratic Forces (**SDF**).

2. Evidence filed by the Applicant (**Save**) shows, prima facie, that: (1) their detention is unlawful; (2) Australia is a member of the **Coalition** against ISIL[3]; (3) the Coalition has allied with the AANES, and specifically supports the AANES to maintain the detention of persons including the women and children; (4) the AANES has asked Coalition members including Australia to repatriate their citizens; (5) were the Second Respondent (the **Executive**) to exercise the executive power of the Commonwealth to request the release of the citizens for repatriation to Australia, the AANES would release those citizens to the Executive.

3. On that evidence, Save invokes the judicial power of the Commonwealth, deriving from habeas corpus, to require the Executive: (1) to prove either that the women and children are lawfully detained, or that the Executive cannot effect their release; or otherwise (2) to bring their bodies to the Court.

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1 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-521 (Brennan J).
2 The case also concerns the detention of persons who are eligible for citizenship.
3 The Islamic State in Iraq and the Levant, also sometimes described as "ISIS" or "Daesh".

4. Alternatively, if on that evidence the judicial power derived from habeas corpus is not available, then Save seeks judicial review of a decision, which the Court should infer has been made by the Executive — by the First Respondent or otherwise — to not take all reasonable steps to effect their release.

5. Save is a registered charity with the stated purpose of supporting children in need.[4] It brings this proceeding for the benefit of the women and children presently detained in the Al-Roj camp in North-East Syria.

6. All of the women are citizens. The children are either citizens or eligible for Australian citizenship.[5] Many of the children were born in the camps, and many of the women travelled to Syria when they themselves were children. None have been charged with any crime, and (on the evidence filed by Save) there is no lawful basis for their detention.

7. These opening submissions seek to demonstrate why, in law and fact, the evidence filed by Save is a sufficient basis for habeas corpus to (at least notionally) "issue", such that the onus shifts to the Executive to prove either that the detention of the women and children is lawful, or that the Executive cannot secure their release and return their bodies to the Court.

8. On the (notional) "return", the evidence of the Executive is not sufficient to establish — to the requisite cogent standard — that the detention is unlawful, or that the Executive cannot effect the release of the women and children or bring their bodies to the Court. It follows that the Court should make an order in the nature of habeas corpus, requiring the Executive to bring the women and children to the Court.

B. Save's evidence

9. Australia is a member of the Coalition.[6] There are now more than 80 member countries, which include the United States of America and the United Kingdom.[7] The Coalition was

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4 Save the Children Australian Constitution, p 54 of the Annexure MT-1 to the Affidavit of Mathew Tinkler, affirmed 5 June 2023 (**Tinkler Affidavit**). The Statement of Mathew Tinkler dated 18 May 2023 (**Tinkler Statement**) commences on p 7 of the Annexure MT-1 to the Tinkler Affidavit. The truth of each fact stated in the Tinkler Statement is affirmed at [3] of the Tinkler Affidavit.

5 Tinkler Statement [37]-[39], Tinkler Affidavit, Annexure MT-1, 74–78 (redacted); *Australian Citizenship Act 2007* (Cth), s 16.

6 Affidavit of Michael Anthony Newton, affirmed 25 July 2023, Annexure MAN-1, 4, 8 (**Newton Report**); Affidavit of Peter Woodward Galbraith, sworn 26 July 2023, Annexure PWG-1, 9 [7.2] (**Galbraith Report**); Affidavit of Gregory James Barton, sworn 23 August 2023 (**Barton Affidavit**), Annexure GJB-1, [3.1] (**Barton Report**).

7 Newton Report, 8; Barton Report, [3.1]–[3.2].

formed in 2014 to combat ISIL attacks against Iraq.[8] Since the end of the active conflict, the Coalition now performs a role which includes supporting stability in North-East Syria.[9]

10. The AANES, and its military wing the SDF, are a non-state organisation,[10] which has, in fact, control over the part of North-East Syria where Al-Roj is located.[11]

11. The Coalition's role includes providing financial and other support for the construction and maintenance of detention facilities in North-East Syria,[12] which include Al-Roj. Government statements about the provision of such support tend to assign the responsibility to the Coalition, rather than particular governments.[13]

12. Australia also directly funds a number a humanitarian organisations on the ground that provide assistance in the camps.[14]

13. The AANES and SDF are allied with the Coalition.[15] The AANES and SDF are reliant on support from the Coalition, including to staff and maintain their detention facilities.[16] As the success of the AANES and SDF depend on maintaining and fostering the effectiveness of the Coalition,[17] there is a significant power disparity in their relationship.[18]

14. Professor Newton, an expert in international law who has substantial experience in Iraq, with the Kurdish Regional Government, and (since 2014) with ISIL and the situation in North-East Syria, opines that:

> Australian officials, along with the broader Coalition enjoys the practical ability, by virtue of exercising de facto authority, to make arrangements for ending the extended detention of Australian women and children in Northeastern Syria. As a logical corollary, Australian officials have the means, in my expert opinion, of securing the release and subsequent return, of the Australian women and children in Northeastern Syria.[19]

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8 Newton Report, 8; Barton Report, [6.5].
9 Newton Report, 8.
10 Newton Report, 5; Barton Report, [4].
11 Newton Report, 5; Galbraith Report, [2.1.1]; Tinkler Statement [24]; Barton Report, [1.1].
12 Newton Report, 5, 9–14.
13 Newton Report, 9.
14 Tinkler Statement, [53(2)], [53(4)(b)],[53(14)]; Annexure MT-1, 86, 100, 106.
15 Barton Report, [3.2].
16 Newton Report, 6-7, 16; Barton Report, [1.2], [4.2], [4.4]; affidavit of Gary Kamalle Dabboussy, affirmed 16 August 2023, [48(g)] (**Dabboussy Affidavit**).
17 Newton Report, 8.
18 Newton Report, 8, 11, 16.
19 Newton Report, 4–5. See also 7–8.

15. Professor Barton, who has extensively researched ISIS, and has experience working with Commonwealth agencies including the Attorney-General's Department and Department of Foreign Affairs and Trade, agrees.[20]

16. In October 2022, the Executive successfully effected the release from detention in Al-Roj and repatriation of four Australian citizen women and their thirteen children.[21] The Executive has not provided positive evidence that this could not be repeated in respect of the remaining women and children.[22]

17. The AANES and SDF have a strong interest in the repatriation of the remaining women and children, and the evidence does not show any contrary interest of the AANES and SDF, or any reason why the AANES and SDF would not support their repatriation, or take every reasonable step to facilitate it.[23] The AANES and SDF have repeatedly and publicly requested that Australia repatriate its citizens.[24]

18. The AANES have also expressed this to representatives of the respondents, including at the time of the repatriation in October 2022, when [redacted] the Foreign Relations Department of AANES told Marc Innes-Brown: "For years AANES had been asking for a solution to ISIS families as the facilities of ANNES were unable to deal with this challenge alone. Therefore they appreciated the Australian Government's repatriation decision."[25]

19. The US has also made requests for Australia to repatriate its citizens and has made offers of assistance to do so.[26]

20. Peter Galbraith, a former US Ambassador with extensive experience in North-East Syria, including more than 20 trips there since December 2014 (7 in the past 18 months), opines

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20 Barton Report, [4.3].

21 Tinkler Statement, [4]. See also Dabboussy Affidavit [3], [42]-[48].

22 See Tinkler Statement, [51]–[68]; Dabboussy Affidavit, [35]–[41].

23 Barton Report, [4.4]; Newton Report, 7; Galbraith Report, [4]; Affidavit of Joshua McDonald, affirmed 18 August 2023 (**McDonald Affidavit**), [15]; Tinkler Statement, [66].

24 Galbraith Report, [4.1], [6.1]; Tinkler Statement, [66(4)]. The Foreign Minister of the AANES told journalist Ellen Whinnett: "We are ready to co-operate with [Australia] and we together can solve this problem … We have this conversation and meeting between us and the ambassador of Australia in Lebanon about the situation in the area and we talk about the situation with the Australian people." Reported in the article 'Islamic fate: the lost heirs of Aussie terror', published 16 July 2022, at 138 of Annexure MT-1. That approach, communicated in July 2022, is consistent with the conduct and position of the AANES in respect of the most recent repatriation in October 2022.

25 Barton Affidavit, Annexure GJB-2, 727–728.

26 Galbraith Report, [4.3.4], [7.2]. See also Newton Report, 7.

that if Australia requests the release and repatriation of women and children, he is sure the AANES will agree and the US government, if asked, will assist.[27]

21. Other countries, including France, Germany, the US, Sweden, Finland, the Netherlands, Denmark, Albania, Kosovo, Bosnia-Herzegovina, Russia and Indonesia have also successfully and safely repatriated their citizens.[28]

22. The lay evidence, too, supports a finding that Australian officials have access to the camps as needed.[29]

23. There is evidence that the Respondents had decided to conduct further repatriations at the time of the successful repatriation in October 2022, and had engaged with the AANES regarding procedural arrangements. In a file note by Marc Innes-Brown,[30] reporting to senior officials within DFAT on his meeting on 27 October 2022 with the AANES [redacted] Foreign Relations, he noted "the plan to repatriate further groups of women and children".[31]

C. Habeas corpus in the Australian constitutional context

24. By as early as 1640, the writ of habeas corpus had come to play "a structural role in limiting executive power."[32] Although the writ is cast as the subject, a co-ordinate observation may

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27 Galbraith Report, [5.1]. See generally [5]–[7].

28 Galbraith Report, [5.3], [7.5]. See also Newton Report, 7, 15; Tinkler Statement, [64].

29 Newton Report, 5. See also Dabboussy Affidavit, [48]. For example, in late 2021, Australian officials attended Al-Roj across two visits to assess the women's attitude to repatriation: Dabboussy Affidavit, [32]. In 2022, they attended the camps to carry out DNA tests on the women and risk assessments: McDonald Affidavit, [17]–[18]. There are multiple Australian agencies present in the region. Australian officials have met with the women, and they meet with the camp administration 'repeatedly': Dabboussy Affidavit, [49]. It also appears that Australian officials have the capacity to access the camps and organise assistance for the Australians at very short notice. For example, on occasions, when Australian officials have been alerted to instances of Australians being seriously sick, medical assistance has appeared at the camp within 24-48 hours: Dabboussy Affidavit, [40]–[41]. Members of the Australian community including Save's CEO, Mat Tinkler and media advisor, Joshua McDonald, have safely and easily entered the camps, as have several Australian journalists: McDonald Affidavit, [4], [16]; Tinkler Statement, [27], [64(2)]. The Respondents have never denied that they have the practical ability to secure the release of the women and children: Dabboussy Affidavit,[38]-[39]. To the contrary, they have taken actions that are consistent with their ability to do so, and the CEO of Save has been informed that the Australian Government has access to the camp and "can operationalise repatriations where appropriate": Tinkler Statement, [87].

30 See email signature 'First Assistant Secretary, Middle East, Africa and Afghanistan Division, at DFAT' Barton Report, Annexure GJB-2, 726.

31 Barton Report, Annexure GJB-2, 728.

32 ***Plaintiff M68*** *v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 104 [156] (Gageler J); see also *Boumediene v Bush* 553 US 723 (2008), 2245, [741] (Kennedy J, with whom Stevens, Souter, Ginsburg and Breyer JJ joined) citing Rex Collings, 'Habeas Corpus for Convicts — Constitutional Right or Legislative Grace', (1952) 40 *California Law Review* 335,336, 742; Alexander Hamilton*, Federalist No. 84*, (The Federalist Papers, 1788); *Cisinski v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 507, 14 [38]-[39] (Lee J); *Ruhani v Director of Police* (2005) 222 CLR 489, 572 [282] (Callinan and Heydon JJ, dissenting but not on the point of principle of the importance of habeas in the separation of powers).

be made about the role of the writ in terms of the scope of judicial power vis-à-vis the executive. In this way, the writ secured the separation of power, by tasking the courts with freedom from indefinite detention at the will of the executive.[33] As Kovarsky has argued, the "defining feature" of the writ is that "it allows judges — not legislators or monarchs — to determine how much custodial process rendered detention lawful."[34] And in the words of the Supreme Court of the United States, the writ ensures that "the Judiciary will have a time-tested device … to maintain the 'delicate balance of government' that itself is the surest safeguard of liberty."[35]

25. In Australia, the writ was received into law as a matter of both common law and statute upon federation.[36] Its modern day constitutional significance is reflected in seminal statements of the High Court,[37] and in the recognition in *Kirk v Industrial Court (NSW)* that the writ forms part of the constitutionally entrenched supervisory jurisdiction of the State Supreme Courts.[38]

D. Prima facie case that women and children are unlawfully detained

26. Traditionally, an application for the writ of habeas corpus involved a two-stage process. The applicant would first apply for an order nisi (often ex parte). Upon establishing a prima facie case of unlawful detention, the writ would issue, and the respondent would be required to "produce the body" to the Court for a full hearing on the return.[39] If the respondent was unable to do so (for example, because they did not have control of the body), the Court would investigate whether a sufficient return to the writ had been made.[40]

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33 *Al-Kateb v Godwin* (2004) 219 CLR 562, 613 [140] (Gummow J), quoting from *Hamdi v Rumsfeld* 542 US 507(2000), 544-555 (Scalia J in dissent, though not on that principle).

34 Lee Kovarsky, '*A Constitutional Theory of Habeas Power*' (2013) 99(4) *Virginia Law Review* 753, 759.

35 *Boumediene v Bush* 553 US 723 (2008),2247, [745] (Kennedy J, with whom Stevens, Souter, Ginsburg and Breyer JJ joined).

36 *Antunovic v Dawson* (2010) 30 VR 355, [14]–[22] (Bell J). The *Habeas Corpus Act 1679* (Imp) and *Habeas Corpus Act 1816* (Imp) are the primary habeas statutes, though it is also worth mentioning the *Petition of Right 1627* (which declared in substance that orders of the monarch were not sufficient justification for the imprisonment of his subjects) and the *Habeas Corpus Act 1640 (*which provided that anyone imprisoned by command of the King or his Council or any of its members without cause was to have a writ of habeas corpus on demand to the judges of the King's Bench or the Common Pleas). See further *Plaintiff M68* (2016) 257 CLR 42, 103–104 [156]–[158] (Gageler J).

37 See, eg, *Plaintiff M68* (2016) 257 CLR 42, 103 [155] (Gageler J) citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-521 (Brennan J).

38 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

39 Judith Farbey and R. J Shape with Simon Atrill, *The Law of Habeas Corpus* (3rd edition, Oxford University Press, 2011) ch 8, 9; David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (2nd edition, Federation Press, 2018) ch 10.

40 See, eg, *Rahmatullah* [2013] 1 AC 614.

27. When, in modern times, the two-stage process is collapsed into one hearing, the historical context reverberates in the operation of the burdens and standards of proof.[41] The Full Court recently articulated the requirements of proof for habeas corpus in ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[42]

28. Allsop CJ observed that the applicant has first to establish a "prima facie case"[43] or to demonstrate "reasonable justification or probable cause".[44] Another way of expressing the question is "whether the party seeking relief has shown a case fit to be considered by the court."[45] Justice Mortimer observed that "[t]he contentions of the applicant for the writ must not be fanciful, or vexatious, and there must be some probative material adduced to justify the Court considering the allegations."[46]

29. Central to the reasoning in *McHugh* was the principle in ***Blatch*** *v Archer*,[47] that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[48] As Allsop CJ observed, "the necessity not to define precisely or overly finely in the abstract what has to be proved by the applicant can be appreciated if one recognises that in respect of some detentions… the incidents or aspects of the lawfulness of the detention are within the knowledge and power of proof of the detainer."[49]

30. On the return, the respondent must adduce strong, clear and cogent evidence,[50] and must prove their case to a high degree of probability.[51] The respondent must advance a positive case with a strong evidential foundation. That is a very important distinction from the usual position taken by the Executive as the respondent in judicial review matters commonly heard and determined by this Court, where the onus is on the applicant.[52] Unless the claim

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41 See further on the burden of proof, *Liversidge v Anderson* [1942] AC 206, 245 (Atkin LJ); *Greene v Secretary of State for Home Affairs* [1942] AC 284, 302 (Wright LJ).

42 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223.

43 *McHugh*[2020] FCAFC 223, 24-25 [60] (Allsop CJ).

44 *McHugh* [2020] FCAFC 223, 24-25 [60] (Allsop CJ).

45 *McHugh* [2020] FCAFC 223, 24-25 [60] (Allsop CJ).

46 *McHugh* [2020] FCAFC 223, 82 [273] (Mortimer J).

47 *Blatch v Archer* (1774) 1 Cowp 63.

48 *Blatch v Archer* (1774) 1 Cowp 63, 970.

49 *McHugh* [2020] FCAFC 223, 25 [60] (Allsop CJ).

50 *McHugh* [2020] FCAFC 223, 24 [57] (Allsop CJ); David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (2nd edition, Federation Press, 2018) 238.

51 *Antunovic v Dawson* (2010) 30 VR 355, 382 [122] (Bell J).

52 *Commonwealth v AJL20* (2021) 273 CLR 43, 89 [93] (Gordon and Gleeson JJ, in dissent but not on the relevant principle).

is supported by strong, positive evidence, the response risks being characterised as "nothing more than the old return".[53]

31. Save has made out a prima facie case of unlawful detention. The women and children are detained. They are unable to leave the perimeter of the camp, which is secured by armed forces. It is also uncontroversial that there is no apparent lawful basis for their detention. The women and children are held without charge or warrant.

32. In those circumstances, the Respondents have indicated that, subject to possible questions about justiciability and the applicability of the act of state doctrine, they will not advance any case about the legality of the detention.[54] In other words, this is a case where "the question whether the proposed respondent to the writ has the requisite control [is] the principal issue".[55]

E. Sufficient doubt whether the Respondents have control

33. As a matter of legal principle, Save's primary position is that it needs to show sufficient doubt whether the Executive can return the bodies to the Court, if required to do so. Save's alternative position is that it must also show sufficient doubt whether that ability is connected to the Executive's involvement in the detention. The requirement that an application show sufficient doubt on control, upon which the writ would notionally issue and the onus switch to the respondent on the notional return, is consistent with authority, and also questions of principle considered in *McHugh*, including by reference to *Blatch*.

34. Save's position on the dispositive legal principles for control is confined to a situation with the following features: (1) the detainees are Australian citizens and their children, being detained outside Australia and its external territories; and (2) the detention is not by, or under purported authority of, a foreign sovereign state.

35. The ordinary habeas case is one where the respondent to the writ is a person who has detained the body within the physical territory of the state over which the court has jurisdiction.[56] But the authorities demonstrate that neither detention within the territorial jurisdiction nor physical control is necessary, and that the court will require a return if the

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53 *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 240 (Darley CJ).

54 Concise Statement in Response (14 July 2023), [3].

55 ***Rahmatullah*** *v Secretary of State for Defence* [2013] 1 AC 614, 631G [25] (Lord Kerr JSC).

56 See *Rahmatullah* [2013] 1 AC 614, 636C [42] (Lord Kerr JSC), 649H [90] (Lord Phillips). See, eg, *R v Lindbergh; ex parte Jong Hing* (1905) 3 CLR 93, and more recently *Youth Empowered Towards Independence Incorporated v Commissioner of Queensland Police Service* [2023] QSC 174.

applicant can show sufficient doubt whether the respondent has control over the detention, in that it is able to bring the body to the court.[57]

36. Provided the Court has jurisdiction to issue the writ to the respondent, the writ can run to require that a body detained outside the territory be brought to court.

37. In ***Barnardo v Ford,***[58] the mother of a child, Harry Gossage, applied for habeas corpus to issue against Dr Barnardo, the head of an institution for children in which Harry had been placed, with her written agreement. Dr Barnardo filed an affidavit to the effect that he had given Harry to Mr Norton, who had informed Dr Barnardo he wished to adopt a child and take him to Canada, and that since Mr Norton took Harry, Dr Barnardo had had no communication with either Mr Norton or Harry, did not know either of their addresses, and Harry was no longer in Dr Barnardo's possession, custody or control.[59]

38. The Queen's Bench Division had jurisdiction over Dr Barnardo, even though it appeared that Harry was now in Canada.

39. The Queen's Bench Division granted the application for the writ. The Court of Appeal dismissed an appeal. Holding that the writ should issue, Lord Esher observed "I think the appellant is bound to use every effort to get the child back and produce it in order that the Court, and not he, may determine what ought to be done with it".[60] Fry LJ agreed, observing "[t]he writ appears to me to proceed on the hypothesis that obedience to it is possible. If it be shown to be impossible; as a general rule, I think the writ ought not to issue".[61]

40. Dr Barnardo appealed to the House of Lords, which dismissed the appeal, and extended the time for return of the writ to three months from the date of judgment.[62] Lord Watson disagreed with an aspect of the reasoning of the Court of Appeal below, holding that the writ is intended to facilitate the release of persons actually detained in unlawful custody, not to afford a means of inflicting penalties on persons by whom they were at one time illegally detained.[63] His Lordship observed, by reference to the form of the writ, that "it is

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57 See further, Matthew Groves, 'Habeas Corpus, Justiciability and Foreign Affairs' (2013) 11(3) *New Zealand Journal of Public and International Law* 587; Judith Farbey and R. J Shape with Simon Atrill, *The Law of Habeas Corpus* (3rd edition, Oxford University Press, 2011), 206.

58 [1892] AC 326.

59 See the facts stated in *The Queen v Barnardo* [1889] 24 QBD 283, 283–287.

60 *The Queen v Barnardo* [1889] 24 QBD 283, 296 (Lord Esher).

61 *The Queen v Barnardo* [1889] 24 QBD 283, 298 (Fry LJ).

62 *Barnardo v Ford* [1892] AC 326, 341.

63 *Barnardo v Ford* [1892] AC 326, 333–334 (Lord Watson).

the fact of detention, and nothing else, which gives the Court its jurisdiction".[64] His Lordship strongly rejected use of the writ as, in effect, a punishment for past unlawful detention of a person no longer unlawfully detained.[65] However, their Lordships considered there was a case to be answered on control. Lord Herschell said that where the court entertained a doubt as to whether Dr Barnardo still had custody or control of Harry, the Court was "unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it."[66] It is apparent from the judgment of Lord Halsbury LC, with which Lord Watson relevantly concurred, that there was sufficient doubt over whether Dr Barnardo retained control that the Court was satisfied the writ should issue to test his evidence on the return. Lord Herschell (with whom Lord Hannen agreed) accepted that, in circumstances where Lord Coleridge CJ at first instance had entertained a doubt on the affidavits on this question, counsel for the mother were entitled to cross-examine on the return.[67] Similarly, Lord MacNaghten concluded there was sufficient doubt as to whether Harry was still within Dr Barnardo's control or within his reach that the writ should issue so the evidence could be tested on the return.[68]

41. *R v Secretary of State for Home Affairs; Ex parte* ***O'Brien***[69] concerned an application for habeas corpus in relation to a political prisoner who had been arrested by the British Government and then transferred to the Irish Free State where he was detained. The application named the Home Secretary as the respondent. The Home Secretary deposed that Mr O'Brien "is now in Mountjoy Prison, Dublin, and he is in the custody and control of the said Governor of the said prison. The said Governor is an official of the Free State Government and is not subject to the orders or directions of myself or the British Government".[70] However, the Home Secretary had made statements to the House of Commons suggesting the British Government retained control over deportees, and that, if an advisory committee decided that a person should not have been deported, they would be released.[71]

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64 *Barnardo v Ford* [1892] AC 326, 334 (Lord Watson).
65 *Barnardo v Ford* [1892] AC 326, 335 (Lord Watson).
66 *Barnardo v Ford* [1892] AC 326, 339 (Lord Herschell).
67 *Barnardo v Ford* [1892] AC 326, 340 (Lord Herschell).
68 *Barnardo v Ford* [1892] AC 326, 340 (Lord MacNaghten).
69 [1923] 2 KB 361.
70 *O'Brien* [1923] 2 KB 361, 364.
71 *O'Brien* [1923] 2 KB 361, 364.

42. The Attorney-General argued that the writ was addressed to the wrong person (because the Home Secretary had parted with control, citing *Barnardo*[72]) and the application was made to the wrong court (because it should have been made to a court of the Irish Free State, in whose territory Mr O'Brien was now detained). Mr O'Brien responded that an admission by the Home Secretary in the House of Commons that he had agreed with the Free State Government to return Mr O'Brien if his internment were held to be unauthorised was enough to make the question whether the Home Secretary in fact had sufficient control of the body one which could only be determined on return of the writ, also citing *Barnardo*.[73]

43. The Court of Appeal accepted Mr O'Brien's argument. Bankes LJ held that the Home Secretary's evidence that the Governor of Mountjoy Prison was an official of the Free State Government and was not subject to orders of the British Government left "the question in doubt how far, if at all, by arrangement with the Free State Government the body of the applicant is under the control of the Home Secretary".[74] Following *Barnardo*, he held that the Home Secretary should be required to make a return.

44. Scrutton LJ observed that there was no issue of the court's jurisdiction over the Home Secretary.[75] His Lordship cited *Barnardo* for the proposition 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".[76] His Lordship expressly did not decide "the exact degree of power over the body which justifies the issue of the writ", noting the different verbal formulae used in *Barnardo*.[77] However, in light of the difference between the Home Secretary's affidavit and what he said to the House of Commons, Scrutton LJ held that *Barnardo* applied, because "[o]n this conflicting evidence … it appears to me quite doubtful whether or not, if an order is made for the production of the body, the Home Secretary can or cannot produce that body".[78]

45. Similarly, Atkin LJ held, applying *Barnardo*, that "[a]ctual physical custody is obviously not essential".[79] His Lordship held that "custody" and "control" (used in *Barnardo*) are a correct measure of liability to the writ.[80] Whereas the validity of the order relied on by the

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72 *O'Brien* [1923] 2 KB 361, 369.
73 *O'Brien* [1923] 2 KB 361, 373.
74 *O'Brien* [1923] 2 KB 361, 381 (Bankes LJ).
75 *O'Brien* [1923] 2 KB 361, 391 (Scrutten LJ). As the court was not asked to issue the writ to a person resident in Ireland, it was unnecessary to consider the application of the *Habeas Corpus Act 1862*.
76 *O'Brien* [1923] 2 KB 361, 391 (Scrutten LJ).
77 *O'Brien* [1923] 2 KB 361, 391 (Scrutten LJ).
78 *O'Brien* [1923] 2 KB 361, 392 (Scrutten LJ).
79 *O'Brien* [1923] 2 KB 361, 398 (Atkin LJ).
80 *O'Brien* [1923] 2 KB 361, 398 (Atkin LJ).

Home Secretary turned on "the legal right to control", he held that "in testing the liability of the respondent to the writ the question is as to de facto control".[81] Where the Home Secretary's affidavit refrained from stating that he had no control (in fact), Atkin LJ held that there was at least "grave doubt whether he is not still in the custody or control of the Home Secretary", and applying *Barnardo* ordered the return.[82]

46. The rule was made absolute, the writ issued on 10 May 1923, returnable on 16 May 1923, on which date the report of the Court of Appeal decision notes that the Home Secretary produced the body of Mr O'Brien, and he was discharged.

47. An appeal to the House of Lords was heard on 14 May 1923, but was dismissed as incompetent (at the conclusion of argument, for written reasons given on 9 July 1923). Lord Atkinson (dissenting in the result) observed that the writ issued below "operates with coercive force upon the Home Secretary to compel him to produce in Court the body of the respondent. If the Executive of the Free State adhere to the arrangement made with him he can with its aid discharge the obligation thus placed upon him".[83]

48. In ***Rahmatullah*** *v Secretary of State for Defence*,[84] a Pakistani national was lawfully detained by UK forces in Iraq, then transferred to the custody of US forces, who transferred him to Afghanistan, where he was detained at a US airbase. He sought a writ of habeas, naming the UK Secretary of State for Defence (over which the UK courts had jurisdiction) as respondent. There was evidence of a (non-binding) memorandum of understanding between the UK and the US, which included an agreement that the US forces would return a transferred prisoner to the UK "upon request". The Court of Appeal had held below that there was sufficient uncertainty as to control that the writ should issue.[85]

49. On appeal to the Supreme Court, James Eadie QC, for the Secretary, argued as follows. *First*, citing *Barnardo* and *O'Brien*, that control lies at the heart of habeas corpus jurisdiction, because a proper respondent must be able to produce the body to the court, in obedience to the writ.[86] *Second*, again citing *Barnardo* and *O'Brien*, that where control is doubtful, the writ will run to test evidence as to whether the respondent has, in fact, control over the detention in question.[87] *Third*, the writ does not extend to a case where detention

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81 *O'Brien* [1923] 2 KB 361, 398 (Atkin LJ).
82 *O'Brien* [1923] 2 KB 361, 399 (Atkin LJ).
83 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 624 (Atkinson LJ).
84 [2013] 1 AC 614.
85 *Rahmatullah v Secretary of State for Defence* [2011] EWCA Civ 1540, [32] (Kay LJ).
86 *Rahmatullah* [2013] 1 AC 614, 618H–619A.
87 *Rahmatullah* [2013] 1 AC 614, 619C.

is by a foreign sovereign state, from whom the UK government could request the release of the individual, but there is uncertainty as to the response to such a request.[88] *Fourth*, having regard to the act of state doctrine, and (even where that doctrine is not a bar) the principles of comity between sovereign states, the fact Mr Rahmatullah was in the custody of a foreign sovereign state (the US) was highly relevant to the question of control.[89] (In considering the application of *Rahmatullah* to the present case, it is important to bear in mind that the third and fourth points of Mr Eadie's arguments have no application to the AANES and SDF, which is not a sovereign state.)

50. Lord Kerr JSC (with whom Lord Dyson MR and Lord Wilson JSC agreed) wrote the plurality judgment. His Lordship held there was a prima facie case that the US's detention of Mr Rahmatullah, following his involuntary transfer from Iraq to Afghanistan, was unlawful.

51. As to control, his Lordship was sceptical of evidence that a later memorandum of understanding had superseded the memorandum in effect when Mr Rahmatullah was transferred. This provided "a sufficient basis for the finding that there was at least uncertainty as to whether the UK could exert control", which uncertainty "was enough to justify the issue of the writ"[90] (presumably following *Barnardo* and *O'Brien*).

52. Quoting Atkin LJ in *O'Brien* ("actual physical custody is obviously not essential"), Lord Kerr JSC observed that "[t]he 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".[91] His Lordship observed that the writ should only be issued where it can be regarded as "proper and efficient" to do so,[92] and it obviously would "not be proper and efficient to issue the writ if the respondent to it does not have custody of the person detained or the means of procuring his release".[93]

53. Adopting an expression used by Mr Eadie QC in argument, Lord Kerr JSC observed that "[a]t the heart of the cases on control in habeas corpus proceedings lies the notion that the person to whom the writ is directed has either actual control of the custody of the applicant

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88 *Rahmatullah* [2013] 1 AC 614, 619D.
89 *Rahmatullah* [2013] 1 AC 614, 619F–620D. See further 620E–621D.
90 *Rahmatullah* [2013] 1 AC 614, 630F [17] (Lord Kerr JSC).
91 *Rahmatullah* [2013] 1 AC 614, 636D [43] (Lord Kerr JSC).
92 *Rahmatullah* [2013] 1 AC 614, 636E [44] (Lord Kerr JSC), quoting *Ex p Mwenya* [1960] 1 QB 241, 303 (Lord Evershed MR).
93 *Rahmatullah* [2013] 1 AC 614, 636E [44] (Lord Kerr JSC).

or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court".[94] In this regard, he described the dispositive reasoning of the House of Lords in *Barnardo* as turning on "a reasonable prospect that the respondent, despite his claims, either had or could obtain custody of the child".[95]

54. Lord Kerr JSC observed that in *O'Brien*, it was the fact of the agreement about which the Court of Appeal was left in doubt that gave rise to the need for an inquiry as to sufficient control, not its legal enforceability.[96] His Lordship observed that the dispositive reasoning in *O'Brien* turned on factual control by the British Government of Mr O'Brien's unlawful detention in the Irish Free State, not on whether the initial detention by the Home Secretary was unlawful.[97]

55. Lord Kerr JSC rejected Mr Eadie QC's argument that the issue of the writ had the effect of the Court directing the Government in the conduct of foreign affairs. The writ was issued because there was sufficient reason to believe the Government could obtain control of Mr Rahmatullah. The issue of the writ required only that the Government show, by whatever efficacious means it could, whether or not control existed in fact.[98]

56. Lord Kerr JSC concluded that "[a]n applicant for the writ of habeas corpus must therefore demonstrate that the respondent is in actual physical control of the body of the person who is the subject of the writ or that there are reasonable grounds on which it may be concluded that the respondent will be able to assert that control".[99] Applying that test, he affirmed the decision of the Court of Appeal that the writ should issue.

57. Lord Phillips expressed the test differently: "[h]abeas corpus will lie not merely against a defendant who is himself detaining the prisoner, but against a defendant who holds the prisoner in his custody or control through another".[100] Although he expressed his agreement with the judgment of Lord Kerr JSC, he expressly carved out an "unexplored issue", which would appear to cover the facts of the instant case: where there was no suggestion that the UK acted unlawfully in either originally detaining Mr Rahmatullah or in handing him over to the US forces.[101]

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94 *Rahmatullah* [2013] 1 AC 614, 636G [45] (Lord Kerr JSC) (emphasis added).
95 *Rahmatullah* [2013] 1 AC 614, 636 [45] (Lord Kerr JSC) (emphasis added).
96 *Rahmatullah* [2013] 1 AC 614, 637 [48] (Lord Kerr JSC).
97 *Rahmatullah* [2013] 1 AC 614, 639 [52] (Lord Kerr JSC).
98 *Rahmatullah* [2013] 1 AC 614, 641 [60] (Lord Kerr JSC). See also 642 [63] and 643 [68].
99 *Rahmatullah* [2013] 1 AC 614, 642 [64] (Lord Kerr JSC) (emphasis added).
100 *Rahmatullah* [2013] 1 AC 614, 649 [90] (Lord Phillips).
101 *Rahmatullah* [2013] 1 AC 614, 651[97], 652–653 [104]–[105] (Lord Phillips).

58. Two points may be made about Lord Phillips's judgment. First, his characterisation of the reasoning in *Barnardo* and *O'Brien* involves a degree of gloss and a degree of reconstruction,[102] and Lord Kerr JSC's treatment of those cases adheres more closely to their reasoning. Second, and more importantly for the present case, a key integer of his "unexplored issue" was the fact, heavily relied upon by Mr Eadie QC in argument, that Mr Rahmatullah was held by a foreign state (the US), such that by issuing the writ, the court would require the domestic state to prevail upon the foreign state to release the person from detention.[103]

59. Lord Reed JSC agreed that the appeal should be dismissed, on the basis that the memorandum of understanding, on its face, gave the UK sufficient control, applying *O'Brien* and *Barnardo*.[104] His Lordship expressed agreement with Lord Phillips's "unexplored issue", although he expressed it in terms of whether the respondents "had committed any civil wrong under English law in respect of the detention of Mr Rahmatullah".[105] He also noted that it was important that Mr Rahmatullah was initially detained by British forces, because the application would "otherwise have no real or substantial connection with this jurisdiction".[106]

60. Lord Carnwath and Baroness Hale JJSC agreed in the result. They said that "control" turned on "the realities of the relationship between the UK and the USA as the currently detaining power".[107] The critical point for them was the ability under the original memorandum of understanding for the UK to request the release of Mr Rahmatullah.[108]

61. They were not concerned by the "unexplored issue", noting that "[t]he strength of habeas corpus is its simplicity",[109] and observing that the case did not (and could not) rest on the "simple ground" that the UK might be in a position to persuade the US to release Mr Rahmatullah.[110] Rather, the case rested on the basis that the UK had ongoing obligations under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, as the original detaining power, and had entered into the memorandum of understanding with the US to give it the necessary control it required for that purpose.[111]

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102 *Rahmatullah* [2013] 1 AC 614, 651 [97].
103 *Rahmatullah* [2013] 1 AC 614, 652–653 [104]–[105].
104 *Rahmatullah* [2013] 1 AC 614, 654–655 [112]–[114].
105 *Rahmatullah* [2013] 1 AC 614, 655 [115].
106 *Rahmatullah* [2013] 1 AC 614, 655 [115].
107 *Rahmatullah* [2013] 1 AC 614, 655 [118].
108 *Rahmatullah* [2013] 1 AC 614, 655 [119].
109 *Rahmatullah* [2013] 1 AC 614, 656 [121].
110 *Rahmatullah* [2013] 1 AC 614, 656 [122].
111 *Rahmatullah* [2013] 1 AC 614, 656 [122] (Lord Carnwath and Baroness Hale JJSC).

Finally, it did not make any difference in principle that the illegality of detention arose from the actions of the US, rather than the UK; it was not a defence for the UK to say unlawfulness arose from someone else's actions, where the UK had the practical ability to bring the unlawful detention to an end.[112]

62. In ***Plaintiff M68****/2015 v Minister for Immigration and Border Protection*,[113] the plaintiff sought a declaration that the Executive's participation in his detention was unlawful. The dispositive answer was that its participation was authorised by a valid law of the Commonwealth: s 198AHA of the *Migration Act 1958* (Cth). As the plurality (French CJ, Kiefel and Nettle JJ) explained, the central question was whether the Executive's involvement was authorised by statute.[114] But for present purposes, it is relevant to identify the reasoning of the High Court concerning the unlawfulness of involvement by the Executive in detention, if not authorised by a law of the Commonwealth.

63. The plaintiff was detained on Nauru, but the Commonwealth contracted for and funded the construction and maintenance of the detention centres on Nauru. The Commonwealth contracted Transfield Services (Australia) Pty Ltd (**Transfield**) to provide services, including provision of security at the detention centres, which contract Transfield then subcontracted to Wilson Security Pty Ltd. Officers of Australia Border Force occupied an office at one of the detention centres, from which they carried out functions including management of the contract with Transfield.

64. The plurality first dealt with the question of lawful detention.[115] Their Honours first observed that the Executive was authorised by Commonwealth law to detain the plaintiff and transfer him to Nauru. Thereafter, it was "very much to the point that the restrictions applied to the plaintiff are to be regarded as the independent exercise of sovereign legislative and executive power by Nauru".[116] It followed that the Commonwealth did not, itself, detain the plaintiff.[117]

65. The next issue was the Commonwealth's involvement in the plaintiff's detention. Importantly, the plurality held that it was "necessary that the Commonwealth's indisputable participation in the detention of the plaintiff on Nauru be authorised by the law of

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112 *Rahmatullah* [2013] 1 AC 614, 656 [123] (Lord Carnwath and Baroness Hale JJSC).
113 (2016) 257 CLR 42.
114 *Plaintiff M68* (2016) 257 CLR 42, 67 [29] (French CJ, Kiefel and Nettle JJ).
115 *Plaintiff M68* (2016) 257 CLR 42, 67–68 [30]–[37] (French CJ, Kiefel and Nettle JJ).
116 *Plaintiff M68* (2016) 257 CLR 42, 68 [34] (French CJ, Kiefel and Nettle JJ).
117 *Plaintiff M68* (2016) 257 CLR 42, 68–69 [36] (French CJ, Kiefel and Nettle JJ).

Australia".[118] That observation was part of the dispositive reasoning, because the question whether her detention was unlawful if not authorised by a law of the Commonwealth was necessarily anterior to the question whether her detention was so authorised.

66. Justice Gageler agreed in the result, but more fully dealt with the anterior question. He first quoted observations made by Deane J in *Re Bolton; Ex parte Beane*,[119] picked up by a majority in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* in the following terms: "[s]ince the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision".[120]

67. Transfield submitted that this statement of principle was directed solely to the content of the common law of Australia, and did not bear on the capacity of the Executive: as the common law did not run in Nauru, the principle did not limit the Commonwealth's capacity to be involved in detention there.[121] Justice Gageler described this argument as coming "three centuries too late".[122] That was because the writ of habeas corpus, as reinforced and modified by statute, was "of the highest constitutional importance"[123] and remained of "undiminished significance within our contemporary constitutional structure".[124] Following the *Habeas Corpus Act 1640*, "[s]tate imprisonment would not be able to occur in the exercise of any inherent executive capacity", but "only if and to the extent permitted by statute".[125]

68. His Honour then observed that the Executive is always amenable to habeas corpus under s 75(iii) of the Constitution.[126] That observation is important to the present case, because it explains why the concern of Lord Reed JSC that, without original detention by UK forces,

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118 *Plaintiff M68* (2016) 257 CLR 42, 70 [41] (French CJ, Kiefel and Nettle JJ).
119 (1987) 162 CLR 514, 528 (Deane J), quoted in *Plaintiff M68* (2016) 257 CLR 42, 102 [148].
120 (1992) 176 CLR 1, 19, quoted in *Plaintiff M68* (2016) 257 CLR 42, 102 [149] (Gageler J).
121 *Plaintiff M68* (2016) 257 CLR 42, 103 [152]–[154] (Gageler J).
122 *Plaintiff M68* (2016) 257 CLR 42, 103 [155] (Gageler J).
123 *Plaintiff M68* (2016) 257 CLR 42, 104 [156] (Gageler J), quoting *Halsbury's Laws of England*, (1st ed), LexisNexis, vol 10, [92].
124 *Plaintiff M68* (2016) 257 CLR 42, 103 [155] (Gageler J).
125 *Plaintiff M68* (2016) 257 CLR 42, 104 [156] (Gageler J).
126 *Plaintiff M68* (2016) 257 CLR 42, 105 [161] (Gageler J).

there might otherwise be no real or substantial connection with the jurisdiction (at [59] above), does not arise under our Constitution.[127]

69. It is also important as the premise to the line of reasoning that followed. First, his Honour observed that "[t]he extent of the inherent constitutional incapacity of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty can be discerned for the purposes of the present case in the extent of its amenability to habeas corpus".[128] Next, he observed that the "extent of that amenability to habeas corpus" was "sufficiently illustrated" by *O'Brien*, which showed "that the question of amenability to the writ is quite distinct from the question of the legality or illegality of the detention".[129] Referencing in a footnote *O'Brien* and the judgments of Lord Kerr JSC and Lord Reed JSC in *Rahmatullah*, his Honour then observed "[a]menability 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".[130] His Honour considered that measure (ie, the approach to de facto control in *O'Brien* and *Rahmatullah*) to be the appropriate one to be applied in considering whether the plaintiff's detention involved action on the part of the Commonwealth in excess of its non-statutory executive power.[131]

70. Applying that measure, his Honour concluded that the Executive had de facto control by reason of the conduct of Wilson Security staff in confining the plaintiff to the detention centre, and exercising physical control over her for the purpose of performing services under the subcontract with Transfield, observing "[t]hey acted, in the relevant sense, as de facto agents of the Executive".[132] His Honour concluded that, therefore, "[t]he procurement of the plaintiff's detention lay beyond the non-statutory executive power of the Commonwealth".[133]

71. Finally, we mention the recent decision of the England and Wales Court of Appeal in ***C3*** *v Secretary of State for Foreign, Commonwealth and Development Affairs*,[134] anticipating that it will be relied upon by the respondents. That was an application for habeas corpus by

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127 See also, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600 [276] (Kiefel J): "The actions of officers of the Commonwealth extra-territorially, on the high seas, remain subject to this Court's jurisdiction given by s 75(v) of the Constitution …".

128 *Plaintiff M68* (2016) 257 CLR 42, 106 [164] (Gageler J).

129 *Plaintiff M68* (2016) 257 CLR 42, 106–107 [165] (Gageler J).

130 *Plaintiff M68* (2016) 257 CLR 42, 107 [165] (Gageler J).

131 *Plaintiff M68* (2016) 257 CLR 42, 107 [166] (Gageler J).

132 *Plaintiff M68* (2016) 257 CLR 42,108 [173] (Gageler J).

133 *Plaintiff M68* (2016) 257 CLR 42, 108 [174] (Gageler J).

134 [2023] EWCA Civ 444.

two British women detained by the AANES in Al-Roj. The Court had evidence of a communication from Dr Omar, a representative of the AANES, that the AANES was "ready to provide unconditional assistance and cooperate with the UK to hand over its citizens, if we receive an official request on this matter".[135] The UK Foreign Secretary had refused to make a request to the AANES for the return of the applicants, principally on the ground that they travelled to Syria voluntarily and would be a threat to national security if returned to the UK.[136] The Foreign Secretary contended that habeas corpus was "not the correct vehicle" for the case, and that the applicants should instead have sought judicial review of his decision to refuse to make a request.[137]

72. Underhill LJ framed the principal issue as being "whether, by reason of the AANES's offer, the UK Government should be regarded as having control over the Applicants' detention in the sense necessary to justify the issue of a writ of habeas corpus".[138] His Lordship observed that *Rahmatullah* gave the authority of the Supreme Court to the decision and reasoning of the Court of Appeal in *O'Brien*,[139] and that Lord Kerr's judgment contained the majority ratio.[140]

73. However, Underhill LJ then drew a distinction between the instant case and *Barnardo*, *O'Brien* and *Rahmatullah*: the UK Government in the instant case "was not responsible for the Applicants' detention and accordingly no question of an agreement to re-transfer on request arises".[141] His Honour inferred from the lack of any case that did not include involvement by the respondent in the original detention a criterion for the applicability of *Barnardo*, *O'Brien* and *Rahmatullah* that the respondent had to have been involved in the original detention.[142] He then deployed this inferred criterion as a "principled boundar[y]".[143]

74. There are five reasons why this Court should not follow the approach in *C3*.

75. **First**, it does not appear that there was any evidence before the Court of Appeal akin to the evidence before this Court, in particular the evidence here of previous successful repatriation, and expert evidence concerning the connection between the Executive's

135 *C3* [2023] EWCA Civ 444, [12] (Underhill LJ).
136 *C3* [2023] EWCA Civ 444, [2] (Underhill LJ).
137 *C3* [2023] EWCA Civ 444, [6] (Underhill LJ).
138 *C3* [2023] EWCA Civ 444, [20] (Underhill LJ).
139 *C3* [2023] EWCA Civ 444, [38] (Underhill LJ).
140 *C3* [2023] EWCA Civ 444, [37] (Underhill LJ).
141 *C3* [2023] EWCA Civ 444, [46] (Underhill LJ).
142 *C3* [2023] EWCA Civ 444, [51] (Underhill LJ).
143 *C3* [2023] EWCA Civ 444, [52] (Underhill LJ).

capacity to make a request and its involvement, via the Coalition, in the detention by the AANES of the women and children. Save's evidence in this regard is summarised above.

76. There is a strong prima facie case that the respondents exercise sufficient control to discharge their onus; de jure control and direct operational control need not be demonstrated. That control is characterised as 'de facto control', as it relates to control of the process of repatriation by the Australian government. The existence of a measure of control sufficient to raise a doubt of the type raised in *O'Brien* arises from all the material before the Court. Relevantly, it demonstrates a high level of connection between the AANES and Coalition members including Australia, a high level of obligation and willingness on the part of the AANES to repatriate any relevant detainee requested by Australia, a high level of previous, successful and ongoing engagement by the AANES and Australia in repatriations, and a factual context allowing clear inferences to be drawn about the factors which determine the fate of any repatriation request made by the Australian government. That factual context includes the power imbalance between the Australian government and the AANES, a non-state actor bereft of the status and prerogatives of a nation, locked in existential battle and financially dependent upon the Coalition. Thus the material can show the Australian government has a sustained military and political arrangement, in context of the Coalition, with the AANES; in context of the Coalition there is an arrangement pursuant to which both (1) Coalition members provide support for the detention of the women and children, and (2) the Executive has been asked to repatriate its citizens, to which the AANES will agree on request.

77. Australia is thus not a mere supplicant, whose only power to effect repatriation is to ask politely; nor is the AANES, a non-state actor, possessed of any de jure or de facto 'complete discretion' to decline or place conditions on repatriations (other than necessary procedural conditions). Through the Coalition, Australia is aligned with, and supporting, the AANES and SDF, including in their detention of its citizens and their children. To draw an analogy to the law of tort, whereas the existence of a statutory power does not give rise to a duty of care on the public authority to use it, the authority may, by its conduct, assume a responsibility to exercise the power, and whether that has occurred is sometimes considered by reference to notions of "control".[144]

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144 *Electricity Networks Corporation v Herridge Parties* (2022) 96 ALJR 1106, 1112 [22]–[23] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).

78. It is in part because of the Executive's involvement (via the Coalition) in the arrangement by which the women and children are detained that "Australian officials, along with the broader Coalition enjoy the practical ability, by virtue of exercising de facto authority, to make arrangements for ending the extended detention of Australian women and children."[145]

79. At a minimum, Save's evidence raises sufficient doubt (applying the test in *Barnardo*, *O'Brien* and *Rahmatullah*) as to whether the Executive can bring the bodies of the women and children to the Court as to justify a (notional) return — ie, in terms of procedure, that the respondents must adduce compelling evidence demonstrating their inability in fact to procure the release of the women and children, and bring their bodies to the Court.

80. **Second**, the delineation of the functions of the judicial and executive branches of government under our Constitution are an important point of distinction. As Gageler J explained in *Plaintiff M68*, the Executive is amenable to the writ under s 75. *Plaintiff M68* also establishes that the Executive can lawfully be involved in the detention of a citizen, whether physically within or outside of Australia and its external territories, only where authorised by a law of the Commonwealth.

81. **Third**, the England and Wales Court of Appeal does not appear to have drawn any distinction between the AANES and a foreign sovereign government. Careful consideration of the nuanced argument put by Mr Eadie QC in *Rahmatullah* shows the centrality of immunity of, and comity between, sovereign states as a limiting factor on the doctrine of control.

82. Under international law, foreign states and their agencies are generally entitled to immunity from the jurisdiction of the courts of other countries. In Australia, foreign state immunity is governed by the *Foreign States Immunities Act 1985* (Cth). The act of state doctrine sits alongside the law of foreign state immunity. The act of state doctrine is a domestic law doctrine limited by domestic private international and constitutional law.[146] It forms part of the common law of Australia and prevents the court from passing judgment on the legality of an act committed in the jurisdiction of another state by that state or its officials.[147] The doctrine is commonly defined by reference to the observations of Fuller J in *Underhill v Hernandez* that "[e]very sovereign State is bound to respect the

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145 Newton Report, 5.

146 M Davies et al, *Nygh's Conflict of Laws in Australia* (10th ed, 2019, LexisNexis Butterworths) [10.68].

147 ***Habib** v Commonwealth* (2010) 183 FCR 62 [5] (Black CJ), [51] (Perram J).

independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[148]

83. In *Sarei v Rio Tinto PLC* the United States Court of Appeals for the Ninth Circuit summarised the relevant principles regarding act of state in the United States, in terms that turned on the existence of a foreign sovereign exercising sovereign power.[149] In *Doe I v Unocal Corp*[150] the court declined to extend the protections of the act of state doctrine to non-state actors. Australian case law which has considered the act of state doctrine has similarly not extended the relevant immunities to non-state actors.[151]

84. *Sarei v Rio Tinto PLC* and *Doe I v Unocal Corp* were cited by Jagot J in ***Habib*** *v Commonwealth of Australia.*[152] *Habib* concerned exceptions to the act of state doctrine for violations of international law, including torture. In that case, the relevant foreign states included the United States, Afghanistan, Pakistan and Egypt. The court determined it had both the power and constitutional obligation to determine Mr Habib's claim. However, the questions determined in *Habib* (and other cases concerning international law and fundamental human rights) do not arise where the detaining power is a non-state actor. The ambit of the exceptions to the act of state doctrine for violation of international law need not be considered here. This is because the act of state doctrine is simply not engaged. Neither Save nor the respondents have put forward any contention that the Syrian state, or its agents, are involved in the detention of the remaining Australian women and children. There is no common law or constitutional bar to this court considering the legality of detention by the AANES in northeast Syria. The respondents otherwise put forward no positive case on the legality of detention. On the facts, the respondents would be unable to do so.

85. In *O'Brien* and *Rahmatullah*, the factual question of control had to be answered in a context where a person was detained by a foreign sovereign state. It was in that context that non-binding agreements took on a particular relevance. The same can be said of Gageler J's reasoning in *Plaintiff M68*. By contrast, in *Barnardo*, the detention was by Mr Norton, not

148 168 US 250 (1897), 252.
149 456 F3.d 1069 (9th Cir. 2006) 1084.
150 395 F.3d 923 (9th Cir. 2002).
151 *Moti v R* (2011) 245 CLR 456; *Habib* (2010) 183 FCR 62; ***Hicks*** *v Ruddock* (2007) 156 FCR 574; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354*; Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* ("*Spycatcher*") (1988) 165 CLR 30.
152 (2010) 183 FCR 62, [95]-[96] (Jagot J).

Canada, such that the question of factual control by Dr Barnardo did not require any consideration of any form of intergovernmental agreement.

86. The AANES/SDF is "a de facto entity whose presence and control over a geographic Syrian territory is not authorized or officially recognized by the Syrian government".[153] Thus, the factual question of control by the Commonwealth must be asked in a context where the detention is outside Australia, but is not by a sovereign state to which any consideration of comity between nations applies.

87. Contrary to the respondent's concise response,[154] the evidence does not support the factual proposition that AANES has "absolute discretion" with respect to ending the detention. Indeed, it is unclear, in the context of a non-state organisation, and outside of powers conferred by a justiciable contract or similar private law instrument, what the word "discretion" is intended to connote. As a question of fact, the evidence before the Court is that the AANES "cannot say no."[155]

88. This case is entirely distinct, in this respect, from a situation where a person asks an Australian court to require the Executive to "prevail" upon a foreign sovereign power, to, in its absolute discretion, release their citizen.[156]

89. **Fourth**, the Court of Appeal does not appear to have considered a relevant point of distinction from *Rahmatullah* — that C3 and C4 were British citizens — despite referring to the importance of that status in summarising *(Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*.[157]

90. Each of the women is a citizen.[158] The children are either Australian citizens or eligible to become Australian citizens.[159]

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153 Affidavit of Anan Alsheikh Haidar, affirmed 25 July 2023, Annexure AAH-1, 5 (**Haidar Report**).
154 Concise Statement in Response (14 July 2023), [1], [9(d), (e)], [12].
155 Barton Report, [4.3]–[4.4]. Newton, 4–5, 16.
156 *Rahmatullah* [2013] 1 AC 614, 652–653 [105] (Lord Phillips), quoted and relied upon by Underhill LJ in *C3* [2023] EWCA Civ 444, [49].
157 [2002] EWCA Civ 1598, referred to in *C3* [2023] EWCA Civ 444, [56].
158 Tinkler Statement [37], [39]; Tinkler Affidavit, Annexure MT-1, 74–78 (Annexure to Tinkler Statement).
159 Tinkler Affidavit, Annexure MT-1, 15–16 [38], [39] (Tinkler Statement), 74–78 (Annexure to Tinkler Statement) (redacted).

91. The status of citizenship is a statutory concept[160] which engages rights, privileges, immunities and duties.[161] Relevantly, citizens have the right to enter and remain in Australia.[162] As Kiefel CJ, Keane and Gleeson JJ stated in ***Alexander*** *v Minister for Home Affairs*:[163]

> For an Australian citizen, his or her citizenship is an assurance that, subject only to the operation of the criminal law administered by the courts, he or she is entitled to be at liberty in this country and to return to it as a safe haven in need. These entitlements are not matters of private concern; they are matters of public rights of "fundamental importance" to the relationship between the individual and the Commonwealth.

92. However, citizenship also has a constitutional dimension. For the holders of citizenship, the status "attracts constitutional protections".[164] Just as the *Magna Carta* decreed that "no free man shall be … exiled … but … by the law of the land",[165] the Constitution prohibits the executive, absent the safeguards provided by the exercise of judicial power under Chapter III of the Constitution, from the exile of its citizens.[166] This is because, like detention, "exile has long been regarded as punishment",[167] given "the sanction of 'expatriation' is 'available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it.'"[168] Here, through the Non-repatriation Decision, or the failure to make a further repatriation decision, the respondents have effectively left the remaining Australian women and children in exile. Despite having the ability to seek and

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160 *Alexander v Minister for Home Affairs* (2022) 178 ALD 423, 430 [31] (Kiefel CJ, Keane, and Gleeson JJ), citing *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178 , 183 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162 [7] (Gleeson J); *Love v Commonwealth of Australia* (2020) 270 CLR 152 263 [300], 264 [305] (Gordon J); *Chetcuti v Commonwealth (*2021) 272 CLR 609, 622–629 [14]–[34] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 630 [38] (Gordon J).

161 *Alexander* (2022) 178 ALD 423, 430 [31] (Kiefel CJ, Keane, and Gleeson JJ); *Hwang (an infant by her next friend Yu) v Commonwealth* (2005) 80 ALJR 125, 129 [13] (McHugh J); *Love v Commonwealth of Australia* (2020) 270 CLR 152, 309 [440] (Edelman J).

162 *Alexander* (2022) 178 ALD 423, 430 [31] (Kiefel CJ, Keane, and Gleeson JJ); *Potter v Minahan* (1908) 7 CLR 277, 305; *Love v Commonwealth of Australia* (2020) 270 CLR 152, 198 [95] (Gageler J), 254 [213] (Keane J), [273] (Nettle J), 309 [440] (Edelman J); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Re Minister for Immigration & Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 454 [22] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88,105 [69] (Thawley J).

163 *Alexander* (2022) 178 ALD 423, 439–440 [74] (Kiefel CJ, Keane, and Gleeson JJ) (citations omitted).

164 *Alexander* (2022) 178 ALD 423, 430 [31]; see also [63], [70] (Kiefel CJ, Keane, and Gleeson JJ); *Hwang (an infant by her next friend Yu) v Commonwealth* (2005) 80 ALJR 125, 129 [14] (McHugh J).

165 See, *Ex parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 79 (Isaacs J).

166 *Alexander* (2022) 178 ALD 423, 439 [72], 441 [79], 445 [96] (Kiefel CJ, Keane and Gleeson JJ),460-461 [157]-[158] (Gageler J). See also *Ex parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 60-62, 65-66, 71-72 (Knox CJ), 96 (Isaacs J), 125 (Higgins J), 132-133, 138 (Starke J).

167 *Alexander* (2022) 178 ALD 423, 439 [72] (Kiefel CJ, Keane and Gleeson JJ), see also [75], [167]. See also *Stretton v Minister For Immigration and Border Protection* (No 2) (2015) 231 FCR 36, 38 [3] (Logan J).

168 *Alexander* (2022) 178 ALD 423, 441 [78] (Kiefel CJ, Keane and Gleeson JJ).

effect repatriation of these women and children,[169] the respondents have failed to do so – not for months, but years.[170]

93. The issue of the writ would also be consistent with the role of the judiciary in supervising the restraint of liberty, which is one of the fundamental principles which acts as the "fabric on which the written words of the Constitution are superimposed."[171] Indeed, the insistence on liberty being secured by the courts, which sits within our inherited constitutional bedrock, arises in part from the role of habeas corpus in the English legal system.[172]

94. Similarly, the issuing of the writ aligns with the obligation of protection that the executive owes to its citizens abroad, notwithstanding that this obligation is an "imperfect" one.[173] In turn, that obligation imposed on the Executive is supported by, and mirrors, the position at international law, whereby citizens have rights not to be unlawfully or arbitrarily detained[174] and not to be arbitrarily deprived of the right to enter their own country;[175] and States have an obligation to ensure an effective remedy for those rights.[176]

95. **Fifth**, and in any event, Underhill LJ's reasoning in *C3* is not supported by, or consistent with, *Barnardo*, *O'Brien* or *Rahmatullah*.

96. True it is that cases are only authority for what they decide. But under the common law doctrine of precedent, a decision can (and necessarily must) be applied as authority to different facts. *O'Brien* and *Rahmatullah* in fact involved original detention by the state, and *Barnardo* by Dr Barnardo. But the ratio decidendi of Lord Kerr's judgment should be identified differently. His Lordship's observation that habeas corpus is "a flexible remedy"[177] was not surplusage. His Lordship's careful statement "at least the reasonable

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169 See paragraphs [9]–[23] above.

170 Tinkler Statement [2], [53], [74(2)]; Tinkler Affidavit, 105 (redacted).

171 See, *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J), and *Ex parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 79 (Isaacs J). See also *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 610 [94] (Gagler J); Leslie Zines, *The High Court and the Constitution* (3rd ed, Butterworths 1992) 324.

172 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 1885), 210; William Blackstone, *Commentaries on the Laws of England*, (1765), Book 1,132-133; *Plaintiff M68* (2016) 257 CLR 42, 103-104 [155]-[156] (Gageler J); *Ex parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 102 (Isaacs J).

173 *Love v Commonwealth of Australia* (2020) 270 CLR 152, [107] (Gageler J), 173 [13] (Kiefel CJ); *Hicks* (2007) 156 FCR 574, 593-4 [61]-[67], [77] (Tamberlin J); *Mutasa v A-G* (UK) [1980] 1 QB 114, 120 (Boreham J); *Habib v Commonwealth (No 2)* (2009) 175 FCR 350, 367 [62] (Perram J). See also *Attorney-General v Tomline* (1880) 14 Ch D 58 at 66 (Brett LJ).

174 *International Covenant on Civil and Political* Rights, Art 9(1) (**ICCPR**); *Convention on the Rights of the Child* Art 37 (**CROC**).

175 ICCPR Art 12(4); *Universal Declaration of Human Rights*, Art 13(2).

176 ICCPR, Arts 2(3); CROC Art 4.

177 *Rahmatullah* [2013] 1 AC 614, 636 [42] (Lord Kerr JSC).

prospect of being able to exert control over his custody or to secure his production to the court"[178] required a factual inquiry as to whether a sufficient degree of control exists.[179] Rejecting the characterisation of *O'Brien* as turning on the unlawfulness of the original detention[180] (cf Lord Phillips), Lord Kerr observed that the issue of the writ in *O'Brien* "depended crucially on the finding that it was likely that the Home Secretary could procure Mr O'Brien's release".[181] There is no basis in his Honour's careful reasoning to support a "principled boundary" constraining the principle only to cases where the original detention was by the respondent.

97. The same may be said for *Plaintiff M68*. While the original detention and transfer was lawfully done by the Commonwealth, it formed no part of the careful reasoning of Gageler J as to the relevant limit on the capacity of the Executive to be involved in detention.

98. In point of principle, original detention is irrelevant. The writ is not about the history of the detention. Rather, what is important is the ability of the respondent to comply with the writ, by procuring the release of the body from detention, and producing it to the issuing court.

99. That proposition is consistent with the long line of cases outlined above and the approach adopted by Tamberlin J (albeit in the context of an application for summary judgment) in ***Hicks*** *v Ruddock*.[182]

F. The Executive has not established that it cannot effect release and return the bodies to the Court

100. For the above reasons, Save's evidence establishes a prima facie case of unlawful detention and sufficient doubt as to whether the respondents can effect the release of the women and children from that detention and return their bodies to the Court.

101. The evidence filed by the respondents is insufficient to make out the onus on the (notional) return. It is to the effect that the Executive might not be able to effect release from detention and bring the bodies to the Court. In *Barnardo*, *O'Brien* and *Rahmatullah*, at the time the

178 *Rahmatullah* [2013] 1 AC 614, 636 [45] (Lord Kerr JSC).
179 *Rahmatullah* [2013] 1 AC 614, 637 – 638 [48] (Lord Kerr JSC).
180 *Rahmatullah* [2013] 1 AC 614, 639 [52] (Lord Kerr JSC).
181 *Rahmatullah* [2013] 1 AC 614, 639 [52] (Lord Kerr JSC).
182 (2007) 156 FCR 574. There, the applicant was an Australian citizen detained by the US in Afghanistan, and then transferred and held without valid charge at Guantanamo Bay. He argued that if Australia asked, there was no reason to suppose that the US would refuse a request for his repatriation and therefore "a kind of control by the Commonwealth government" was demonstrated. Tamberlin J refused the application for summary judgment, holding that the argument enjoyed at least some reasonable prospects of success.

writ issued it was plainly possible that the respondent would be unable to bring the body before the Court. In each case the writ issued because there was sufficient doubt as to whether a return would be effective. Once the writ issued, however, the onus was on the respondent to establish that the body could not be released and brought to the court. The respondents' evidence simply does not undertake that task.

102. It follows that the Court should make an order in the nature of habeas corpus requiring the respondents to bring the women and children to the Court.

G. Judicial review

103. Given the absence of any other lawful basis, the Non-repatriation Decision must be an exercise of non-statutory executive power. Such an exercise of power must not exceed the bounds of Chapter II of the Constitution,[183] and must conform with any Commonwealth law that controls it.[184] Judicial review is available for certain exercises of non-statutory executive power.[185] This includes where the Court is asked to consider the restraints on and the extent and nature of executive power by reference to the Constitution.[186]

104. The following features of this case mean judicial review should lie, so long as the court is not required to impede on issues of foreign policy.[187] **First,** it is clear there is unlawful detention. **Second**, the people detained are Australian citizens or eligible to become Australian citizens. **Third**, the respondents have the ability to end the detention.[188] **Fourth**, the Commonwealth has previously repatriated citizens from Al-Roj, showing the Non-repatriation Decision was not predicated on the absence of power to make a decision to repatriate. And **fifth**, liberty of the person is a key concern of judicial control of executive power, pursuant to Ch III of the Constitution and the separation of powers.[189]

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183 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 232 [70], [72], 233 [77] (Gordon J).

184 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 234–235 [85]–[87] (Gordon J); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 464 [96] (Gordon and Steward JJ); *A v Hayden (No 2)* (1984) 156 CLR 532, 540; 59 (Gibbs CJ).

185 See, eg, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 239–230 [57]-[61] (Kiefel CJ, Gageler and Gleeson JJ); 245 [144], 250–251 [174]–[176] (Edelman J); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23, 27 [3], 34 [36], 35 [39] (Kenny J); 37 [50] (Besanko J); 39 [56], 50 [96] (Griffiths J); 54 [118] (Mortimer J); 89 [305] (Charlesworth J).

186 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 232–233 [70]-[77] (Gordon J). See also *Hicks* (2007) 156 FCR 574, 580–581 [26], 597 [77] (Tamberlin J).

187 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [106(iii)]; *Hicks* (2007) 156 FCR 574, [34] (Tamberlin J).

188 See paragraphs [9]–[23] above.

189 See paragraphs [66], [93] above.

105. Where judicial review is available, its "width and depth" will depend on the nature and subject matter of the challenged exercise of executive power.[190] Here, the Court will be asked to consider standard grounds for judicial review; namely that through the Non-repatriation Decision the respondents: took into account a prohibited consideration, acted for an ulterior purpose, or acted unreasonably. Alternatively, 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.[191] For the purpose of this judicial review claim, 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.[192]

106. The Court has a very wide power to issue declarations,[193] which "is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise".[194] It is confined only by the "boundaries of judicial power",[195] notably the requirement under federal jurisdiction that there be a "matter".[196]

107. The Tinkler Statement establishes that Save has a sufficient interest in the subject matter of the proceeding to seek relief.

108. The discretionary factors which the courts commonly look to when determining whether to issue a declaration suggest the Court ought to issue a declaration in this matter if Save

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190 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23, 32 [29] (Kenny J). See also *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 219-220 (Mason J).

191 As to which, see *Hicks* (2007) 156 FCR 574, 593 [61] (Tamberlin J); *C3* [2023] EWCA Civ 444, [59] (Underhill LJ; Holyrode and Elisabeth Laing LJJ agreeing).

192 *Hicks* (2007) 156 FCR 574, 599 [84], [86] (Tamberlin J); *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [100] (Lord Phillips).

193 *Federal Court of Australia Act 1976* (Cth) s 21, discussed at *Clarence City Council v Commonwealth of Australia* (2020) 280 FCR 265, 292 [70] (the Court); and *Minister for the Environment v ACN 089 171 415 Pty Ltd* [2020] FCA 1557, [32] (Mortimer J). See also *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435-437 (Gibbs J).

194 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 (Gibbs J), cited with approval in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-82 (Mason CJ, Dawson, Toohey and Gaudron JJ), and *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [102] (the Court).

195 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *IMF (Australia) Ltd v Sons of Gwalia Ltd (administrator appointed)* (2005) 143 FCR 274, 291 [67] (Emmett J); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 230 [61] (Kiefel CJ, Gageler and Gleeson JJ)

196 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 245 [26]-[29] (Kiefel CJ, Keane and Gordon JJ); *CGU Insurance Ltd v Blakely* (2016) 259 CLR 339, 350 [26] (French CJ, Kiefel, Bell and Keane JJ); *Re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ);

is successful in its judicial review claim.[197] A declaration would not be hypothetical or theoretical. It relates to the ongoing unlawful detention of citizens.[198] There are clear foreseeable consequences, and there is utility in making a declaration. The declaration would result in, at the very least, a decision being made as to repatriation. There would be finality in any declaration. This is so even if the declaration itself did not lead to repatriation. A declaration would clearly indicate (a) the basis upon which the Non-repatriation Decision was impugned by the Court; or (b) that a further repatriation decision must be made.

H. Scope of relief

109. Should the Court issue the writ, there is no question that it should extend to the STCA-authorised remaining Australian women and children.[199] It should also extend to all remaining Australian women and children. This is because Save, as a "stranger" in the sense of a third party, can apply for habeas corpus.[200] While there may be circumstances where a mere stranger or vexatious volunteer will be denied standing,[201] Save cannot be so described. Rather, Save is an organisation with a special interest in the liberty of the remaining Australian women and children and which is genuinely concerned with the release of those women and children.[202] As much is clear from the significant time Save has spent advocating for the repatriation of the remaining women and children, including through visits to the Al-Roj camp, through public and private representations to government[203] and through commencing these proceedings. In addition, relevant factors which weigh in favour of the Court finding that Save has the standing it asserts in relation to all remaining women and children include (1) the detainees cannot bring the claim

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197 *Russian Commercial Bank and Industrial Bank v British Bank for Foreign Trade* [1921] AC 438; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437-38 (Gibbs J; McTiernan, Walsh, Stephen and Mason JJ agreeing); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [101]-[103] (the Court).

198 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [103] (the Court), *a fortiori* where the ongoing detention is of citizens and is unlawful.

199 Concise Statement in Response (14 July 2023), [21].

200 *Truth About Motorways Ply Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 599-600 [2] (Gleeson CJ and McHugh J), 652-653 [162] (Kirby J); *Waters v Commonwealth* (1951) 82 CLR 188 at 190 (Fullagar J); *R v Waters* [1912] VLR 372 at 375 (Madden CJ). See also A V Dicey, Introduction to the Study of the Law of the Constitution (Macmillan and Co, 1885), 228.

201 *Clarkson v R* [1986] VR 464 at 465 and 467 (Crockett J); David Clark and Gerard McCoy, *Habeas corpus: Australia, New Zealand and the South Pacific* (2nd ed, 2018, Federation Press), 139 citing *Ex p Child* (1854) 15 CB 237, 238; *Re W (Habeas Corpus Third Party Application)* (2006) 1 HKC 468, 474F (Hong Kong Court of First Instance).

202 *Clarkson v R* [1986] VR 464, 464-66 (Crockett J). By way of analogy, see *Ruddock v Vadarlis* (2001) 110 FCR 491, 509 [66] (Black CJ), cf 518 [107]-[108] (Beaumont J); *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 11 FCR 452, 469 [56] (North J).

203 Tinkler Statement, [53(1)-(20)], [82]-[83].

themselves;[204] (2) Save makes the claim through representation by solicitors and barristers;[205] (3) the women and children are Australian citizens (or are entitled to citizenship);[206] and (4) obtaining express instructions from all remaining women and children is difficult in the circumstances.[207]

11 September 2023

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204 *Cox v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 179 FLR 474, 477 [11] (Mildren J); *Clarkson v R* [1986] VR 464, 465 (Crockett J).

205 See *Clarkson v R* [1986] VR 464, 467 (Crockett J).

206 As to which, see paragraphs [90]–[94] above.

207 Tinker Statement [25]-[26], [28], [69]-[77]. See also, eg, *Cox v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 179 FLR 474, 477 [11] (Mildern J).