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Registrar

Important Information

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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 Reply

1. The Applicant agrees with Respondents' Submissions (**RS**), [102], [139]: the present controversy concerns only whether the Court should order a return. In other words, the Court is confronted with the same issue as arose in *Barnardo*, *O'Brien*, and *Rahmatullah*, as to whether the writ should issue. There, as here, a key issue was control.

2. Habeas corpus is a creature of the common law. Its jurisprudence develops incrementally, decided case upon decided case, authority deriving from the application of the rule to the facts of each case. The relevant line of authority, comprising *Barnardo, O'Brien*, and *Rahmatullah*, establishes that, when the issue of the writ turns on a question of control (assuming the Applicant shows detention and a prima facie case that detention is unlawful), the dispositive question is whether there exists sufficient doubt as to the fact of control — that is, the Respondent's ability to comply with the writ.

3. In *Barnardo*, the mother's counsel argued in the House of Lords, "[i]f there is any doubt at all on the facts the writ should issue, and the question be decided on the return. It is not necessary for us to show that the custody is continuing. … The appellant should be examined and cross-examined on the return to the writ; that full information may be got".[1] The House of Lords accepted this argument. As Lord Herschell put it: "where the court entertains a doubt whether this be the fact, it is 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. Now it is impossible to read the judgment of the Lord Chief Justice without seeing that he did entertain such a doubt, and that he was not prepared, upon the affidavits, to accept as conclusive the statements of the appellant".[2] The dispositive rule in *Barnardo* is stated in the headnote to the report in the Appeals Cases as "the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ, in order that the facts might be more fully investigated".[3]

4. That rule was applied in *O'Brien*, on the affidavit evidence there before the court: see Bankes LJ at 381; Scrutton LJ at 392; Atkin LJ at 398–399. Lord Justice Atkin observed that "the applicant by his affidavit submits reasons for supposing that the Home Secretary is in a position by agreement to cause him to be returned to England".[4] (It should be noted

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1 (1892) 67 LTR 1, 2.
2 [1892] AC 326, 339–340.
3 [1892] AC 326, 327.
4 [1923] 2 KB 361 at 398.

that the relevant submission in his affidavit (as reported[5]) relied solely on statements from Hansard, which were hearsay, and constituted proceedings in Parliament.[6])

5. The rule stated in *Barnardo*, and applied in *O'Brien*, was not questioned by Laws LJ in *Rahmatullah*, who observed (at [13]): "[t]he writ has been issued not only where it is shown that the prisoner is unlawfully held, and the respondent has custody, power or control over him, but also in order that the court may inquire into either or both of those issues".[7] His Honour distinguished *Barnardo* and *O'Brien* on the basis that "the arrangements are perfectly clear but they allow or contemplate no more than the making of a request to the third party which might or might not be acceded to".[8] On appeal, Lord Neuberger MR noticed a statement in an affidavit of an officer of the Ministry of Defence: "that the 'considered view' of the Ministry of Defence was that 'making a request purportedly relying on the [first] MoU would be an inappropriate and futile course of action'."[9] Lord Neuberger quoted Lord Herschell's statement of the rule in *Barnardo*,[10] and identified the application of that rule in *O'Brien*.[11] Applying the rule, his Lordship held that the "bald observation" in the affidavit supported the proposition that there were "grounds for doubt".[12] The Supreme Court unanimously dismissed the appeal.

6. That approach is also consistent with principle. The principle in *Blatch v Archer*[13] (cited by Allsop CJ in *McHugh* in support of the "prima facie" threshold for an applicant on unlawfulness[14]) coheres with the rule in *Barnardo*, applied in *O'Brien* and *Rahmatullah*.

7. Section 140 of the *Evidence Act 1995* (Cth) does not alter that position, because the issue of the writ under s 23 of the *Federal Court of Australia Act 1976* (Cth), which is interlocutory in character,[15] depends only on the existence of sufficient doubt as to control. It is for the respondent, on the return, to prove a case: see *McHugh* at [294] (Mortimer J). The writ issued in *Barnardo*, *O'Brien* and *Rahmatullah* for the sole purpose of putting the respondent to proof. Absent irresistible clearness, s 140 of the Evidence

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5 [1923] 2 KB 361 at 363–364.
6 *Bill of Rights*, cl 9; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.
7 [2012] 1 WLR 1462 at 1469 [13] (Laws LJ) (emphasis added).
8 [2012] 1 WLR 1462 at 1475 [29] (Laws LJ).
9 [2012] 1 WLR 1462 at 1482 [21] (Lord Neuberger MR).
10 [2012] 1 WLR 1462 at 1483 [28] (Lord Neuberger MR).
11 [2012] 1 WLR 1462 at 1484 [30]–[31] (Lord Neuberger MR).
12 [2012] 1 WLR 1462 at 1486–1487 [36], [41] (Lord Neuberger MR). See also [42]–[45].
13 (1774) 1 Cowp 63 at 65.
14 *McHugh* (2020) 283 FCR 602 at [60].
15 *McHugh* (2020) 283 FCR 602 at [21] (Allsop CJ).

Act would not be construed as curtailing the common law concerning the operation of the writ.[16]

8. The Applicant says the test for control is whether the Respondents can bring the bodies to the Court, and that a more particularised comparison of the facts of this case with those of other cases "is unlikely to be helpful".[17] But on any measure derived from *Barnardo*, *O'Brien* and *Rahmatullah*, the bare fact of the October 2022 repatriation, taken with the documents discovered by the Respondents, plainly raises a sufficient doubt.

9. The Respondents were relevantly ordered to discover "documents recording or evidencing agreements or arrangements dated 1 January 2018 to present between the second respondent and AANES in relation to the potential or actual repatriation of Australian citizens (or people who are known to the second respondent to be eligible to be Australian citizens) held in Al-Roj camp".[18]

10. The documents discovered raise at least sufficient doubt as to whether an agreement was formed between the Respondents and the AANES to repatriate all Australians located in Al-Roj camp. Such an agreement exceeds the agreement in *O'Brien*, which the Respondents characterised at [39] as 'a present arrangement … which the respondent to the writ could call upon'. The documents include, among others, the following facts.

11. Marc Innes-Brown was appointed as Special Envoy to liaise with AANES "to facilitate the return to Australia of Australians that are currently located in Al Roj camp."[19]

12. Mr Innes-Brown then proposed the repatriation of 4 women and 13 children "in the coming weeks, subject to appropriate checks."[20]

13. At a meeting on 28 September 2022, the Respondents confirmed they wanted to "progress matters of joint interest" with AANES.[21] As part of the agreement, AANES would "facilitate all procedures" which were "simple" and involved the signing of paperwork and the option of the Respondents making a statement thanking AANES.[22]

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16 See *McHugh* (2020) 283 FCR 602 at [237] (Mortimer J), quoting *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [42] (French CJ).
17 [2012] 1 WLR 1462 at 1487–1488 [45] (Lord Neuberger MR).
18 Pursuant to an order made by Mortimer CJ on 16 June 2023 requiring discovery by 28 July 2023.
19 Barton at page 699, CTH.0003.0003.0028.
20 Ibid.
21 Barton at page 702, CTH.0003.0001.0277.
22 Ibid.

14. None of the discovered documents contain any evidence that the Respondents sought permission from AANES for the repatriation to occur, or that the repatriation was premised on the absolute discretion of AANES. For example, the repatriation document is framed as an agreement between the two parties,[23] while the repatriation procedures document is precisely that, procedural in content only.[24]

15. Importantly, the Respondents sought changes to the repatriation procedures, including by amending the repatriation documentation,[25] changing the time of the meeting between Mr Innes-Brown and the AANES,[26] and altering the route the women and children would take when leaving Al-Roj camp.[27] All the changes sought were promptly made by the AANES.[28]

16. At a meeting on 24 October 2022, to coordinate arrangements for the repatriation of "Cohort 1", it was confirmed all DNA, citizenship and passport documentation had been completed at Al-Roj camp the previous day. It is at least possible this related to all women and children detained at Al-Roj camp.[29] Further pre-flight checks in relation to Cohort 1 were to be undertaken by the AFP on 26 and 27 October 2022.[30]

17. On or about 27 October 2022, 17 Australians were repatriated from Al-Roj camp. According to Ms Logan, this was part of a "broader repatriation effort" coordinated by a joint agency taskforce led by the Department of Home Affairs.[31]

18. It is abundantly clear that there was a plan to repatriate further women and children from Al-Roj camp.[32] The file note of the meeting between Mr Innes-Brown and AANES on 27 October 2022 records AANES confirming their ongoing cooperation, and Mr Innes-Brown thanking them for their cooperation on "repatriation arrangements".[33] In the internal email dated 1 November 2022 (*after* the successful repatriation), Mr Innes-Brown refers to requests from AANES for assistance and cooperation "aside from liaison

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23 Barton at page 707, CTH.0003.0003.0018.
24 Barton at page 708, CTH.0003.0003.0019.
25 Barton at pages 709-711, CTH.0003.0003.0041 and CTH.0003.0003.0042.
26 Barton at page 715, CTH.0003.0003.0007.
27 Barton at pages 709-711, CTH.0003.0003.0041 and CTH.0003.0003.0042
28 Barton at page 712, CTH.0003.0004.0001; Barton at page 716, CTH.0003.0003.0020.
29 Indeed, that is consistent with the evidence of Joshua McDonald at [17]-[18] of his affidavit.
30 Barton at pages 713-714, CTH.0003.0003.0001.
31 Affidavit of Kathleen Logan at [8].
32 Barton at page 728, CTH.0003.0003.0005. See also Barton at pages 713-714, CTH.0003.0003.0001, which described the women and children repatriated on 27 October 2022 at "Cohort 1".
33 Barton at pages 727-728, CTH.0003.0003.0004.

on repatriation issues".[34] Mr Innes-Brown expressly referenced, in discussion with his AANES counterpart on 27 October 2022, a "plan to repatriate further groups of women and children".[35]

19. Noting that Mr Innes-Brown was appointed as Special Envoy precisely in order to liaise with AANES on repatriation, the email and file note together indicate intended future cooperation and liaison on planned future repatriations. The Respondents have provided no explanation for their failure to call Mr Innes-Brown to give evidence.

20. The above facts at least raise sufficient doubt as to whether a broader repatriation agreement was formed between AANES and the Respondents in relation to all the Australians detained at Al-Roj camp.

21. At RS [32], the Respondents accept that de facto control is a question of fact and that the ability to call for production of the person may exist by reason of an arrangement, undertaking, contract or situation of agency. There is at least sufficient doubt whether that exists here.

22. Finally, RS [119] raises what appears to be a pleading point. The writ has, through time, conformed to the various legal forms and procedures that have come and gone, in England, and more recently, here. The Applicant has adopted a concise statement, as an appropriate modern form. The Respondents' attempt to use that form to tame the writ, in a way that cuts into its fundamental character, should not be countenanced.

25 September 2023

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[34] Barton at page 726, CTH.0003.0003.0003.
[35] Barton at page 726, CTH 0003.0003.0005.