Case Notes

Hicks v Ruddock (2007) 156 FCR 574

MARTIN ROLAND HILL*

Introduction

David Matthew Hicks was released from Yatala Prison on 29 December 2007. Mr Hicks' release concluded more than five years of detention and imprisonment. Questions remain over the legality of Mr Hicks' detention by the United States of America at Guantanamo Bay in Cuba, his trial, and subsequent imprisonment; among them, whether Mr Hick's detention violated his right to liberty.

This note looks at one of the numerous legal aspects of Mr Hicks' odyssey: the 2006 application to the Federal Court of Australia.[1] Particularly, it examines the Federal Court's decision in relation to the respondents' motion for summary judgement. Of the five issues identified by Tamberlin J in *Hicks v Ruddock*[2] ('*Hicks*') this note will consider the justiciability, judicial review issues, and the application for a writ of habeas corpus.[3]

Hicks is the decision of a single justice of the Federal Court hearing a motion for summary judgement. This had a considerable influence on the structure of the case as well as on the discussion of the parties' submissions. Further, it relates to a matter that — since Mr Hicks' guilty plea to a charge of providing material support for terrorism,[4] subsequent repatriation, and release — ceased to be justiciable. While the authority of Justice Tamberlin's decision may be questioned before future courts, it contains strong dicta on the writ of habeas corpus in Australian law. It also contains interesting discussions of the Act of State doctrine and the potential role of a duty of protection in administrative decision making.

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1 This application has been noted in the *Sydney Law Review*. See: Marley Zelinka, '*Hicks v Ruddock* versus *The United States v Hicks*' (2007) 29 *Sydney Law Review* 527.

2 *Hicks v Ruddock* (2007) 156 FCR 574 ('*Hicks*').

3 The other two identified issues, which concern the meaning of 'no reasonable prospects of success' under s 31A of the *Federal Court of Australia Act 1976* (Cth) and whether Mr Hicks' Statement of Claim was so imprecise, unclear or incomplete as to warrant striking out, are essentially concerned with Federal Court procedure.

4 Under s 950v(25) of the *Military Commissions Act* 10 USC (2006). See United States Military Commission, *Record of Trial of David Michael Hicks* (2007) <www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf> accessed 12 January 2008.

1. The Odyssey — A Factual Background

Mr Hicks, an Australian citizen, who converted to Islam, travelled to Afghanistan around January 2001,[5] eventually supporting the Taliban faction in the civil conflict then occurring. Mr Hicks had previously joined the Kosovo Liberation Army and travelled to Pakistan in late 1999.[6] In Pakistan, Mr Hicks joined Lashkar-e-Toiba before being accepted into the Taliban.[7]

The Northern Alliance, a faction in the Afghan civil conflict, transferred Mr Hicks to the custody of the United States on 9 December 2001.[8] The United States, with allies including Australia, intervened in the Afghan civil conflict in October 2001.[9] This intervention was a military response to the terrorist attacks that occurred in the United States on 11 September 2001.[10] The attacks were orchestrated by Osama bin Laden, who had received support and shelter in Afghanistan.

In late 2001, Mr Hicks was detained by members of the military force of the Northern Alliance, while sitting at a taxi stand in Baghlan.[11] Mr Hicks was, about 11 January 2002, transferred by United States authorities to a US naval base at Guantanamo Bay ('Guantanamo').[12] The Guantanamo base is leased by the United States from Cuba.[13] Mr Hicks remained detained at Guantanamo until he was transferred to the custody of Australian authorities en-route to Yatala.

2. The 2006 Application

On 6 December 2006, Mr Hicks filed an application with the Federal Court. The application sought:

1. A declaration that the inability to prosecute Mr Hicks under Australian law was an irrelevant consideration, and constituted an improper purpose with respect to the exercise by then Commonwealth Attorney-General Philip Ruddock and then Minister for Foreign Affairs Alexander Downer ('the Minister') of their executive discretion whether, and if so how, the Commonwealth of Australia should take steps to protect Mr Hicks by seeking his repatriation and release by authorities of the United States from their custody.[14]

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5 Australian Associated Press, 'From Adelaide to al-Qaeda' *Sydney Morning Herald* (11 June, 2004) <www.smh.com.au/articles/2004/06/11/1086749868720.html> accessed 12 January 2008.

6 Leigh Sales, *Detainee 002* (2007) at 17, 19.

7 Id at 20–21.

8 *Hicks* (2007) 156 FCR 574 at 577.

9 Sales, above n6 at 34.

10 President George W Bush, *Presidential Address to the Nation* (2001) The White House <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> accessed 25 February 2008.

11 Sales, above n6 at 27.

12 *Hicks* (2007) 156 FCR 574 at 577.

13 *Agreement Between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations* 16 February 1903, Cuba – United States of America, 6 Bevans 1113 (entered into force 23 February 1903).

14 *Hicks* (2007) 156 FCR 574 at 577.

2. A declaration that the willingness to waive mandated trial standards was an irrelevant consideration, and constituted an improper purpose with respect to the exercise by the Attorney-General and the Minister of their executive discretion whether, and if so how, the Commonwealth should take steps to protect Hicks by seeking his repatriation.[15]
3. An order that the Attorney-General and the Minister consider according to law whether, and if so how, the Commonwealth should take steps to protect Mr Hicks by seeking his repatriation.[16]
4. An order by way of relief in the nature of a writ of habeas corpus, that the Attorney-General, the Minister, and the Commonwealth request [that] the authorities of the United States repatriate and release Mr Hicks from their custody.[17]

The respondents to the application — the Attorney-General, the Minister, and the Commonwealth — brought a motion to dismiss Mr Hicks' application. The motion, under s 31A of the *Federal Court of Australia Act 1976* (Cth)[18] ('*Federal Court Act*'), sought summary judgment adverse to Mr Hicks. The respondents' motion turned on submissions that hearing the application 'would be contrary to the Act of State doctrine' and that the Federal Court lacked jurisdiction because the foreign affairs aspects gave 'rise to non-justiciable questions such that there is "no matter"' on which the Court could adjudicate'.[19] Alternately, the respondents sought the Statement of Claim struck out on the ground that parts of it were not properly pleaded.[20]

3. Justiciability and the Act of State Doctrine

A significant question confronting the Federal Court and Justice Tamberlin was whether the Court could determine the application. This question had two aspects: whether the Act of State doctrine prevented the application and whether there were applicable judicial standards.

Justice Tamberlin proceeded from a view that the 'two principles of Act of State and justiciability are to some extent distinct but they are interrelated in the present case'.[21] This approach echoes that of the England and Wales Court of Appeal in *Kuwait Airways Corporation v Iraqi Airways Company*[22] ('*Kuwait Airways*'). The Court of Appeal accepted

15 *Hicks* (2007) 156 FCR 574 at 577.
16 *Hicks* (2007) 156 FCR 574 at 578.
17 *Hicks* (2007) 156 FCR 574 at 578.
18 Section 31A of the *Act* relevantly provides that the Federal Court 'may give judgment for one party' in relation to a proceeding if 'the Court is satisfied that the other party has no reasonable prospect' of success. Under s 31A(3) 'a defence or a proceeding … need not be (a) hopeless; or (b) bound to fail; for it to have no reasonable prospect of success'.
19 *Hicks* (2007) 156 FCR 574 at 576.
20 *Hicks* (2007) 156 FCR 574 at 576. Tamberlin J noted Mr Hicks' counsel had foreshadowed amendments to the Statement of Claim.
21 *Hicks* (2007) 156 FCR 574 at 582.
22 *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883.

that the Act of State doctrine and the non-justiciability principle can only be understood in relation to one another.[23]

Under the Act of State doctrine, courts can decline to adjudicate certain matters involving foreign governments. The High Court of Australia acknowledged this doctrine in the *Spycatcher Case*.[24] A majority of the High Court adopted the formation of Fuller CJ in the decision of the Supreme Court of the United States in *Underhill v Hernandez*[25] as correctly stating Australian law.[26] Chief Justice Fuller commenced the Supreme Court's opinion by stating that 'Every sovereign State is bound to respect the 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'.[27] This restraint is intended to reflect judicial faith in the 'comity of nations'.[28]

The respondents submitted that application of the *Spycatcher Case* rendered Mr Hicks' application not justiciable. This submission evoked a consideration of the Act of State doctrine, resting heavily on the High Court's statement that 'there are some claims in which the very subject-matter of the claims and the issues they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign'.[29] The statement of the submission of Tamberlin J suggests the argument presented by the respondents was that judicial consideration of the application would cause embarrassment between Australia and the United States, and should thus not be heard.[30]

If Mr Hicks' application did not fall within the scope of the Act of State doctrine, it may have fallen within the scope of the non-justiciable principle. The scope of the Act of State doctrine is limited to the acts of foreign sovereigns within their own territory.[31] As such, it would prevent the Federal Court from considering the legality of the detention by the President of an individual within the territory of the United States. This would have been a strong argument if the actions of the United States were being challenged in the application. Lord Wilberforce, in *Buttes Gas & Oil Company v Hammer*,[32] considered that the issues before the House of Lords were not issues a municipal court could decide as there were 'no judicial or manageable standards' by which such a court could judge them.[33] The Court of Appeal, in *Kuwait Airways*, accepted this broader non-justiciable principle, which encompasses matters beyond the Act of State doctrine.[34]

23 *Kuwait Airways* [2002] 2 AC 883 at 956 (Brooke LJ).
24 *Attorney General (United Kingdom) v Heinemann Publishing Australia Pty Ltd* (1988) 165 CLR 30. ('*Spycatcher Case*')
25 *Underhill v Hernandez* 168 US 250 (1897).
26 *Spycatcher Case* (1988) 165 CLR 30 at 40.
27 *Underhill* 168 US 250 (1897) at 252.
28 PE Nygh & Martin Davies, *Conflict of Law in Australia* (7th ed, 2002) at 157; *Spycatcher Case* (1988) 165 CLR 30 at 41.
29 *Spycatcher Case* (1988) 165 CLR 30 at 44; *Hicks* (2007) 156 FCR 574 at 583.
30 *Hicks* (2007) 156 FCR 574 at 583.
31 *Kuwait Airways* [2002] 2 AC 883 at 956.
32 *Buttes Gas & Oil Company v Hammer* [1982] AC 888.
33 *Buttes Gas* [1982] AC 888, 938; *Hicks* (2007) 156 FCR 574 at 583.
34 *Kuwait Airways* [2002] 2 AC 883 at 962.

This principle closely accords with the *Spycatcher* dicta the respondents had relied on, possibly more than that dicta accords with the Act of State doctrine. The non-justiciable principle creates a broader class of situations in which a court may decline jurisdiction for fear of causing embarrassment.

The House of Lords also carved out a significant exception to the non-justiciable principle. In *Kuwait Airways*, while determining the jurisdiction of United Kingdom courts, the Lords formed the opinion that *Buttes Gas* did not prohibit a municipal court from adjudicating 'a breach of established principle of international law committed by one state against another when the breach is plain'.[35] This requires Lord Wilberforce's speech in *Buttes Gas* to be read down significantly.[36] Lord Hope of Craighead stated that a grave infringement of human rights is one instance where the Act of State doctrine and non-justiciable principle do not shut the eyes of a municipal court.[37] This exception allows for common law courts to hear matters concerning the 'grave' violation of human rights by foreign governments. The significance of this lies in the judicial recognition of the importance of human rights and the need for their protection. Mr Hicks submitted that his trial before a United States Military Commission would involve a violation of the *Geneva Convention relative to the Treatment of Prisoners of War*[38] ('*Third Geneva Convention*') and thus would be a violation of his human rights. This raised the question of whether a violation of the *Third Geneva Convention* is sufficiently grave to enliven the exception. Correctly, Tamberlin J accepts that it is and, in so doing, accepts the human rights exception as a potential principle of Australian law. A further possible grave violation was Mr Hicks' imprisonment, which Tamberlin J would have considered later in the decision.

Applicable judicial standards are a fundamental requirement of justiciability. Simply, a common law court cannot adjudicate a matter where there are no applicable laws. The requirement emerges from the cited dicta of Lord Wilberforce in *Buttes Gas*.[39] Justice Tamberlin's opinion is that it is

> arguable that the necessity for "judicial or manageable standards" by which to decide the issues in a given case are satisfied when those issues involve consideration of the Constitutional reach of, and limitations on, executive power.[40]

On the standards question, Tamberlin J considered whether there was a justiciable matter. The respondents submitted the Federal Court lacked jurisdiction because there was 'no matter'[41] before it. In response, Tamberlin J and Mr Hicks relied on *Re Ditfort; Ex parte Deputy Commissioner of Taxation*[42] to conclude that matters going to the nature of

35 *Kuwait Airways* [2002] 2 AC 883 at 1081 (Lord Nicholls).
36 *Hicks* (2007) 156 FCR 574 at 584.
37 *Kuwait Airways* [2002] 2 AC 883 at 1108.
38 *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature on 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).
39 *Buttes Gas* [1982] AC 888 at 938.
40 *Hicks* (2007) 156 FCR 574 at 584.
41 *Hicks* (2007) 156 FCR 574 at 585.
42 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347.

the executive power, under s 61 of the *Constitution of the Commonwealth of Australia* ('the *Constitution*'), are constitutional questions.[43] In *Re Ditfort*, Gummow J observed that questions on the powers of the executive government in regard to international relations raise justiciable matters.[44] Given this, Tamberlin J asserted jurisdiction.

A further question before Tamberlin J was whether the application required the Federal Court to venture 'into areas political in nature such that it has no legal guidelines'.[45] Mr Hicks submitted that the proper approach, in the context of judicial review, is to 'carefully examine the particular grounds of review raised on which the specific relief is based'[46], and that a 'question is not rendered non-justiciable simply because it might have implications for military or foreign policy'.[47] Reliant on the series of United States authorities[48] leading to *Omar v Harvey*,[49] His Honour concluded the application was sufficiently justiciable to deny summary judgment, accepting the view that the Act of State doctrine did not extinguish the right of a citizen to challenge their detention.[50] Justice Tamberlin cited an extended passage of the United States Circuit Court of Appeals, deciding the appeal to *Omar v Harvey*,[51] emphasising 'a decision on the merits might well have implications for military and foreign policy, but that alone hardly makes the issue non-justiciable'.[52] His Honour's conclusion is one that may have interesting implications for administrative law. If accepted as an accurate statement of Australian law, the conclusion suggests that administrative decisions with a connection to defence or foreign affairs are not inherently immune from judicial review.

4. Habeas Corpus

The writ of *habeas corpus ad subjiciendum* is an ancient and significant feature of English law. Lord Birkenhead observed habeas corpus 'is perhaps the most important writ known to the constitutional law of England, affording … a swift and imperative remedy in all cases of illegal restraint or confinement'.[53] The fame of the writ has been attributed to the fame of some of those who have applied for it, and the political circumstances of certain applications.[54] Mr Hicks' application was made, in circumstances so political the Act of State doctrine was evoked, by an infamous applicant.

At common law, habeas corpus is a prerogative writ. The writ issues on the part of the Crown.[55] This view dates from as early as 1619 when, in *Bourn's Case,*[56] Montague CJ

43 *Hicks* (2007) 156 FCR 574 at 585.
44 *Re Ditfort* (1988) 19 FCR 347 at 396; *Hicks* (2007) 156 FCR 574 at 586.
45 *Hicks* (2007) 156 FCR 574 at 586.
46 *Hicks* (2007) 156 FCR 574 at 586.
47 *Hicks* (2007) 156 FCR 574 at 586.
48 *United States v Curtiss-Wright Export Corporation* 299 US 304 (1936); *Abu Ali v Ashcroft* 350 F Supp 2d 28 (2004).
49 *Omar v Harvey* 416 F Supp 2d 19 (2006).
50 *Hicks* (2007) 156 FCR 574 at 587.
51 *Omar v Harvey* 479 F 3d 1 (2007).
52 *Omar v Harvey* 479 F 3d 1 (2007) at 10; cited in *Hicks* (2007) 156 FCR 574 at 587.
53 *Secretary of State for Home Affairs v O'Brien* [1925] AC 603 at 609; cited in *Hicks* (2007) 156 FCR 574 at 588.
54 David Clarke & Gerard McCoy, *The Most Fundamental Right* (2000) at 1.
55 Robert Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989) at 188.

said 'the King ought to have an account why any of his subjects are imprisoned'.[57] The modern process of this account involves two steps. According to North J:

> The first step is the making of an order nisi for the issue of a writ of habeas corpus which requires the person holding the detainee to bring the detainee to the court and show cause why the detention is lawful. If, on the hearing, the detention cannot be justified the order nisi is made absolute and the court orders that the detainee be released.[58]

The Federal Court's jurisdiction to issue a writ of habeas corpus has been queried. In *Ruddock v Vadarlis*,[59] Beaumont J queried whether the Federal Court had the requisite jurisdiction. Beaumont J observed that 'no such power is expressly invested'[60] in the Court, and the power to issue writs of habeas corpus should not be implied.[61] His Honour reluctantly conceded that, if the original jurisdiction of the Federal Court was properly evoked, the Court may have the power, under s 23 of the *Federal Court Act*, to make an order in the nature of habeas corpus.[62] Excluding the position of Beaumont J, whether the Federal Court can issue writs of habeas corpus, or make orders in the nature of, is not presently contentious. Justice Tamberlin accepted the Court had such jurisdiction.

The motion for summary judgment required the Federal Court to consider whether Mr Hicks' application for habeas corpus had reasonable prospects of success. The respondents submitted that, firstly, they did not have custody or control of Mr Hicks, and, secondly, there was no evidence his detention was unlawful.[63]

A. Control or Custody

A writ of habeas corpus issues where the subject has the body (*corpus*) of the person named in it (the object) 'taken and detained'[64] in their custody.[65] It is not necessary to establish 'actual detention and complete loss of freedom'[66] for the writ to issue. Establishing either custody or control is sufficient.[67] *Barnardo v Ford* ('*Barnardo*') illustrates

56 *Richard Bourn's Case* (1791) Cro Jac 543.
57 *Bourn's Case* (1791) Cro Jac 543.
58 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 469 (North J).
59 *Ruddock v Vadarlis* (2001) 110 FCR 491 ('*Vadarlis*').
60 *Vadarlis* (2001) 110 FCR 491 at 517.
61 *Vadarlis* (2001) 110 FCR 491 at 517 .
62 *Vadarlis* (2001) 110 FCR 491 at 518. Section 23 of the *Federal Court of Australia Act 1976* relevantly provides that the 'Court has power, in relation to matters in which it has jurisdiction … to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate'.
63 *Hicks* (2007) 156 FCR 574 at 588.
64 *Barnardo v Ford* [1892] AC 326 at 339 (Lord Herschell).
65 *Barnardo* [1892] AC 326 at 339 (Lord Herschell).
66 *Vadarlis* (2001) 110 FCR 491 at 509 (Black CJ).
67 *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361 at 398 (Atkin LJ); *Vadarlis* (2001) 110 FCR 491 at 509.

that the early authorities on the level of control required are unclear.[68] Subsequent authorities have done little to clarify the standard.

Whether Mr Hicks was in the respondents' custody was a live issue. The respondents submitted habeas corpus should not issue because Mr Hicks was neither in their control nor their custody.[69] While the known facts at the time established Mr Hicks was not in their custody, the validity of the respondents' submission hinged on establishing they did not have sufficient control.

In reply, Mr Hicks submitted that 'actual custody'[70] was not required for the writ to issue. Rather, showing the applicant was '"under the control" of the respondents'[71] as far as they had power to bring about his release was submitted to be sufficient. Although it is not cited, the test echoes that phrased by Lord MacNaghten in *Barnardo*.[72] Justice Tamberlin accepts that control is a question of 'fact and degree'[73] such that Mr Hicks should not be blocked from adducing and testing evidence as to the respondents' power to procure his release.[74]

Mr Hicks' submissions relied on the authority of *R v Secretary of State for Home Affairs; Ex parte O'Brien* ('*O'Brien*').[75] Habeas corpus was sought on behalf of Mr O'Brien who had been arrested in London and conveyed to Dublin where he was detained.[76] The Secretary of State for Home Affairs ('the Home Secretary'), the subject of the writ, had ordered Mr O'Brien's arrest. As the Home Secretary had lost actual custody of Mr O'Brien at the time his corpus was transferred to the authorities of the Irish Free State,[77] at issue was whether the Home Secretary retained sufficient control. The Lord Justices of the English Court of Appeal acknowledged that the level of control of the Home Secretary was unclear. The lack of clarity resulted from a conflict between public statements made by the Home Secretary and submissions that he did not have control. The relevant submissions included public statements that he had not lost control of persons detained and transferred to the Irish Free State, and that there was an agreement that, if a committee decided Mr O'Brien should not have been deported, the two governments would release him.[78] Having found the order to arrest and transport Mr O'Brien unlawful, Scrutton CJ, on the authority of *Barnardo*, held the writ should issue so that the truth could be ascertained.[79] Citing Bankes and Scrutton LJJ, Tamberlin J emphasises the possibility that 'an oral "arrangement" may be sufficient to constitute control'.[80] Whether this is accurate, though there is little reason to doubt it, is a legal

68 *Ex parte O'Brien* [1923] 2 KB 361 at 391 (Scrutten LJ).
69 *Hicks* (2007) 156 FCR 574 at 588.
70 *Hicks* (2007) 156 FCR 574 at 588.
71 *Hicks* (2007) 156 FCR 574 at 588.
72 *Barnardo* [1892] AC 326, 340.
73 *Hicks* (2007) 156 FCR 574 at 588.
74 *Hicks* (2007) 156 FCR 574 at 588.
75 *O'Brien* [1923] 2 KB 361.
76 *O'Brien* [1923] 2 KB 361 at 373–374.
77 *O'Brien* [1923] 2 KB 361 at 381 (Bankes LJ).
78 *O'Brien* [1923] 2 KB 361 at 381.
79 *O'Brien* [1923] 2 KB 361 at 392.

aspect of the application that could have been clarified in subsequent proceedings. If accurate, as His Honour observed, it is a standard 'considerably less than a requirement of custody'.[81] This has implications for the size of the class of cases in which habeas corpus would be available.

The Civil Division of the England and Wales Court of Appeal affirmed the authority of *O'Brien* in *Re Sankoh*.[82] *Re Sankoh* was a habeas corpus application brought on behalf of Mr Foday Saybana Sankoh, leader of the Revolutionary United Front in Sierra Leone, who had been detained by the Sierra Leone police in May 2000.[83] The detaining authorities had been assisted by the British Task Force then deployed in Sierra Leone. The petition against the Secretaries of State for Foreign and Commonwealth Affairs and for Defence relied on 'material tending to show'[84] Mr Sankoh was 'within the custody or control of the British authorities'.[85] The Civil Division distinguished Mr Sankoh's situation on the facts. Lord Justice Laws was of the opinion there was 'not the whisper of an objective basis for the suggestion'[86] the respondents had at the time the degree of control over Mr Sankoh 'as might justify the issue of a writ of habeas corpus'.[87] This absence of an objective basis for the allegation that the United Kingdom had control over either the person of Mr Sankoh or over Sierra Leone lead the Court to refuse to issue the writ.

The Federal Court had to determine whether Mr Hicks' situation was of the *O'Brien* or the *Re Sankoh* type. That is, was there sufficient control? Arguing the facts, the respondents submitted *O'Brien* was distinguishable. Their submissions emphasised the existence of the arrangement and of some element of control. In *O'Brien* there was conflicting evidence, but Mr Hicks had not presented evidence of a similar arrangement between the respondents and the United States.[88] Notably, there was evidence of an agreement between the United Kingdom and the United States, which saw United Kingdom detainees repatriated. Another distinguishing factor was that the Attorney-General and the Minister had not been in control or custody of Mr Hicks, unlike the Home Secretary who had been in control of Mr O'Brien until the transfer. The respondents also drew attention to how little assistance *Re Sankoh* provided, submitting the 'power to make a request falls far short of, and can never amount to, control'.[89]

Justice Tamberlin accepted there was sufficient doubt over control to rebut an application for summary judgment. His Honour's reasoning rested explicitly on the authority of *O'Brien* and implicitly on *Barnado* to the extent that they support the proposition that it is inappropriate to dismiss an application when there is doubt about

80 *Hicks* (2007) 156 FCR 574 at 589.
81 *Hicks* (2007) 156 FCR 574 at 589.
82 *Re Sankoh* [2000] EWCA Civ 386.
83 *Re Sankoh* [2000] EWCA Civ 386 at 2.
84 *Re Sankoh* [2000] EWCA Civ 386 at 2.
85 *Re Sankoh* [2000] EWCA Civ 386 at 2.
86 *Re Sankoh* [2000] EWCA Civ 386 at 12.
87 *Re Sankoh* [2000] EWCA Civ 386 at 12.
88 *Hicks* (2007) 156 FCR 574 at 590.
89 *Hicks* (2007) 156 FCR 574 at 591.

control or custody. Justice Tamberlin drew further support for his analysis from a discussion of *O'Brien* and *Barnardo* by Sharpe J, formerly of the Court of Appeal for Ontario, in the *Law of Habeas Corpus*.[90] This analysis, after consideration of the respondents' submissions, led Tamberlin J to hold the writ of habeas corpus should issue, if only to permit Mr Hicks to lead and test evidence to determine whether there was the requisite degree of control.[91]

B. *Unlawfulness of Detention*

The English common law presumes a right to liberty.[92] In *Liversidge v Anderson*[93] Lord Atkin observed that 'in English law every imprisonment is unlawful and that it is for a person directing imprisonment to justify his act'.[94]

The respondents submitted Mr Hicks' protracted detention was not unlawful. Justice Tamberlin phrased the submission as a contention 'that there is no evidence that the detention is unlawful and therefore the proceedings should be dismissed'.[95] His Honour rejected this submission.

The duration of Mr Hicks' detention was central to his submission that was unlawful. By the time of the application, Mr Hicks had been detained for five years. Further, Mr Hicks contended that no evidence was before the Federal Court which could justify the detention.[96] This, it was submitted, was sufficient to establish the detention was '*prima facie* unlawful'.[97] Since the detention was *prima facie* unlawful, it was suggested the matter be heard to establish legality or illegality.[98] Justice Tamberlin accepted the detention was prima facie unlawful.

The fundamental flaw of the respondents' submission was its reliance on an erroneous onus. The respondents submitted that there was no evidence the detention was unlawful.[99] This implies that the onus was on Mr Hicks to lead evidence of unlawfulness. In *R v Carter; Ex parte Kish,*[100] Evatt J stated that the 'onus as to the legality of detention is upon the respondents'.[101] (Why Tamberlin J cites *Abbasi* as primary authority for this proposition is unclear.) Thus, while the duty of the court is to see if any legal ground is made out, the onus rests on the respondents to show lawfulness.[102] Justice Tamberlin states that no such relevant evidence was presented.[103]

90 *Hicks* (2007) 156 FCR 574 at 590; see: Robert Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989) at 178–179.
91 *Hicks* (2007) 156 FCR 574 at 591.
92 David Clark & Gerard McCoy, *Habeas Corpus* (2000) at 16.
93 *Liversidge v Anderson* [1942] AC 206.
94 *Liversidge* [1942] AC 206 at 245. Lord Atkin carves out an exception for judges.
95 *Hicks* (2007) 156 FCR 574 at 591.
96 *Hicks* (2007) 156 FCR 574 at 591.
97 *Hicks* (2007) 156 FCR 574 at 591.
98 *Hicks* (2007) 156 FCR 574 at 591.
99 *Hicks* (2007) 156 FCR 574 at 591.
100 *R v Carter; Ex parte Kish* (1934) 52 CLR 221.
101 *R v Carter; Ex parte Kish* (1934) 52 CLR 221 at 227.
102 *Hicks* (2007) 156 FCR 574 at 591.
103 *Hicks* (2007) 156 FCR 574 at 591.

C. *Issue of the Writ*

Justice Tamberlin directed the matter go to hearing to determine legality. His Honour stated that the respondents' submission that there was no reasonable prospect of success had not been persuasive.[104] In so doing, he rejected this ground of the motion for summary judgment.

5. Judicial Review

The third main section of the decision of Tamberlin J considered the application for judicial review. Mr Hicks' core argument was that the respondents had taken irrelevant matters into account when considering whether to request his repatriation. If they had, the resulting decision would have been invalid. Again, the context of His Honour's consideration is a motion for summary judgment. The discussion of Tamberlin J suffers from this. It reads as a series of submissions and seems to lack judicial critique. This, particularly the entry given to a possible duty of protection, does not assist the development of an area of administrative law that His Honour acknowledges is lacking clear principles.

For clarity it is important to identify the decision Mr Hicks sought judicially reviewed. Mr Hicks had petitioned the respondents to request his repatriation. Mr Hicks submitted the respondents had a duty to consider such an application, and could only have regard to relevant considerations when exercising that duty.[105]

Two irrelevant considerations were proposed to invalidate the respondents' decision. The first of these was the view that 'Mr Hicks could not be prosecuted under Australian law' if repatriated.[106] The second was an opinion that it was desirable that Mr Hicks 'remain in detention in Guantanamo Bay and should be the subject of proceedings there'.[107] The respondents rebutted that both were relevant when considering whether to request repatriation.[108] Further, the respondents submitted, as the relevant discretion was a 'wide and unfettered executive discretion at the highest level',[109] the question of 'extraneous considerations'[110] was inapplicable and the decision could not be reviewed.[111]

The structure of Mr Hicks' reply is an attempt to formulate parameters on the ministerial discretion, and show the respondents were outside that boundary. This attempt centred on demonstrating a constitutional duty, on the part of the federal executive government, to protect its citizens.[112] Mr Hicks sought to found this duty on the executive power under s 61 of the *Constitution*.[113] The nature and existence of the

104 *Hicks* (2007) 156 FCR 574 at 592.
105 *Hicks* (2007) 156 FCR 574 at 592.
106 *Hicks* (2007) 156 FCR 574 at 592.
107 *Hicks* (2007) 156 FCR 574 at 592.
108 *Hicks* (2007) 156 FCR 574 at 592.
109 *Hicks* (2007) 156 FCR 574 at 592.
110 *Hicks* (2007) 156 FCR 574 at 592.
111 *Hicks* (2007) 156 FCR 574 at 592.
112 *Hicks* (2007) 156 FCR 574 at 593.

purported duty were claimed to derive from those obligations that constitute allegiance. In *Joyce v Director of Public Prosecutions*[114], Lord Jowitt LC affirmed the 'feudal' conception that individuals need protection and sovereign lords require service.[115] So, on the pledge of allegiance to a sovereign, an individual acquires that sovereign's protection. This is significant in the international sphere, where the legal personhood of individuals was not traditionally recognised and states must act on their behalf. Justice Gummow, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*,[116] accepted Lord Jowitt's analysis, observing that the 'protection of the laws of Australia'[117] are 'counterpart of a local allegiance'.[118] Lord Jowitt further acknowledged as 'a universally recognised customary rule of the law of nations [that] every state holds the right of protection over its citizens abroad'.[119] It is this right of diplomatic protection that, ultimately, Mr Hicks wanted invoked on his behalf.[120]

Having considered this argument, and elaborated upon other submissions, Tamberlin J concluded they were 'sufficient to defeat a summary judgment'.[121] This conclusion is justifiably qualified. His Honour noted Mr Hicks' submissions are 'not foreclosed by authority',[122] and held that no authority had been cited or argument advocated by the respondents to establish that they lacked a reasonable prospect of success.[123] Even so, little authority was cited as a foundation for the applicant's submissions. This may be because the legal principles of judicial review are formative. However, it means a fog of sophistry hangs around the arguments; one that is not dispelled by His Honours' elaboration of them, and could only be dispelled by a final determination.

6. *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*

Justice Tamberlin drew special attention to the *Abbasi* decision.[124] His Honour noted that counsel had addressed the Civil Division's decision, and that there were similarities between that matter and Mr Hicks'. Mr Abbasi had, at the time of his application, been held at Guantanamo Bay for eight months.[125] The application was 'founded on the contention that one of his fundamental human rights, the right not to be arbitrarily

113 *Hicks* (2007) 156 FCR 574 at 593.
114 *Joyce v Director of Public Prosecutions* [1946] AC 347.
115 *Joyce* [1946] AC 347 at 366.
116 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.
117 *Re Minister* (2002) 212 CLR 162 at 198.
118 *Re Minister* (2002) 212 CLR 162 at 198.
119 *Joyce* [1946] AC 347 at 371.
120 See: Natalie Klein & Lise Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality' (2007) 13(1) *Australian Journal of Human Rights* 1.
121 *Hicks* (2007) 156 FCR 574 at 597.
122 *Hicks* (2007) 156 FCR 574 at 597.
123 *Hicks* (2007) 156 FCR 574 at 597.
124 *R (on the application of Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598 ('*Abbasi*').
125 *Abbasi* [2002] EWCA Civ 1598 at 1.

detained, is being infringed'.[126] One issue considered by the Civil Division was whether executive action in the conduct of foreign affairs was justiciable.[127] In this context, the Civil Division considered whether Mr Abbasi had a right to diplomatic protection and ultimately concluded that, if such a right existed, it was unenforceable.[128] Further, since the Foreign and Commonwealth Office had considered Mr Abbasi's application, it had fulfilled its obligations.[129]

A theme of the judgment of Tamberlin J was the duration of Mr Hicks' detention. It is the Civil Division's concern over Mr Abbasi's detention that His Honour concurs with and emphasises. Justice Tambelin expressed a politely qualified view that the injustice in Mr Hicks' case 'could be seen to be substantially greater' than that of Mr Abbasi.[130] This opinion is significant, as His Honour supports an argument that the 'nature and extent of the injustice'[131] suffered by a party requesting representation is a vital factor in any consideration of whether to make the representation.[132] Further, His Honour suggests, 'the greater the injustice, the clearer is the duty to consider whether to make representations'.[133]

7. Application for Summary Judgment – Justice Tamberlin's Conclusion

Justice Tamberlin concluded his decision by emphasising the significance of *Hicks*. His Honour rejected the respondents' motion for summary judgment holding they had failed to show the application lacked reasonable prospects of success. Procedurally, His Honour ordered a timetable be filed so the matter could be expedited.[134]

Significantly, Tamberlin J acknowledged that *Hicks* fell into a lacuna. His Honour observed that there was 'no principle or authority precisely in point on the issues raised in the exceptional circumstances' presented.[135] On that basis, the matter was worthy of further hearing.

More broadly, Tamberlin J reiterated the case's concern with human rights. Particularly, *Hicks* concerned 'the fundamental right to have cause shown as to why a citizen is deprived of liberty for more than five years in a place where he has not had access to the benefit of a duly constituted court without valid charge'.[136] This deprivation of liberty, His Honour concluded, was such an exception as to enliven the

126 *Abbasi* [2002] EWCA Civ 1598 at 1.
127 *Abbasi* [2002] EWCA Civ 1598 at 37–50.
128 *Abbasi* [2002] EWCA Civ 1598 at 106.
129 *Abbasi* [2002] EWCA Civ 1598 at 66.
130 *Hicks* (2007) 156 FCR 574 at 599.
131 *Hicks* (2007) 156 FCR 574 at 599.
132 *Hicks* (2007) 156 FCR 574 at 599.
133 *Hicks* (2007) 156 FCR 574 at 599. It is possible to draw from the discussion of Tamberlin J an implication that the actual or potential violation of a citizen's human rights may have a role in the judicial review of a decision regarding the exercise of diplomatic protection.
134 *Hicks* (2007) 156 FCR 574 at 600.
135 *Hicks* (2007) 156 FCR 574 at 600.
136 *Hicks* (2007) 156 FCR 574 at 600.

Kuwait Airways jurisdiction and justify proceeding to hearing and final judgment.[137] This acknowledges the nature of the human rights exception to questions of justiciability and Act of State, and emphasises the importance of protecting those rights.

Conclusion

Mr Hicks' application involved issues that required the sustained discussion of significant legal doctrines and principles. These included the human rights exception to the non-justiciable principle, whether an oral agreement could constitute control for the purposes of habeas corpus, and the existence of a constitutional duty to protect nationals abroad. Yet, with Mr Hicks' release from Yatala, the matter raising the issues evaporated. This leaves Australian jurisprudence with the summary judgment of Tamberlin J: a strong analysis weakened only by leaving unsettled many of the questions it considered. These were weighty questions concerning the abuse of a citizen's fundamental right to liberty, and how the Australian courts acknowledge and protect that right.

137 *Hicks* (2007) 156 FCR 574 at 600.