No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE BAR HUMAN RIGHTS COMMITTEE OF THE BAR OF ENGLAND AND WALES AND THE COMMONWEALTH LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATIES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE* [1]

The first named *amicus*, the Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

The second named *amicus*, the Commonwealth Lawyers Association ("CLA") is a body dedicated to the rule of law throughout the Commonwealth.[2] All Law Societies and Bar Associations of the fifty-three countries comprising the Commonwealth are institutional members of the CLA.

This brief is submitted in support of the Petitioner, but the *amici* wish to make it clear at the outset that the main purpose of this brief is to explain how the courts of England and Wales have historically exercised jurisdiction in habeas corpus cases and in challenges to the jurisdictional competence or structural fairness of proceedings and how they would do so if confronted with issues of the kind understood to arise in these proceedings. We hope this may assist this Honourable Court, for the following reasons:

a) the writ of habeas corpus has its origin in England;
b) in *Rasul* v. *Bush*, 542 U.S. 466 (2004), the Supreme Court referred to the English origins of habeas corpus (citing English authority) and to habeas becoming "an integral part" of the common-law heritage of the two

[1] The content of this brief is entirely the work of the authors identified, and no party other than the *amici* and their legal representatives have made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] The Commonwealth is a voluntary association of fifty-three independent sovereign states. Its 1.7 billion people account for thirty percent of the world's population.

countries by the time the Colonies achieved independence;[3]

c) because of Britain's history of Constitutional struggles between Crown and Parliament, issues relating to the jurisdiction to grant the remedy of habeas corpus have not infrequently arisen in the High Court in England in the context either of statutory provisions purporting to restrict the availability of the remedy or executive power attempting to override it either through an executive order or through legislation;

d) the English courts have also recently had occasion to consider the consequences of a lack of structural independence or impartiality on the part of military tribunals and the admissibility of evidence which may have been obtained under torture by foreign states, both of which issues it is understood may arise in these proceedings. English case law on these issues and on the further questions addressed in Section IV of this brief is of very longstanding and of the highest authority.

SUMMARY OF ARGUMENT

In the English courts the ability of a person in detention to access the courts in order to challenge the basis of his detention is paramount. The jurisdiction of the courts in such a case has been jealously guarded for centuries and extends to a review of the *vires* of any lower tribunal purporting to try any detainee. There are numerous judicial statements

[3] 542 U.S. at 473–74 (internal quotation marks omitted). Note too *Johnson* v. *Eisentrager*, 339 U.S. 763, 779 (1950), where the Court referred to the English origins of habeas corpus and the harmony between the relevant laws of the two jurisdictions. See also *Fay* v. *Noia*, 372 U.S. 391, 399–400 (1963), where the Court, per Brennan J., spoke of the "extraordinary prestige of the Great Writ * * * in Anglo-American jurisprudence" and also stated (at 401): "It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

emphasising the immediacy of the right to seek relief and the speedy nature of the remedy.

As to the question of ouster, were the legislature of the United Kingdom to enact a complete and unequivocal removal of the remedy in circumstances which would result in there being no effective form of challenge of any kind to detention before an English court, it is likely that the court would consider the ouster unconstitutional and unlawful as being in breach of the paramount principles of the rule of law and the separation of powers central to any constitutional democracy.

In respect of the issues of due process understood to be among those raised in these proceedings, as a matter of English law the right to trial before an independent and impartial tribunal is a fundamental aspect of the right to a fair trial both at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") and a breach of this right will inevitably lead to a quashing of any conviction. Similarly the right to exclude evidence obtained by torture is absolute as is the right to sight of all evidence relied upon by the prosecuting authorities. Furthermore only in limited and carefully defined circumstances will it be permissible for evidence to be admitted without the witness responsible for that evidence being tendered for cross-examination. In such circumstances a detainee is entitled to raise each of these points at the earliest stage of proceedings and need not await the conclusion of those proceedings.

In summary, were the English courts to be faced with a challenge of the kind raised by the petitioner in this case, they would not refuse to hear it on the grounds that ongoing proceedings had yet to reach their conclusion and would, on the issues of independence and impartiality and use of coerced evidence, rule in the petitioner's favour.

ARGUMENT

I. The origins and history of the writ of habeas corpus illustrate the importance of the writ and the breadth of protection it affords.

The origins of the writ of habeas corpus in England and the Commonwealth may be found in *Magna Carta*. Article 1 of *Magna Carta* states that all the freedoms set out therein were "given to all the free-men of our realm, for us and our Heirs forever," and Article 29 provides that "[n]o Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed or exiled, * * * but by the lawful Judgment of his peers or by the Law of the Land."[4] A Divisional Court of the Queen's Bench has recently endorsed the following statement as accurately reflecting *Magna Carta*'s present day significance in English law:

> "[*Magna Carta*] becomes and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had. * * * For in brief it means this, that the king is and shall be below the law."[5]

Although it appears that it was in the sixteenth century that the writ of habeas corpus first began to be used as a means of testing the validity of executive committals,[6] it was in 1640 that the English Parliament made its first express attempt to

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[4] *Magna Carta* arts. 1 & 29, 1 Stat. at Large (Runnington rev. to Ruffhead ed., London, Charles Eyre *et al.* 1786).

[5] 1 Frederick Pollock & Frederic W. Maitland, The History of English Law Before the Time of Edward I, at 173 (reprint 1923) (London, Cambridge Univ. Press 2d ed. 1898), cited and quoted with approval by Lord Justice Laws in *R (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067, 1095 (Q.B.D. Admin. Ct.).

[6] R.J. Sharpe says in the leading textbook on the subject, The Law of Habeas Corpus (2d ed. 1989), at 7: "By the time of Elizabeth [I] it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. There are cases as early as 1567 in which habeas corpus was used by persons detained by order of the Privy Council to obtain their release on bail."

curtail the power of executive detention. Section VIII of the Habeas Corpus Act of 1640, 16 Car. 1, c. 10, provided that "any Person" imprisoned by order of the King or Council should have habeas corpus and be brought before the court *without delay* with the cause of imprisonment shown. The Act was passed against the background of the first case of major constitutional importance to address the question of habeas corpus, *Darnel's Case*, (1627) 3 How. St. Tr. 1 (K.B.).[7]

In 1679 a second Habeas Corpus Act, 31 Car. 2, c. 2, made it clear that the scope of the protection afforded by habeas corpus—the guarantee against arbitrary detention—was intended to be broad. Section II describes it as for "the more *speedy* Relief of all Persons imprisoned for any such criminal or supposed criminal Matters" (emphasis added), and Section XII made it an offence to remove detained persons to places where the writ could not be served.

Over the centuries English judges and lawyers have emphasised the importance of the writ of habeas corpus and its fundamental purpose. The jurisdiction of the High Court in England to grant the writ was recognised as extending to any part of the King's dominions. Blackstone described the writ thus:

> "[T]he great and efficacious writ in all manner of illegal confinement is that of *habeas corpus ad subjiciendum*; * * *. This is a high prerogative writ, * * * running into all parts of the king's dominions: for the king is at all time intitled to have an account, why the liberty of any of

[7] In *Darnel's Case*, the King, Charles I, had imprisoned five Knights as a result of their refusal to contribute to the repayment of a forced loan he had taken out. The Knights sought their freedom by issue of writs of habeas corpus and, in response, the King simply asserted (at 33) that they had been detained "*per speciale mandatum domini regis*." The issue in the case was whether the Court was required to assume that there was substantive legal justification for the imprisonment or whether the failure to disclose specific grounds entitled the prisoners to be bailed pending trial. The Court ruled in favour of the King and refused to bail the Knights. The Habeas Corpus Act of 1640 in effect reversed that decision.

> his subjects is restrained, wherever that restraint may be inflicted."[8]

The breadth of the remedy was reaffirmed in the House of Lords by the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 (appeal taken from Eng.), when he said the following (at 609):

> "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a *swift and imperative remedy* in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by the Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." (Emphasis added.)

II. As a principle of English law the writ of habeas corpus applies in war as well as peace time. It applies to all forms of military tribunal. Speed is at the essence of the remedy, and it can be relied upon at any stage of detention.

Innumerable judicial statements to the effect that the writ of habeas corpus applies in times of war as well as peace could be cited. The well known dissent of Lord Atkin to this effect in *Liversidge* v. *Anderson*, [1942] A.C. 206 (H.L. 1941) (appeal taken from Eng.), has come to be recognised as stating the true position in English law (*Inland Revenue Comm'rs* v. *Rossminster Ltd*., [1980] A.C. 952, 1011, 1025 (H.L. 1979) (appeal taken from Eng.)). His words written in one of the darkest periods of the war stated (at 244):

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[8] 3 William Blackstone, Commentaries *131.

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified by law."

Against this background, as a matter of English common law, an English court would not recognise or accept a judicial abstention said to be applicable because the detention arose in military tribunal proceedings. On the contrary, English courts have long regarded both military detentions and detentions of inferior courts and tribunals as core areas requiring habeas review. There are innumerable cases stretching back to early times in which military detentions have been subjected to habeas corpus review.[9]

It has never been an answer to the jurisdictional question that military and national needs may be more compelling than the interests of the detainee. An early example of this is *Goldswain's Case*, (1778) 2 Wm. Bl. 1207, 96 Eng. Rep. 711 (K.B.), heard at the time of the American War of Independence. There the prisoner's argument for release was met by the Admiralty's plea that it was a time of urgent necessity, the French having recently declared alliance with the American Revolutionaries, such that the Navy's conduct was justified and should not be reviewed. Rather than accept this plea, the court expressed disapproval of the detention and required the Admiralty to set out any question of law it meant

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[9] *E.g.*, *R* v. *King*, (1674) Comb. 245, 90 Eng. Rep. 456 (K.B.); *Good*, (1760) 1 Wm. Bl. 251, 96 Eng. Rep. 137 (K.B.); *Goldswain's Case*, (1778) 2 Wm. Bl. 1207, 96 Eng. Rep. 711 (K.B.); *Ex parte Drydon*, (1793) 5 T.R. 417, 101 Eng. Rep. 235 (K.B.); and *R* v. *Young*, (1808) 9 East. 466, 103 Eng. Rep. 650 (K.B.).

to argue (and the Admiralty then consented to the discharge of the detainee without further argument).

The position is not made different where the detainee is foreign or has been on the other side of combat. It was after all in order to avoid an application for habeas corpus by Napoleon, on grounds that there was no authority in English law to hold him after termination of war, that special legislation was passed for his continued detention.[10]

English law knows no separate principle whereby the hearing of any application for habeas relief may be postponed out of comity or reluctance to interfere with related tribunal proceedings or military affairs. As the wording of the 1679 Act referred to above makes clear, speedy resolution is at the essence of the remedy, and it is a rule in English law that habeas corpus is not a discretionary remedy but issues *ex debito justitiae*. Further recognition of this principle appears in Lord Chief Justice Wilmot's Opinion to the House of Lords in 1758:

> "[Habeas corpus] is a remedial mandatory Writ, by which the King's supreme Court of Justice, and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the Cause of his Imprisonment; *and it is a Writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it*. It runs, at the Common Law, to all Dominions held of the Crown. It is accommodated to all persons and places."[11] (Emphasis added.)

The rule that habeas is not discretionary means that an English court may only refuse relief where there is no legal basis for the application and not on discretionary grounds

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[10] See An Act for the More Effectually Detaining in Custody Napoleon Buonaparté, 56 Geo. 3, c. 22 (1816).

[11] John Eardley Wilmot, Notes of Opinions and Judgments Delivered in Different Courts 77, 88 (London, Hansard 1802).

such as inconvenience, inexpediency or indeed judicial abstention. Accordingly, detentions by the military and by courts martial are fully reviewable in English law from the moment of detention. There is no doctrine of abstention or deference to military tribunals by which a court could decline to hear a habeas application. The English court's interest can be only in the legality of the detention and the merits of the application before it. If this case were in an English court, an abstention argument would inevitably have to be dismissed.

As for when an application for habeas may be made, it is clear from both the origins of the remedy and the way it has evolved since that an intrinsic element of the remedy is that it be implemented speedily and without delay. As already submitted, habeas corpus owes its origins to Article 29 of *Magna Carta* establishing the right to trial and to due process and the right against arbitrary detention.[12] That article also emphasised the importance of securing those rights speedily:

> "We will sell to no man, we will not deny, *or defer*, to any man, either Justice or Right." (Emphasis added.)

Similarly Sir Edward Coke underlined the importance of the right enshrined in *Magna Carta* by stating:[13]

> "[T]he law did so highly hate the long imprisonment of any man, though accused of an odious, and heynous crime, that it gave him [the writ *de odio et atia*] for his reliefe."
>
> "And * * * [*Magna Carta* enacts that the prisoner] shall have [the writ] gratis, without fee, and *without delay*, or deniall * * *." (Emphasis added.)

The importance of ensuring immediate access to a court on a writ of habeas corpus is axiomatic to English law. It is settled law that as a matter of principle a writ may be brought

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[12] See p. 4 above.

[13] Edward Coke, Second Part of the Institutes of the Laws of England *42 (1817 ed., London, printed for W. Clarke & Sons) (1642).

before the trial of any proceedings. There is a long line of authority stretching back to early cases in which this is implicit. In *Cox* v. *Hakes*, (1890) 15 App. Cas. 506 (H.L.) (appeal taken from Eng.), Lord Halsbury, L.C., stated (at 514, 522):

> "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might * * * make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question."
>
> "It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

In *Secretary of State for Home Affairs* v. *O'Brien*, *supra*, the House of Lords cited *Cox* v. *Hakes* with approval. Lord Shaw (at 643–44) stressed the importance of urgency:

> "My Lords, I think it right further to observe that urgency is written all over the face of habeas corpus proceedings. 'Preventing delay,' 'immediate determination of the right to the applicant's freedom,' the avoidance of 'the delay and uncertainty of ordinary litigation'—these

> expressions are significant of urgency as an essential quality of the proceedings."

And as R.J. Sharpe puts it:[14]

> "From the seventeenth century to the nineteenth century, habeas corpus was an important aspect of day-to-day criminal procedure. It was the accepted method by which a person committed by the local justices could appeal to the general power of the King's Bench to grant bail, and it generally provided a method of review over pre-trial proceedings. It was, and still is, thought to provide a measure of protection against arrest and detention unauthorised by the ordinary criminal process."

The interrelation between *Magna Carta* and habeas corpus has long been recognised by legal commentators. The nineteenth century commentator Paterson described habeas corpus and the bond between the two thus:

> "It is now a familiar code, and represents a whole armoury of strength, for every line and syllable of which each citizen would fight to the last, as for his household gods. Holt said every man should be concerned for Magna Carta. And the *Habeas Corpus* Act is only a natural sequel and development of Magna Carta. No dictator, whether single handed or hydra-headed, can long breathe the same air with those who have caught the secret of its power. It appeals to the first principles of security, and to the law of nature, if any such be."[15]

By the late seventeenth century the writ of habeas corpus began to fall into disrepair as a result of the delays caused by those who sought to thwart its effectiveness. Paterson described the mischief created thus:

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[14] R.J. Sharpe, *supra*, at 128.

[15] 2 James Paterson, Commentaries on Liberty of the Subject and the Laws of England Relating to the Security of the Person 208 (London, MacMillan 1877).

> "The writ of *habeas corpus*, as has been said, was thus a right preserved with great difficulty, and even in 1591, eleven judges in a body remonstrated against its abuses and insufficient remedy. That memorandum stated, that the subject was often committed or detained in prison by commandment of any nobleman or councillor, and after discharge put again in secret prisons, and not the ordinary known prisons * * *, so that the Queen's Court did not know where to direct the writ to."[16]

The Habeas Corpus Act, 1679, referred to above sought to remedy this mischief. The securing of the right speedily was conceived as an essential element of the act. This much is clear from the introductory words to Section II of the Act already cited. However, the Act went much further by creating a system of safeguards to ensure expeditious relief. Section II went on to stipulate strict time limits within which a prisoner was to be brought before the court once a writ was served. Section X provided that any ordinary judge who heard a writ during the vacation time of the High Court, who improperly denied or refused to hear a writ would be liable to the petitioner in the sum of five hundred pounds. Section V provided that gaolers who improperly sought to avoid, frustrate or delay a writ were also subject to substantial fines as well as possible contempt.

As Paterson pointed out, the much improved system of habeas corpus established by the 1679 Act proved so effective that it remained in place largely unamended for two centuries:

> "The defect, the danger and the delay now referred to, having never been lost sight of, at length, * * * the *Habeas Corpus* Act passed, and after the lapse of two centuries, it has been found by experience to have made the machinery revolve so promptly and cut so clearly into the marrow of all the mischiefs attending the possession of might, regardless of right, that no king or minister, led

[16] *Id.* 205–06.

> away with the dream of power, has since sought seriously to battle or disable it."[17]

Indeed the system of detention and habeas corpus in English jurisdiction today has retained many of the key features created and refined by the 1679 Act, principal among them that detainees must be brought speedily before the courts, that it is for the courts at the earliest opportunity to consider the lawfulness of detention, and that the court has a duty to review the decision to continue to detain and to allow the detainee the opportunity to make renewed applications.

It is also clear that English law has long recognised the legitimacy of using the writ of habeas corpus to challenge the jurisdiction of a tribunal. The concept of jurisdictional review seems to have emerged early in the history of the struggle between the common law courts and the other jurisdictions for control. The cases of the early years of the seventeenth century generally indicate a growing acceptance of habeas corpus as a device to test the legality of commitments, and in particular there are numerous cases of prisoners being discharged or bailed having been committed by the High Commission.[18] Relief was awarded if the return failed to show a good cause for the imprisonment, and the courts were plainly not willing to accept the returns which did not make manifest that all had been within the powers conferred by law. The High Commission cases particularly demonstrate the effectiveness of the writ where an attack was mounted against the jurisdiction of the tribunal ordering the committal.

As R.J. Sharpe says:

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[17] *Id.* 207

[18] See R.J. Sharpe, *supra*, at 7 & 25 and cases cited therein: esp. *Hinde*, (1576) 4 Leon. 21, 74 Eng. Rep. 701 (K.B.); *Roper*, (1607) 12 Co. Rep. 45, 77 Eng. Rep. 1326 (K.B.); *Throgmorton*, (1610) 12 Co. Rep 69, 77 Eng. Rep. 1347 (K.B.); *Chancey*, (1611) 12 Co. Rep. 82, 77 Eng. Rep. 1360 (K.B.); *Bradstone* v. *High Commission*, (1613) 2 Bulst. 300, 80 Eng. Rep. 1138 (K.B.); *Hodd* v. *High Commission*, (1615) 3 Bulst. 146, 81 Eng. Rep. 125 (K.B.); *Codd* v. *Turback*, (1615) 3 Bulst. 109, 81 Eng. Rep. 94 (K.B.).

> "There are also many modern cases which illustrate the operation of jurisdictional review on habeas corpus. The courts are quite willing to grant relief where an inferior tribunal has stepped outside the limits of its authority by misconstruing a statute or by failing to base its decision upon the proper considerations. The law of extradition provides many examples where relief has been awarded on this basis, as in the cases where the offence alleged is not extraditable or 'political' within the meaning of the statute, or where the committing magistrate has failed to follow the statutory procedures. Similarly, in the law of immigration, it is open to the applicant on habeas corpus to show that he or she is not a person subject to the statute or that the authorities failed to follow the requisite procedure."[19]

The habeas corpus procedure has always combined the qualities of flexibility with an ability to provide a swift and ready remedy. From its inception it has operated as an interlocutory remedy ancillary to other main causes of action. These essential features of habeas corpus were well understood by the commentator Edward Jenks, who observed:

> "[I]t is somewhat disconcerting to find that this high prerogative document is not an Original writ at all, but a mere interlocutory mandate, or judicial precept, which occurs in the course of other proceedings."[20]

The nature of the procedure therefore is that it can be invoked at any time during the course of other proceedings and that its very purpose is that applicants should be able to challenge their detention at any time as well as (and perhaps typically) prior to the commencement, let alone conclusion, of any proceedings.

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[19] R.J. Sharpe, *supra*, at 32.

[20] Edward Jenks, *The Story of the Habeas Corpus*, 18 L.Q.R. 64, 64–65 (1902).

These safeguards in domestic law are also reflected in Article 5 of the European Convention, a document very substantially drafted by English lawyers in the aftermath of the Second World War. Article 5(3) states:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear before trial."

Similarly Article 5(4) affords further protection in relation to detained persons:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The European Court for Human Rights has provided robust supervision of Article 5. A recent example is *Kadem* v. *Malta*, (2003) 37 Eur. Ct. H.R. 18. There the applicant was arrested on the strength of a provisional arrest warrant issued by a duty magistrate in connection with a request for his extradition made by Morocco. There was no evidence that the magistrate's court, which heard Kadem's challenge against his detention, had the power to review the legality of his deprivation of liberty of its own motion. Accordingly, Maltese law did not comply with Article 5(4) of the Convention in this respect. The European court recalled (at para. 41) that under Article 5(4):

> "[A]n arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the 'lawfulness' of his or her deprivation of liberty. In particular, the

> competent court should examine not only compliance with the procedural requirements set out in domestic law, but also the legitimacy of the purpose pursued by the arrest and the ensuing detention and should have the power to order the termination of the deprivation of liberty if it proves unlawful." (Footnotes omitted.)

III. Any statutory ouster of review by the courts over lower tribunals should be strictly construed. Current leading judicial and academic opinion supports the view that a complete ouster of review over lower tribunals would be unconstitutional.

Historically, there have been a number of attempts to suspend some of the protections afforded by the writ in time of national emergency.[21] However, it has long been held that absent express provision to contrary effect, the right of the individual to petition the courts challenging the decision of the executive is in principle preserved.

Furthermore, any Act of Parliament purporting to narrow the scope of review of a detainee will be strictly construed. Lord Atkin in *Liversidge* v. *Anderson*, *supra*, stated (at 245):

> "that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act."

In an earlier Privy Council decision Lord Atkin made the same point in the specific case of an executive decision whereby the Governor of Nigeria (then a colony) purported to exclude the plaintiff from a particular area of Nigeria and then to deport him under an ordinance (the "Deposed Chiefs

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[21] See, *e.g.*, Habeas Corpus Suspension Acts from 1688 (for a list see William Forsyth, Cases and Opinions on Constitutional Law 452 (London, Stevens & Haynes 1869); Defence of the Realm Act, 1914, 4 & 5 Geo. 5, c. 29, whereby Parliament delegated to the King in Council the power to regulate generally for the safety of the realm; Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. 6, c. 62.

Removal Ordinance"). In *Eshugbayi Eleko* v. *Government of Nigeria*, [1931] A.C. 662 (P.C.), he said (at 670):

> "Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

In *Khera* v. *Secretary of State for the Home Department*, [1984] A.C. 74 (H.L.) (appeal taken from Eng.), one of the applicants for habeas corpus was a Pakistan national held in the United Kingdom pending his removal pursuant to an order of an immigration officer. The House of Lords again stated that the dissenting opinion of Lord Atkin was to be treated as correctly stating English law, and that the factual basis for an executive detention was always subject to review on habeas corpus. In the course of his judgment Lord Scarman expressly recognised the importance of the power of review over anyone deprived of their liberty. He said (at 110, 111):

> "But, as I understand the law, it cannot extend to interference with liberty unless Parliament has unequivocably enacted that it should. * * *
>
> "Such exclusion of the power and duty of the courts runs counter to the development of the safeguards which our law provides for the liberty of the subject. The law has largely developed through the process of habeas corpus."

> "Accordingly, faced with the jealous care our law traditionally devotes to the protection of the liberty of those who are subject to its jurisdiction, I find it impossible to imply into the statute words the effect of which would be to take the provision, paragraph 9 of Schedule 2 of the Act, 'out of the "precedent fact" category'. If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear." (Citation omitted.)

In *R (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.D.B. Admin. Ct.), the case was concerned with the availability of another prerogative writ[22] to a territory "under the Crown's subjection." The Crown submitted that the territory although a colony, enjoyed a separate and distinct sovereignty and that as a result the writ of the High Court in London could not run there.[23] Lord Justice Laws and Mr. Justice Gibbs rejected this argument. Referring to the writ of habeas corpus and to the issue of ousting access to the courts, Lord Justice Laws said (at 1097):

> "But I conceive it is generally accepted that interference with a constitutional or fundamental right requires *at least* [emphasis added] *specific* authority given by Parliament, and this is a principle of the common law, independent of our incorporation by the Human Rights Act 1998 of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)."

Judicial and academic opinion now supports the view that a total ouster of court review of the decisions of lower tribunals or of executive decision-making would be unconstitutional as a matter of English law. The debate recently arose in relation

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[22] The writ of certiorari to quash an ordinance passed by the Commissioner exercising powers over a British Indian Ocean territory.

[23] [2001] Q.B. at 1072 & 1086 para. 21.

to a proposed amendment to the immigration legislation which sought to preclude an application for judicial review.

In its report addressing this question the Parliamentary Joint Committee on Human Rights noted that even at the height of the Second World War a clash between the fundamental principles of parliamentary sovereignty and rule of law was avoided by preserving judicial review of the use of emergency powers of detention without trial. The Committee stated:[24]

> "57. * * * Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. * * *
>
> "58. Apart from the fact that the rule of law is a fundamental principle inherent in international human rights law, it is inherent in the fundamental law of the British constitution. It includes the civil right of everyone within the jurisdiction of the United Kingdom to have unimpeded access to the ordinary courts to test the legality not only of administrative decisions but also of the decisions of inferior tribunals."

Addressing the same issue Lord Woolf, the then Lord Chief Justice of England and Wales, in a lecture to Cambridge University on 3 March 2004, spoke out against the proposal in the most unequivocal terms:[25]

> "I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so

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[24] Joint Committee on Human Rights, House of Lords, House of Commons, Fifth Report of Session 2003–04, HL Paper 35, HC 304, Asylum and Immigration (Treatment of Claimants, etc.) Bill at 23–24 (Feb. 10, 2004), *available at* http://www.lib.gla.ac.uk/Depts/MOPS/Offpub/newaware0304.shtml.

[25] Harry Woolf, Squire Centenary Lecture to Cambridge Univ.: The Rule of Law and a Change in the Constitution [third paragraph from end] (Mar. 3, 2004), *available at* http://www.dca.gov.uk/judicial/speeches/lcj030304. htm.

> inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution."

Similarly, Lord Lester QC in a lecture given on 26 February 2004 considered that the proposed ouster was repugnant as an attempt to "repeal the ancient common law supervisory jurisdiction of the Queen's courts over statutory tribunals."[26] He stated:

> "In my view, it is strongly arguable that there are implied limits imposed by the common law, and by a purposive reading of our ancient constitutional statutes, upon the apparently absolute powers of the Queen in Parliament. Parliament cannot validly destroy or alter the essential features of the basic structure of the constitution, for example, by purporting to deprive the Queen's Courts of their supervisory jurisdiction over statutory tribunals, where they lack jurisdiction, commit errors of law, or act in breach of the principles of natural justice."[27]

IV. Respects in which the proposed procedures of the Military Commission would violate fair trial principles of English law and the stage at which each point may be raised.

Amici understand that the areas of the Military Commission procedure under challenge by the petitioner in this case include the following: the independence and impartiality of the commission structure and appellate bodies, the potential for admission of coerced evidence, the inability of the

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[26] Anthony Lester QC, Speech at Inner Temple Parliament Chamber, London: The Constitutional Implications of Ouster Clauses 6 (Feb. 26, 2004), *available at* http://www.odysseustrust.org/lectures.

[27] See also public legal opinion of Michael Fordham to the Refugee Legal Centre, Common Law Illegality of Ousting Judicial Review: Common Law (Jan. 8, 2004), *available at* http://www.blackstonechambers.com/pdfFiles/Blackstone_MF_THE%20LEGALITY%20OF%20OUSTING%20JR1.pdf.

petitioner to cross-examine witnesses relied upon against him, and the inability of the petitioner to have sight of all material relied upon against him. In each respect, and as explained below, English law would favour the petitioner's position.

Independence and impartiality

One of the leading English authorities on independence and impartiality of a tribunal in the English courts is *R* v. *Bow Street Magistrate, ex parte Pinochet (no. 2)*, [2000] 1 A.C. 119 (H.L. 1999) (appeal taken from Eng.). In that case—concerned with an attempt by Senator Pinochet to overturn an earlier House of Lords decision refusing to quash extradition warrants issued against him on grounds of immunity—Lord Hope reviewed the different formulations of the appropriate test adopted in different common law jurisdictions. The test in England was that there was a "real danger of bias" whereas the test in Scotland and other jurisdictions was whether there were circumstances which were capable of creating "in the mind of a reasonable man a suspicion of [the tribunal's] impartiality." *Id.* at 142. Lord Hope explained (*id.*):

> "Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests * * * that they are all founded upon the same principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial."

More recently the Privy Council[28] has had occasion to consider the consequences of a breach of the right to trial before an independent and impartial tribunal, even where it can be shown that the trial has been subjectively fair, that the

[28] As the Court will be aware, under the United Kingdom's legal system appeals from Scotland are heard by the Privy Council, which is comprised of the same judges as the Judicial Committee of the House of Lords.

complaint relates to structural issues and the absence of guarantees of independence and that no question of actual prejudice can be asserted. In *Millar* v. *Dickson*, [2002] 1 W.L.R. 1615 (P.C. 2001) (appeal taken from Scot.), their Lordships made it quite clear that a breach of this nature was so fundamental that it tainted the entire process and compelled the quashing of any conviction so obtained. Furthermore, and importantly for present purposes, they held that the act of *prosecuting* an individual before such a tribunal was itself unlawful. In these circumstances the challenge could be brought at any stage either before or after the conclusion of proceedings. The *amici* wish to emphasise the following from their Lordships' judgments:

> "[T]he right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded." Per Lord Bingham at para. 16.
>
> "By continuing to prosecute the accused before a tribunal which was not independent and impartial [the Lord Advocate] infringed the right of the accused to have the criminal charges against them determined by a tribunal which was independent and impartial." *Id.* at para. 27.
>
> "[T]he question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case." Per Lord Hope at para. 63.
>
> "The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's

> impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand." *Id.* at para. 65 (citation omitted).

The *Millar* case has since been applied in the context of challenges to court martial proceedings. In *R* v. *Dundon*, [2004] EWCA (Crim) 621, the court martial appeals court considered an appeal brought by Mr. Dundon following his conviction and sentence by court martial. The challenge was brought at that stage because it was only as a result of a later decision of the European court that it was appreciated by Mr. Dundon's representatives that an argument based on a want of independence and impartiality was open to him by reference to Article 6 of the European Convention and the right to a fair trial there reflected. The breach in question arose from the involvement of a military Judge Advocate in the trial process. Although no criticism could be made of the substantive fairness of the proceedings the conviction was quashed. As Lord Justice Rose explained (at para. 16):

> "[W]e are unable to envisage any circumstance in which an art. 6 breach having arisen from want of independence and impartiality in the tribunal, it would be possible to conclude that the conviction is safe * * * although no criticism is or could be made of this Judge Advocate's conduct, want of independence and impartiality on his part tainted the basic fairness of the proceedings in relation to conviction as well as sentence. The Appellant's conviction must therefore be declared unsafe, as a matter of principle and authority * * *."

In a series of cases against Turkey the European Court of Human Rights has also directly considered the compatibility of tribunals including in their constitution a military judge in proceedings against individuals who are not members of the State's armed forces. The leading case in this regard is now

Ocalan v. *Turkey*, (2005) 41 Eur. Ct. H.R. 45. The case concerned the Kurdish leader Abdullah Ocalan accused by the Turkish authorities of being the leader of a terrorist group responsible for some 30,000 deaths. Mr. Ocalan was convicted of treason before a Turkish state security court which, in the early stages of hearing the case, had comprised a panel of three judges: one military judge and two civilian judges. Notwithstanding the fact that prior to the verdict the military judge was substituted with a civilian judge (who had been present throughout the proceedings as a potential substitute judge), the Grand Chamber held that the presence of the military judge had violated the right to due process. The court said the following:

> "112. The Court has consistently held that certain aspects of the status of military judges sitting as members of the State Security Courts made their independence from the executive questionable [citation omitted].
>
> "113. It is understandable that the applicant—prosecuted in a State Security Court for serious offences relating to national security—should have been apprehensive about being tried by a bench which included a regular army officer belonging to the military legal service. On that account he could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case [citation omitted].
>
> "114. As to whether the military judge's replacement by a civilian judge in the course of the proceedings before the verdict was delivered remedied the situation, the Court considers, firstly, that the question whether a court is seen to be independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of Article 6 regarding independence, the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the

investigation, the trial and the verdict (those being the three stages in Turkish criminal proceedings according to the Government).

"115. Secondly, when a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings, unless it is established that the procedure subsequently followed in the state security court sufficiently disposed of that concern. More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.

"116. In its previous judgments, the Court attached importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces [citation omitted]. Such a situation seriously affects the confidence which the courts must inspire in a democratic society [citation omitted].

"117. In the instant case, the Court notes that before his replacement on 23 June 1999 the military judge was present at two preliminary hearings and six hearings on the merits when interlocutory decisions were taken. It further notes that none of the decisions were renewed after the replacement of the military judge and that all were validated by the replacement judge.

"118. In these circumstances, the Court cannot accept that the replacement of the military judge before the end of the proceedings disposed of the applicant's reasonably held concern about the trial court's independence and impartiality."

One further aspect of the court's approach to the *Ocalan* case also indicates that objections as to the constitution or fairness of a tribunal may be taken at the outset of

proceedings. As paragraph 5 of the earlier chamber judgment in the case made clear,[29] the court had, at a very early stage, granted interim measures requiring Turkey to "ensure that the requirements of art. 6 in the proceedings against the applicant in the State Security Court were complied with and that the applicant was able to exercise his right to individual application to the court through lawyers of his own choosing effectively." The fact that even an international court such as the European Court of Human Rights—limited as it was by the concept of exhaustion of domestic remedies—was prepared to grant interim measures, prior even to the formal commencement of domestic proceedings, is a strong indication that matters going to the fundamental fairness of proceedings may be raised at any stage and an accused is not required to await the conclusion of the process before raising such issues on appeal.

There is also, of course, an inherent logic in permitting a challenge based on want of independence or impartiality to be brought before a superior court at the earliest possible opportunity. To require the lower tribunal to rule upon this issue would effectively make it a judge in its own cause and require a litigant to submit to a process which he wished to argue was structurally incapable of respecting his due process and fair trial rights.

Evidence obtained by torture

The House of Lords has very recently considered whether there are any circumstances in which evidence obtained by torture may be admitted in judicial proceedings of any kind. The question arose in the context of proceedings relating to the detention of individuals certified by the Secretary of State for the Home Department as "suspected international terrorists" and challenges by these individuals to that certification. The question directly in issue was whether evidence obtained by the torture of witnesses by a foreign

[29] (2003) 37 Eur. Ct. H.R. 10.

State could be admitted in proceedings where the United Kingdom had not been complicit in the torture in any way. A specially convened panel of seven Law Lords held that there was an absolute exclusionary rule precluding admission of such evidence in any proceedings. See *A and others* v. *Secretary of State for the Home Department*, [2005] UKHL 71 (appeal taken from Eng.).

Because of the significance of the issue all seven Law Lords gave judgments in the case, although they were unanimous in upholding the absolute exclusionary rule. The following are among the important statements in the case:

> "[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention." Per Lord Bingham at para. 51.
>
> "The principles of the common law, standing alone, * * * compel the exclusion of * * * torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice." *Id.* at para. 52.[30]
>
> "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria." Per Lord Hoffmann at para. 82.

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[30] Perhaps notably for the purposes of the instant case, Lord Bingham also observed, at paragraph 53, that "It may well be that * * * some of the Category II or III techniques detailed in a J2 memorandum dated 11 October 2002 addressed to the Commander Joint Task Force 170 at Guantanamo Bay [citation omitted] would now be held to fall within the definition in article 1 of the Torture Convention."

> "The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.
>
> "Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use." Per Lord Hope at paras. 112–13 (citations omitted).
>
> "[T]he duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount * * * to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement." Per Lord Carswell at para 150 (citation omitted).

A further feature of this case before the House of Lords was that a series of proceedings involving challenges to control orders[31] and deportation notices were stayed pending the outcome of the case and an indication from the individuals concerned that they wished to contend that evidence obtained under torture should not be admitted against them. The powerful statement of Lord Hope referring to the potential for torture to "spread like an infectious disease" also provides a strong justification for allowing the point to be resolved at the preliminary stage before the integrity of the judicial system is undermined.

Availability of witnesses for cross-examination

For hundreds of years the central principle of the English criminal law has been that witnesses should be made available for cross-examination. As Blackstone put it in 1783:

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[31] These are orders permitted under the United Kingdom's domestic anti-terrorist legislation restricting the freedom of movement and association of individuals alleged by the Government to be "suspected international terrorists" but against whom no criminal proceedings are to be brought.

> "In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, education, understanding, behaviour, and inclination of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which evidence is delivered, as from the matter of it."[32]

Although this absolute rule has been relaxed to a certain degree, it will only be in exceptional cases where an out of court statement may be admitted without requiring the deponent to be available for cross-examination—typical examples are where the witness is overseas or ill—and the presumption remains strongly in favour of oral evidence. *Cf. R* v. *Gokal*, [1997] 2 Crim. App. 266 (1996), where the evidence of an accomplice was admitted without his giving oral evidence.

Right of an accused to sight of all evidence relied upon against him

Another principle of the English common law of long standing which remains absolute is that an accused must be provided with all evidence to be used against him. See, *e.g.*, *Franklyn* v. *Regina*, [1993] 1 W.L.R. 862 (P.C.) (appeal taken from Jam.). Indeed the common law (stimulated by a series of high profile miscarriages of justice and informed by the jurisprudence of the European Court of Human Rights) has now gone further and made it clear that any material which the prosecution has obtained and which it does not intend to rely upon but which may assist the defence must be disclosed. *R* v. *Davis*, (1993) 97 Crim. App. 110. Both this principle and that relating to attendance or otherwise of a witness at trial are of such significance that they—like the matters set out above—could, under English law, readily be taken as a preliminary point without waiting for the conclusion of trial.

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[32] William Blackstone, 3 Commentaries *374.

CONCLUSION

If it were the United Kingdom, and not the United States of America, which controlled the Guantanamo Bay Naval Base and the detained persons held there, then the writ of habeas corpus would be available before the English courts to challenge the jurisdictional propriety and fundamental fairness of proceedings brought against the detained persons. Such recourse would be available at the outset, and it would not be necessary to await the conclusion of any process before raising complaints of this nature.

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