



Neutral Citation Number: [2014] EWCA Civ 24

Case No: C1/2013/0139

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN’S BENCH DIVISION,
DIVISIONAL COURT
LORD JUSTICE MOSES AND MR JUSTICE SIMON
CO25992012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE ELIAS

Between:

THE QUEEN ON THE APPLICATION OF NOOR KHAN Appellant
- and -
THE SECRETARY OF STATE FOR FOREIGN AND Respondent
COMMONWEALTH AFFAIRS

Martin Chamberlain QC, Oliver Jones and Robert McCorquodale (instructed by Leigh Day & Co) for the Appellant
James Eadie QC, Andrew Edis QC, Malcolm Shaw QC and Karen Steyn (instructed by Treasury Solicitors) for the Respondent

Hearing dates: 2 and 3 December 2013

Approved Judgment

Master of the Rolls:

1. The claimant lives in Miranshah, North Waziristan Agency (“NWA”), in the Federally Administered Tribal Areas of Pakistan. His father was a member of the local Jirga, a peaceful council of tribal elders whose functions included the settling of commercial disputes. On 17 March, the claimant’s father presided over a meeting of the Jirga held outdoors at Datta Khel, NWA. During the course of the meeting, a missile was fired from an unmanned aircraft or “drone” believed to have been operated by the US Central Intelligence Agency (“CIA”). The claimant’s father was one of more than 40 people who were killed.
2. In 2010, it was reported in several media outlets, including *The Sunday Times*, on the basis of a briefing said to emanate from official sources, that the General Communications Headquarters (“GCHQ”), an agency for which the defendant Secretary of State is responsible, provides “locational intelligence” to the US authorities for use in drone strikes in various places, including Pakistan.
3. On 16 December 2011, the claimant’s solicitors wrote to the Secretary of State seeking clarification of the policies and practices of the UK Government in relation to the passing of information to US agents for use in drone attacks in Pakistan. On 6 February 2012, the Treasury Solicitor replied saying that it would not be possible to make an exception to the long-standing policy of successive governments to give a “neither confirm nor deny” response to questions about matters the public disclosure of which would risk damaging important public interests, including national security and vital relations with international partners.
4. The claimant then issued these proceedings claiming judicial review of “a decision by the Defendant to provide intelligence to the US authorities for use in drone strikes in Pakistan, among other places”. The relief claimed was a declaration that:
 - “(a) A person who passes to an agent of the United States Government intelligence on the location of an individual in Pakistan, foreseeing a serious risk that the information will be used by the Central Intelligence Agency to target or kill that individual:
 - (i) is not entitled to the defence of combatant immunity; and
 - (ii) accordingly may be liable under domestic criminal law for soliciting, encouraging, persuading or proposing a murder (contrary to s. 4 of the Offences Against the Person Act 1861), for conspiracy to commit murder (contrary to s. 1, or 1A, of the Criminal Law Act 1977) or for aiding, abetting, counselling or procuring murder (contrary to s. 8 of the Accessories and Abettors Act 1861);
 - (b) Accordingly the Secretary of State has no power to direct or authorise GCHQ officers or other Crown servants in

the United Kingdom to pass intelligence in the circumstances set out in (a) above.

- (c) Alternatively, where a GCHQ officer or other Crown servant has information relating to the location of an individual, whom it knows or suspects the United States Government intends to target or kill, the officer may not pass the intelligence to an agent of the United States Government if there is a significant risk that doing so would facilitate the commission of a war crime or crimes against humanity contrary to the International Criminal Court Act 2001.
- (d) Accordingly, before directing or authorising the passing of intelligence relating to the location of such an individual to an agent of the United States Government, the Secretary of State must formulate, publish and apply a lawful policy setting out the circumstances in which such intelligence may be transferred.”

5. The application for permission to apply for judicial review was dismissed by the Divisional Court (Moses LJ and Simon J) on 21 December 2012. The claimant sought leave to appeal and that application was directed to be considered by this court in a rolled up hearing by Pitchford LJ.

6. The reformulated relief now claimed is for:

- “(a) A declaration that a UK national who kills a person in a drone strike in Pakistan is not entitled to rely on the defence of combatant immunity. Accordingly a GCHQ officer or other Crown servant in the United Kingdom may commit an offence under ss. 44-46 of the Serious Crime Act 2007 (the “2007 Act”) when passing locational intelligence to an agent of the US Government for use in drone strikes in Pakistan.
- (b) In the alternative, the Appellant seeks a declaration that:
 - (i) In circumstances where a defence of combatant immunity applies, the passing of locational intelligence by a GCHQ officer or other Crown servant in the United Kingdom to an agent of the US Government for use in drone strikes in Pakistan may give rise to an offence under the International Criminal Court Act 2001 (“ICCA 2001”).
 - (ii) Accordingly, before directing or authorising the passing of intelligence relating to the location of such an individual to an agent of the US Government, the Secretary of State must formulate, publish and apply a lawful policy setting out the

circumstances in which such intelligence may be transferred.”

7. In order to understand why the primary relief claimed is formulated in this way, it will be necessary to consider the 2007 Act and in particular the extra-territoriality provisions contained in Schedule 4. The purpose for which the claim is brought is in order to establish that the reported policy and practice of the UK Government is unlawful. In short, it is the claimant’s case that the policy and practice involves requiring GCHQ officers to encourage and/or assist the commission of murder contrary to sections 44 to 46 of the 2007 Act.
8. About a week before the hearing before the Divisional Court, the Secretary of State served a public interest immunity (“PII”) certificate in respect of the information contained in the sensitive annex to a witness statement by Paul Morrison dated 16 October 2012. Mr Morrison was then the Head of the Counter Terrorism Department in the Foreign and Commonwealth Office. The Divisional Court did not consider the PII certificate. Instead, they decided to adjudicate on the Secretary of State’s threshold objections to the claim which were that the court should refuse permission on the principal ground that the issues raised were non-justiciable and/or that it would be a wrong exercise of discretion to grant relief which would necessarily entail a condemnation of the activities of the United States. The court upheld these objections and refused permission to apply for judicial review.
9. Mr Martin Chamberlain QC, who has argued this case with conspicuous skill, says that, if the claimant can overcome the threshold objections, then the question of how the claim can be tried will have to be considered separately. The court will then have to decide (i) whether to uphold the PII certificate; if so (ii) whether the claim can fairly be tried without the material denied to the court by operation of PII; and (iii) whether to make a closed material procedure declaration under section 6(1) of the Justice and Security Act 2013. Mr Chamberlain emphasises, therefore, that the court should not assume that the claim will be determined on the same exiguous facts as are currently known to the claimant. He says that this is important when considering the Secretary of State’s objection that the relief sought by the claimant would be futile unless at this stage the claimant can identify specific offences that would necessarily be committed by giving effect to a policy or practice of sharing locational intelligence for use in drone strikes.

The Serious Crime Act 2007

10. The claimant’s primary case is based on the proposition that a GCHQ officer who passes locational intelligence may commit an offence under sections 44 to 46 of the 2007 Act. Before I explain the argument, I need to refer to the relevant provisions of the Act.
11. Part 2 of the 2007 Act is entitled “Encouraging or Assisting Crime”. Section 44 concerns “intentionally encouraging or assisting an offence”; section 45 “encouraging or assisting an offence believing it will be committed”; and section 46 “encouraging or assisting offences believing one or more will be committed”. These provisions, which are by no means straightforward, define the relevant actus reus and mens rea of the respective offences. Section 50 provides that a person is not guilty of an offence under Part 2 if he acts reasonably.

12. Section 52 provides:

“(1) If a person (D) knows or believes that what he anticipates might take place wholly or partly in England or Wales, he may be guilty of an offence under section 44, 45 or 46 no matter where he was at any relevant time.

(2) If it is not proved that D knows or believes that what he anticipates might take place wholly or partly in England or Wales, he is not guilty of an offence under section 44, 45 or 46 unless paragraph 1, 2 or 3 of Schedule 4 applies.”

Only subsection (2) is applicable here. Accordingly, the relevant provisions of Schedule 4 need to be considered.

13. So far as material, Schedule 4 provides:

“1

(1) This paragraph applies if –

(a) any relevant behaviour of D’s takes place wholly or partly in England and Wales;

(b) D knows or believes that what he anticipates might take place wholly or partly in a place outside England and Wales; and

(c) either –

(i) the anticipated offence is one that would be triable under the law of England and Wales if it were committed in that place; or

(ii) if there are relevant conditions, it would be so triable if it were committed there by a person who satisfied the conditions.

(2) “Relevant condition” means a condition that –

(a) Determines (wholly or in part) whether an offence committed outside England and Wales is nonetheless triable under the law of England and Wales; and

(b) Relates to the citizenship, nationality or residence of the person who commits it.

2

(1) This paragraph applies if-

(a) Paragraph 1 does not apply;

- (b) Any relevant behaviour of D's takes place wholly or partly in England and Wales; and
- (c) D knows or believes that what he anticipates might take place wholly or partly in a place outside England and Wales; and
- (d) What D anticipates would amount to an offence under the law in force in that place."

The claimant's primary case

14. The following is a summary of Mr Chamberlain's submissions. A UK national who with the requisite intent kills a person outside England and Wales is guilty of murder in English domestic law unless he can rely on a defence available in English law and he may be tried here for the offence: see section 9 of the Offences Against the Person Act 1861. A UK national who kills a person in Pakistan by means of a drone strike is likely to be guilty of murder unless he can rely on the defence of combatant immunity. The defence of combatant immunity is derived from international law, but is recognised by English national law: see *R v Gul (Mohammed)* [2012] EWCA Crim 280, [2012] Cr App R 37 para 30.
15. It is clear that, on a plain reading of para 1 of Schedule 4 to the 2007 Act, there are two alternative circumstances in which an offence of encouraging or assisting an act committed in a place wholly or partly outside England and Wales can be committed. These are either (i) that the anticipated offence is one that would be triable under the law of England and Wales if it were committed outside England and Wales, or (ii) if there are relevant conditions, it would be so triable if it were committed outside England and Wales by a person who satisfies the relevant conditions. The "relevant condition" is one which "relates to the citizenship, nationality or residence of the person who commits it". Mr Chamberlain submits, therefore, that it is not necessary for the English court to find that the notional "principal" has committed an offence triable in England and Wales. Rather, the question is whether any conduct which the UK national is assisting *would* be within the jurisdiction of the English court *if* the notional principal were a UK national. This construction is supported by the authors of *Simester and Sullivan's Criminal Law* (5th ed 2013) at p 368. The Secretary of State does not accept this construction, but he accepts that it is arguable. Mr Andrew Edis QC submits that the mere use of conditional language is insufficient to show that Parliament intended to depart from the general common law position that secondary liability can only arise in respect of an offence committed abroad if that offence is triable in England and Wales.
16. I find Mr Chamberlain's submissions persuasive, but I do not find it necessary to express a concluded view about them. He submits, on the basis of his construction, that the claimant's case does not require a finding that any official of the United States has committed an offence falling within the jurisdiction of the English court.
17. Mr Chamberlain advances a number of reasons why it is unlikely that a defence of combatant immunity would succeed in English law if it were advanced by a UK national who was charged as a principal with the offence of murder by drone strike (no other defence has been suggested as a realistic possibility). He submits that the

defence would not be available for several reasons. First, CIA officials are not members of the US armed forces and GCHQ officials are not members of the UK's armed forces. They cannot, therefore, be combatants. Secondly, it has never been suggested that there is an armed conflict with Pakistan. In so far as it is suggested that there is an armed conflict with Al-Qaeda taking place in Afghanistan and elsewhere, that is wrong because (a) Al-Qaeda is not a sufficiently coherent grouping to be capable of being a party to an armed conflict; and (b) the acts of violence with which Al-Qaeda is associated are too sporadic to reach the threshold of violence required to establish the existence of an armed conflict. Thirdly, if there is an armed conflict in Pakistan between the US and those who are targeted by the drone strikes, it is of a non-international nature.

18. The US view is that the engagement with Al-Qaeda is an armed conflict and that the defence of combatant immunity is in principle available to US officers who execute drone strikes in Pakistan. That view would not, of course, be binding on our courts.
19. For reasons that will become apparent, I do not find it necessary to examine these arguments further. I accept that it is certainly not clear that the defence of combatant immunity would be available to a UK national who was tried in England and Wales with the offence of murder by drone strike.
20. To summarise, Mr Chamberlain submits that the practice and policy of the Secretary of State gives rise to a risk that GCHQ officials who provide locational intelligence to the US are committing offences contrary to section 44 to 46 of the 2007 Act. He accepts that in any individual case an official would not be guilty of an offence unless he had the requisite mens rea. He also accepts that in any individual case the section 50 defence of reasonableness might be available. But he says that these issues which are likely to arise in individual cases are not material for present purposes because this claim concerns the lawfulness of the policy and not the guilt of individual officials in particular cases. Mr Chamberlain's fundamental point is that this case is not concerned with the lawfulness of drone strikes under US law.
21. That is the background against which the issues of justiciability and discretion fall to be considered.

Justiciability and discretion

22. In his witness statement Mr Morrison explains why in his opinion if the court were to grant permission to the claimant to apply for judicial review, "the likely consequence would be serious harm to the national security and the international relations of the United Kingdom." He says that the UK's bilateral relationships with the US and Pakistan are critical to the UK's national security as they are both key partners in efforts to combat the very real threat of terrorism faced by the citizens of all three countries. A key feature of international relations is that law, politics and diplomacy are bound together and the assertion of legal arguments by a state is often regarded as a political act. The UK's international alliances could be damaged by the assertion of arguments under international law which might affect the position of those states. This is particularly so since this case raises difficult legal issues "such as the scope of a state's right under international law to use force in self-defence against non-state actors, which are the subject of intense international legal scrutiny and debate". The risk of damage would be compounded

“by the fact that the Court itself, would necessarily have to make a series of determinations regarding the conduct of the Governments of third States (both the United States and Pakistan). In particular, the Court would have to reach conclusions as to whether the conduct of the United States, and members of the US Administration, amounted to serious violations of international law and criminal law.”

23. He also says:

“Whatever the findings of the Court, an intervention by a judicial body into this complex and sensitive area of bilateral relations is liable to complicate the UK’s bilateral relations with both the US and Pakistan, and there is a clear risk of damage to essential UK interests.”

And:

“There is a strong risk that any finding or assumptions by a UK court in this case would cause the US to revisit and perhaps substantially modify the historic intelligence sharing relationship and national security cooperation.”

24. Mr James Eadie QC in a careful and cogent series of submissions argues that, even if Mr Chamberlain’s construction of the 2007 Act is correct, there are powerful reasons why the court should refuse permission in this case. He says that the court should refuse to grant permission as a matter of discretion. But he also says that permission should be refused on the ground that the claim is not justiciable.

25. I shall start with the question of justiciability. It is common ground that our court will not decide whether the drone strikes committed by US officials are lawful. Moses LJ stated the principle correctly in his judgment:

“14. It is necessary to explain why the courts would not even consider, let alone resolve, the question of the legality of United States’ drone strikes. The principle was expressed by Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 25, 252:

“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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves” (cited with approval in *Buttes Gas and Oil Co v Hammer* (No.3) [1982] AC 888, 933, and *R v Jones (Margaret)* [2007] 1 AC 136, 163).

15. The principle that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against adjudication upon the “legality, validity or acceptability of such acts, either under domestic law or international law” (*Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353, 1362). The rationale for this principle, is, in part, founded upon the proposition that the attitude and approach of one country to the acts and conduct of another is a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers. To examine and sit in judgment on the conduct of another state would imperil relations between the states (*Buttes Gas* 933).”
26. In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2013] 3 WLR 1329, the Court of Appeal considered many of the authorities in this area of the law. Neither party has sought to question the court’s analysis of the case-law. There is scope for argument as to whether the courts have no jurisdiction to sit in judgment on the acts of the government of another country (ie cannot do so); or whether they will not do so because those acts are not justiciable. But in my view such distinctions are of no practical relevance here. I note that in *Buttes Gas* at p 931F-G, Lord Wilberforce said:
- “So I think that the essential question is whether, apart from such particular rules as I have discussed...there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of ‘act of state’ but one for judicial restraint or abstention.”
27. The rationale for the rule has been variously expressed. In *Oetjen v Central Leather Co* (1918) 246 US 297, 303-304, in a passage cited by Rix LJ in *Yukos* Clarke J said:
- “The principle that the conduct of one independent government cannot be successfully questioned in the courts of another...rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.’”
28. None of this is in dispute in the present case. The principle is one which applies save in exceptional circumstances. One such exception is that it will not apply to foreign acts of state which are in breach of clearly established rules of international law or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights.

29. But the court will also usually not sit in judgment on the acts of a sovereign state as a matter of discretion. In *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin), 126 ILR 727, CND sought permission to apply for judicial review, seeking a declaration that it would be unlawful under international law for the United Kingdom to resort to force against Iraq without a fresh United Nations Security Council resolution authorising military action. The application was dismissed by the Divisional Court. The reasons for the decision included that the court would not embark on the determination of an issue which would be damaging to the public interest in the field of international relations, national security or defence. Simon Brown LJ said at para 47(ii):

“Whether as a matter of juridical theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial. Either way, I regard the substantive question raised by the application to be non-justiciable”

30. Maurice Kay J said at para 50 that the “international law” ground was more appropriately categorised as going to jurisdiction than justiciability. He did not consider that the reason why the application must fail was because of an exercise of judicial discretion. Richards J said at paras 55 to 58 that he was satisfied that the claim should be rejected on discretionary grounds. Far from justifying the exceptional exercise of the court’s jurisdiction to grant an advisory declaration, the circumstances made such a course inappropriate and contrary to the public interest. But he also went on at paras 59 to 61 to reject the claim on the ground that it was not justiciable. He reached that conclusion essentially for the same reasons as he had decided to reject the claim as a matter of discretion.
31. Moses LJ said at para 20 of his judgment in the present case that it did not matter whether the questions which go to the issue whether the court should hear the application for judicial review were to be regarded as questions of principle or questions of discretion. I agree.
32. How do these principles apply in the present case? Mr Chamberlain accepts that our courts cannot adjudicate on the question of whether a CIA official who executes a drone strike is guilty of murder or indeed any other offence. His argument is that the principles have no application here. He is not asking the court to sit in judgment on the acts of CIA officials either by declaring that they are unlawful or by condemning them in any other way. He is not inviting the court to adjudicate on the legality or acceptability of the acts of the CIA officials either under our domestic law or under international law. He seeks relief on the basis that the acts of the CIA officials, *if committed by UK nationals*, would be unlawful in English law. The assumption that the operation of drone bombs by US nationals is treated as if executed by UK nationals is a necessary link in a chain of reasoning which comprises (i) a finding that the act of the principal who operates the bombs is murder in English law; (ii) a GCHQ employee who encourages or assists such an act is liable as a secondary party to murder under sections 44 to 46 of the 2007 Act; and (iii) the Secretary of State’s practice and policy of providing locational guidance is unlawful.
33. In short, Mr Chamberlain says that what the court would have to determine in order to grant the primary relief he seeks is (i) the correct construction of the 2007 Act (a

question of domestic statutory interpretation) and (ii) whether there is an armed conflict in Pakistan of a kind which gives rise to combatant immunity under international law and whether officials of GCHQ or the CIA are properly described as lawful combatants in such an armed conflict in English law.

34. Moses LJ explained why the court could or would not grant relief in this case in the following forthright terms:

“55. There is still less any incentive to consider a declaration when it is appreciated what it entails. Mr Chamberlain’s proposition, even if it is right, that a person may be guilty of secondary liability for murder under ss.44-46, although the principal could not, is no answer to the fundamental objection to the grant of a declaration: that it involves, and would be regarded “around the world” (see Simon Brown LJ in *CND* [37]) as “an exorbitant arrogation of adjudicative power” in relation to the legality and acceptability of the acts of another sovereign power. It is beyond question that any consideration as to whether a GCHQ employee is guilty of a crime under Part 2 of the Serious Crime Act 2007, headed “**ENCOURAGING OR ASSISTING CRIME**” would be regarded by those who were said to have been encouraged or assisted as an accusation against them of criminal activity and, in the instant case, an accusation of murder. After all, that is the very nature of Mr Noor Khan’s accusation in Pakistan. No amount of learned and complex analysis of the interstices of domestic criminal legislation would or could diminish that impression. For the reasons given by Mr Morrison and Simon Brown LJ in *CND*, that consequence is inevitable. Even if the argument focussed on the status of the attacks in North Waziristan (international armed conflict, armed conflict not of an international nature, pre-emptive self-defence) for the purposes of considering whether the United Kingdom employee might have a defence of combatant immunity, it would give the impression that this court was presuming to judge the activities of the United States.

56. But, in any event, I reject the suggestion that the argument can be confined to an academic discussion as to the status of the conflict in North Waziristan. The topsy-turvy nature of the declaration sought merely provokes the question: of what crime is it said the GCHQ employee may be guilty? Since it is said to be a crime of secondary liability that inquiry leads, inexorably, to questions as to the criminal activity of the principals, employees of the United States. What is the crime, which GCHQ employees may be accused of assisting or encouraging?

57. These difficulties are, to my mind, insuperable. The claimant cannot demonstrate that his application will avoid,

during the course of the hearing and in the judgment, giving a clear impression that it is the United States' conduct in North Waziristan which is also on trial. He has not found any foothold other than on the most precarious ground in domestic law.....”

35. I agree with these paragraphs. It is true that, if Mr Chamberlain's construction of section 52 and Schedule 4 of the 2007 Act is correct, the court will not be asked to make any finding that CIA officials are committing murder or acting unlawfully in some other way. Nor will the court be asked to say whether the US policy of drone bombing is unlawful as a matter of US law. As a matter of strict legal analysis, the court will be concerned with the hypothetical question of whether, subject to the defences available in English law, a UK national who kills a person in a drone strike in Pakistan is guilty of murder. The court is required to ask this hypothetical question because, if Mr Chamberlain is right, that is what the 2007 Act requires in order to give our courts jurisdiction to try persons who satisfy the “relevant conditions” set out in para 1 of Schedule 4.
36. But none of this can disguise the fact that in reality the court will be asked to condemn the acts of the persons who operate the drone bombs. Whilst for the purposes of the 2007 Act these persons are to be treated as if they are UK nationals, everyone knows that this is a legal fiction devised by Parliament in order to found secondary liability under sections 44 to 46. In reality, the persons who operate the drones are CIA officials and in doing so they are implementing the policy of the US Government. Mr Chamberlain says that the fact that a foreign state may misinterpret English domestic law and, as a result, feel that it is being accused of something that it is not being accused of, is no reason for the English court to refuse to decide the issue. He argues that the court could and, it is to be assumed, would make it clear in its judgment that a finding of breach of sections 44 to 46 of the 2007 Act did not involve a finding that the assisted party had committed an offence under English law. The fact that the judgment of the English court may be misunderstood by persons in a foreign state is not a good reason to refuse permission to apply for judicial review.
37. In my view, a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US authorities as critical of them. Although the findings would have no legal effect, they would be seen as a serious condemnation of the US by a court of this country.
38. I would reach this conclusion without the benefit of the evidence of Mr Morrison. His evidence fortifies my conclusion. I say this despite the fact that he did not focus precisely on the effect of Mr Chamberlain's argument that the court would not be making a finding about US officials or their guilt of criminal offences in US law. In my view, it is clear from the tenor of his statement that his opinion would not have been different if had focused on that particular point.

39. Before I leave this topic, I need to refer to *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614. This is an authority on which Mr Chamberlain places considerable reliance. The applicant in that case was captured by British forces in Iraq and handed over to US forces who detained him at a US airbase in Afghanistan. A memorandum of understanding between the Governments of the UK and the US provided that any prisoner of war transferred by one power to the other would be returned on request. The applicant sought a writ of habeas corpus directed to the Secretary of State on the grounds that his detention was unlawful and that, although he was detained by the US, the Secretary of State enjoyed a sufficient degree of control over him to bring about his release.
40. One of the arguments deployed in opposing the application was that the issuing of a writ of habeas corpus would amount to an impermissible interference within the forbidden territory of the executive's foreign relations since it would involve the court sitting in judgment on the acts of the US. Part of the argument was that the detention by the US was unlawful since it was in breach of international Conventions (the Geneva Conventions).
41. The Supreme Court held that the writ should issue. The basis of the decision was that the UK had control of the custody of the applicant. The detention of the applicant was, at least, prima facie unlawful as being in breach of the Geneva Conventions (para 36, 40 and 53). At para 53 of his judgment, Lord Kerr said:

“This court is not asked to ‘sit in judgment on the acts of the government of another, done within its own territory’ as in *Underhill v Hernandez* (1897) 168 US 250, 252. The illegality in this case centres on the UK's obligations under the Geneva Conventions. It does not require the court to examine whether the US is in breach of its international obligations.....Here there was evidence available to the UK that Mr Rahmatullah's detention was in apparent violation of GC4. The illegality rests not on whether the US was in breach of GC4, but on the proposition that, conscious of those apparent violations, the UK was bound to take the steps required by article 45 of GC4.”
42. At para 70, he repeated that the legality of the US's detention of the applicant was not under scrutiny. Rather, it was the lawfulness of the UK's inaction in seeking his return that was in issue.
43. Mr Chamberlain submits that the Supreme Court had little hesitation in enquiring into the legality of the applicant's detention by the US Government. However, the court was careful to say that, on the facts of that case, it was not being asked to sit in judgment on the acts of the US. There was clear prima facie evidence that the applicant was being unlawfully detained. But that conclusion depended on the effect of the Geneva Conventions, not on an examination of the legal basis on which the US might claim to justify the detention: see para 53. The court applied well-established principles to an unusual situation. I do not consider that this decision tells us anything as to how these principles should be applied in the very different circumstances that arise in the present case.

44. I would, therefore, refuse permission to appeal in relation to the claimant's primary case for the reasons given by Moses LJ at paras 55 to 57 of his judgment: see para 35 above: an application for judicial review would have no real prospects of success.
45. Mr Eadie submits that the court should in any event not grant a declaration in this case because this is not one of those very exceptional cases where a civil court will grant a declaration as to the criminality of conduct: see *R (Rusbridger) v Attorney General* [2004] 1 AC 357 approving the observation by Viscount Dilhorne in *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 at p 742C-D: the facts should be determined in, and in accordance with the procedures of, criminal proceedings. Mr Eadie submits in particular that the question whether the notional UK national who kills a person in a drone strike in Pakistan is entitled to rely on the defence of combatant immunity is fact-sensitive; and this feature of the case is "a factor of great importance" (per Lord Steyn in *Rusbridger* at para 23) which alone is sufficient to take it outside the exceptional category.
46. In view of my conclusion on the non-justiciability/discretion issues which I have discussed above, it is unnecessary for me to express a concluded view on this issue (and others that were debated before us).

The claimant's secondary case

47. The secondary case is that, even if the applicable law was international humanitarian law (and not ordinary domestic criminal law), there is good (publicly available) evidence that drone strikes in Pakistan are being carried out in violation of international humanitarian law, because the individuals who are being targeted are not directly participating in hostilities and/or because the force used is neither necessary nor proportionate. Accordingly, even if they are not liable under sections 44 to 46 of the 2007 Act, there is a significant risk that GCHQ officers may be guilty of conduct ancillary to crimes against humanity and/or war crimes, both of which are statutory offences under section 52 of the International Criminal Court Act 2001 ("the 2001 Act"). In these circumstances, Mr Chamberlain submits that, before directing or authorising the passing of intelligence relating to the location of a targeted individual to an agent of the US Government, the Secretary of State should formulate, publish and apply a lawful policy setting out the circumstances in which such intelligence may be lawfully transferred, which he has failed to do.
48. It can therefore be seen that an essential building block in the secondary claim for a declaration that the Secretary of State should formulate, publish and apply a lawful policy is that GCHQ officers may be committing offences under section 52 of the 2001 Act.
49. The elements of crimes against humanity and war crimes are identified in the 2001 Act as supplemented by the *International Criminal Court Act 2001 (Elements of Crimes) (No 2) Regulations 2004/3239*. Paras 7(1)(a) and (b) of article 7 of the Schedule to the Regulations specify the elements of the crime against humanity by murder or extermination: the attack must be part of a widespread or systematic attack against a civilian population or of a mass killing of members of a civilian population, and the perpetrator must know it. Paras 8(2)(c)(i) and 8(2)(e)(i) of article 8 of the Schedule specify the elements of war crimes: the attack must be against a person not taking a direct part in hostilities and the perpetrator must intend that this is so.

50. As Mr Edis says, there is some uncertainty as to the mental element required of a person being prosecuted for conduct which is “ancillary” to a war crime or a crime against humanity. I shall assume that, in order to render unlawful any conduct by a notional GCHQ official, he or she must know and intend that the recipient will use the information in order to commit an act which is part of a widespread or systematic attack against, or a mass killing of, a civilian population and/or to attack civilians who are not taking a direct part in hostilities in an on-going armed conflict.
51. Whatever the precise mental element required for the offence under section 52 of the 2001 Act may be, I am satisfied that the secondary claim in this case founders on the same rock as the primary claim. The claimant is inviting the court to make a finding condemning the person who makes the drone strike as guilty of committing a crime against humanity and/or a war crime. Since that person is a CIA official implementing US policy, such a finding would involve our courts sitting in judgment of the US.
52. For these reasons, I would not grant permission to appeal in respect of the secondary case either.

Overall conclusion

53. In the end, despite the attractive way in which Mr Chamberlain has presented his argument, I consider that both the primary and secondary claims are fundamentally flawed for the same reason. There is no escape from the conclusion that, however the claims are presented, they involve serious criticisms of the acts of a foreign state. It is only in certain established circumstances that our courts will exceptionally sit in judgment of such acts. There are no such exceptional circumstances here. I would refuse permission to appeal.
54. Although this is a refusal of permission to appeal, the judgment may be cited as a precedent.

Lord Justice Laws:

55. I agree.

Lord Justice Elias:

56. I also agree.