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Case No: CO/2599/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before:

LORD JUSTICE MOSES
MR JUSTICE SIMON

- -

Between:

The Queen on The Application of Noor Khan	**Claimant**
- and -	
The Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

- -
- -

Mr Martin Chamberlain, Mr Oliver Jones and Mr Robert McCorquodale (instructed by **Leigh Day**) for the **Claimant**
Mr James Eadie QC, Mr Andrew Edis QC, Mr Malcolm Shaw QC and Miss Karen Steyn (instructed by **The Treasury Solicitors**) for the **Defendant**

Hearing dates: 23rd – 25th October, 2012

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Approved Judgment

Lord Justice Moses :

1. The claimant seeks to challenge, by way of judicial review, what he calls 'a decision' of the Secretary of State for Foreign and Commonwealth Affairs in relation to the passing of intelligence by employees of GCHQ to forces of the United States. I deliberately describe the nature of these proceedings in vague terms; it will become necessary to examine the extent to which it is possible to be more precise. The Secretary of State's opposition to the grant of permission has led to the need to resolve certain preliminary issues.

2. The claimant seeks to impugn what the claim form describes as a decision to provide "intelligence to the US authorities for use in drone strikes in Pakistan, amongst other places". It is alleged that employees of GCHQ are assisting US agents by supplying what is described as "locational intelligence" for use in drone strikes in Pakistan. By assisting US agents to direct armed attacks in Pakistan, GCHQ employees are said to be at risk of committing offences under the criminal law of England and Wales, as secondary parties to murder. The claimant submits that there is no armed conflict in Pakistan, as it is recognised under international law, still less an international armed conflict, and thus GCHQ employees are not entitled to combatant immunity.

3. Even if GCHQ employees would not be guilty of murder, there is a significant risk that they are guilty of conduct ancillary to crimes against humanity or war crimes. It follows, says the claimant, that the Secretary of State must publish a policy identifying the circumstances in which intelligence may lawfully be passed on if it relates to the location of individuals who may be targeted in a drone strike.

4. The Secretary of State advances his objection to permission on four bases. But each has an impact on the other and resolution will depend upon their cumulative effect. The Secretary of State contends, first, that the court will be required to adjudicate upon the acts of foreign sovereign states, second, that the claimant is seeking a declaration as to whether future conduct is proscribed by domestic criminal law, third, that the court should not be lured into giving an advisory opinion and fourth, at the suggestion of Mitting J when ordering this hearing, that the case cannot be tried at all in the absence of a statutory closed material procedure.

5. The parties debated rival versions of what the court would have to resolve, should permission be granted. For example, the claimant disavows any intention, or need, to resolve the legality of United States' actions in Pakistan, whilst the Secretary of State warns that this court is being invited to rule on that very issue. In *R (Gentle) v Prime Minister)* [2008] 1 AC 1356, Lord Rodger sought to lift the cloak of a claim for a public inquiry in exercise of a right under Article 2 of the European Convention on Human Rights. He identified the real aim or target of the complaint: it was an attempt to investigate why - as the claimants in that case saw it - the Attorney-General changed his mind and gave wrong advice as to the legality of the invasion of Iraq [34] and [35]. Similarly, this Court must cast a critical eye on the claimant's own description of the issues and identify what he is "really after". It is necessary to analyse the nature of the claim, to see what, in reality, it entails.

6. I must set out in full the relief the claimant seeks. He seeks 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."

I should mention, at this stage, that the references to the provisions of various criminal statutes require amendment. The claimant now rests his case as to potential criminality on Sections 44-46, Section 52(2) and Schedule 4 of the Serious Crime Act 2007, which give rise to a risk of committing offences under the International Criminal Court Act 2001.

7. The facts on which the claim is based start from the claimant's own description of tragic events in Datta Khel, North Waziristan Agency in the Federally Administered Tribal Areas of Pakistan. On 17 March 2011 his father Malik Daud Khan was

presiding over an outdoor meeting of the local Jirga to settle, with other elders, a commercial dispute. A missile was fired from a drone and the claimant's father was killed with 49 others who were attending the Jirga.

8. The claimant asserts that the missile was fired from a drone operated by the CIA. He describes a community "plagued with fear" as drones hover over their skies day and night. The community are fearful of gathering together lest such a congregation arouse suspicion; and children do not dare attend school. He concludes: "my hope is that this brutal assassination will end. The people of NWA are against these strikes. I am against these drone strikes".

9. The allegation that the strikes are linked to agents of the US Government and to United Kingdom employees of GCHQ is based on a number of reports, the effect of which can be summarised in the report of the Sunday Times, dated 25 July 2010:

> "GCHQ, the top-secret communications agency, has used telephone intercepts to provide the Americans with 'locational intelligence' on leading militants in Afghanistan and Pakistan, an official briefed on its operations said. Insiders say GCHQ can provide more extensive and precise technical coverage in the region than its American sister organisation, the National Security Agency, because Britain has a better network of intercept stations in Asia...GCHQ uses satellites and planes to collect and analyse the location of telephones used by militants. The Sunday Times have agreed not to disclose further details of these operations at the request of the agency…Cheltenham-based GCHQ said it was proud of the work it did with America, which it said was in "strict accordance with the law."

10. The response of the Secretary of State has been to invoke the consistent and conventional policy of neither confirming nor denying the assertions; to do so would risk damaging the important public interest in preserving the confidentiality of national security and 'vital' relations with international partners. The claimant suggests that that policy has already been breached in the reported assertion of acting "in strict accordance" with the law. Such an assertion is said to be inconsistent with the policy of saying nothing. The dispute led to a late attempt by the Secretary of State to introduce material which was said to cast doubt on the accuracy of the report of GCHQ's comment. It was far too late for the Secretary of State to introduce that material and I have ignored it.

11. I do not, however, think that the point is of any significance. GCHQ's reported assertion of the legality of its activities does not amount to a breach of the policy of 'no comment'. The real question is the impact of that policy on the issues which require resolution: does the fact that the claimant is compelled to rely on unconfirmed reports preclude the grant of permission? The extent to which it is possible to identify a firm factual foundation is an important question which I shall have to determine, but at this stage I shall merely note that, through no fault of the claimant, his case rests on a respectable but unconfirmed report.

12. It is relevant to the analysis of the nature of this claim to observe that the claimant has also launched proceedings, as a petitioner in the Court in Peshawar. In those

proceedings he contends that the Government of Pakistan, and various Ministries, are under a constitutional obligation to take all necessary action to stop "illegal drone strikes" and "safeguard its citizens from target killing by an external force". He pleads that "the act of killing of innocent people on March 17 2011 was extra-judicial killing, more generally referred to as murder". The prayer refers to criminal offences by those inside and outside Pakistan in drone operations.

13. It is plain, from the nature of the claims, that the purpose of the proceedings in England and in Pakistan is to persuade a court to do what it can to stop further strikes by drones operated by the United States. That is, as Lord Rodger would have put it, the real aim of both sets of proceedings. In this country, however, that presents the claimant with a formidable difficulty. His legal advisers acknowledge, as they have to acknowledge, that they cannot seek from this court a declaration that the United States' drone strikes are unlawful. They recognise that a domestic court would refuse to make such a declaration.

Judgment on the Acts of a Foreign State

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).

16. The damage to relations with another sovereign state leads to a further well-settled proposition: that states do not distinguish between legal assertions made by a state and declarations of law by a national court. It does not ameliorate the damage to foreign relations for the state to protest that it is not responsible for the conduct of its courts. The judgment of the court will be regarded by other states as the judgment of the country; the country is bound, in any event, to comply with the decisions of the court in obedience to the rule of law (see *R v (Campaign for Nuclear Disarmament) v*

Prime Minister [2002] EWHC 2777 (Admin), [2003] 3 LRC 335 [43] per Simon Brown LJ).

17. In *CND* evidence was adduced on behalf of the Foreign and Commonwealth Office as to the damage which would be caused to international relations were the court to give a definitive view as to the legal effect of United Nations Resolution 1441 in relation to the invasion of Iraq. Damage would have been caused by forcing the Government even to enter into a discussion as to the effect of that Resolution [41] and [43]. Evidence from Mr Morrison of the FCO in the instant case echoes the evidence adduced in *CND*. He says that if the Secretary of State were required to make a substantive response to the claim, the likely consequence would be serious harm to national security and international relations. The United Kingdom Government would be compelled to express a definitive view on legal issues, complicating and damaging relations with our most important bilateral ally and, in consequence, damaging the United Kingdom's security.

18. All of these considerations are, as Simon Brown LJ said in *CND* "self-evident" [41]. They were not in dispute. But I have set them out again because a major part of the argument on behalf of the claimant concerned Mr Chamberlain's deft attempts to side-step the impediments which these principles present to the progress of the claim.

19. The course adopted by Mr Chamberlain was to guide the court through a sequence of authorities. They were designed to illustrate that there was no irrefragable principle of non-justiciability, that there was no absolute principle against making a declaration as to criminal offences, and no bar, in principle, to a declaration based on facts which were not admitted. I am prepared to follow Mr Chamberlain up his path but wish to make clear, at the outset of the journey, that questions of justiciability are rarely solved by distinguishing between issues of principle and issues of discretion. Lord Bingham described the approach of the courts in terms which avoided identification of absolute principle:

> "It must…have been obvious that an inquiry such as the claimant's claim would be drawn into consideration of issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them" (*Gentle*[8(2)])

20. These are words which suggest discretion, not jurisdiction. But I propose to follow the course set by Simon Brown LJ in *CND* [47(2)]. It does not matter whether the questions which go to the issue whether this court should hear this application for judicial review are to be regarded as questions of principle or questions of discretion.

Identification of a Legal Right in Domestic Law: Deploying a Legitimate Defence in Domestic Criminal Law

21. There are, undoubtedly, cases in which the courts have been prepared to resolve disputed issues of international law, if it is necessary for the purposes of resolving a private right or obligation, even if to do so would hamper international relations and cause embarrassment to the United Kingdom. In *R v Home Secretary, ex parte Adan* [2001] 2 WLR 143, the court was compelled by the terms of the Asylum and Immigration Act 1996, and the United Kingdom's treaty obligations, to question

whether France and Germany were mis-applying the Refugee Convention. If a claimant has a legal right, it is justiciable in the courts (*R (Gentle) v Prime Minister* [2008] 1 AC 1356 per Lord Bingham [8(2)]). There are cases in which the courts are compelled to interpret and apply international law for the purposes of determining private rights and obligations under domestic law (*CND* [61](iii)).

22. This is not the occasion for repetition of the review of such cases conducted in *R (Abbasi) v Secretary of State for FCO* [2002] EWCA Civ 1598, [50]-[51] in *CND* [22]-[33], and in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). Those cases demonstrate that the mere fact that the issues are those which the courts "have traditionally been very reluctant to entertain" will not necessarily be dispositive of the issue of justiciability. If a domestic right or obligation can be identified and can only be vindicated by consideration of the actions of other states under international law, then the courts may be compelled to undertake that task to the extent that it is necessary for that purpose.

23. There is, however, an important caveat. Rights must be recognised before they can be vindicated. The process of identifying a right should involve consideration of :

> "what exercise of the right would entail. Thus the restraint traditionally shown by the courts in ruling on what has been called high policy - peace and war, the making of treaties, the conduct of foreign relations - does tend to militate against the existence of the right." (*Gentle* [8(2)])

24. The necessary vindication of a legal right, once it has been recognised, includes the right to deploy a legitimate defence in a criminal case. In *Jones (Margaret)*, the defendants failed to establish that the United Kingdom's actions in Iraq afforded a defence to criminal charges. But Lord Hoffmann (at [67]) saw "much force" in the submission that it would be "contrary to the right to a fair trial under article 6 of the Convention for a defendant to be told that he could not rely on a defence otherwise open to him" because it raised questions that were not justiciable.

25. The paradigm of a case in which the court is required to consider issues of high policy was *R v Gul (Mohammed)* [2012] 1 Cr App R. 37. The defendant sought to resist the accusation that his actions were acts of terrorism by contending that he was doing no more than encouraging self-defence against coalition forces who were invading Iraq. He contended that those forces were not entitled to combatant immunity because the conflict was a non- international armed conflict. The conclusion of the court, that there was nothing in international law which required the court to exempt those who attacked coalition forces from the scope of the Terrorism Act 2001, is not of significance in the instant case. But *Gul* does make good the proposition that it may be necessary to resolve questions of international law for the purposes of resolving a legitimate defence under domestic criminal law.

26. By a parity of reasoning, the claimant contends that it is necessary to decide on the nature of the United States' attacks in North Waziristan in order to determine whether employees of GCHQ would be entitled to combatant immunity, were they to be prosecuted for offences under the Serious Crime Act 2007. If they were immune

from prosecution under the 2007 Act, they could only be prosecuted under the International Criminal Court Act 2001.

27. This case, submits Mr Chamberlain, concerns only the legality of the activities of employees of GCHQ. It is concerned with domestic criminal law and the compliance of GCHQ employees with the requirements of the criminal law. The need to consider how international law would classify the actions of the United States arises only for the purpose of determining issues of domestic criminal law. In contrast to *CND* this case is not concerned with questions of interpretation of an instrument operating purely on the plane of international law [36]. It does not require the court to pass judgment on the legality of the United States' actions in North Waziristan.

An Advisory Opinion on the Criminal Law

28. By this means Mr Chamberlain attempts to secure a foothold in domestic law (*CND* [40]). But a survey of the domestic ground reveals further impediments. The court is being asked to give an advisory opinion; it is being asked to give an advisory opinion on a difficult point of criminal law, and the point of law depends upon sparse and unproven facts.

29. The courts will not give advisory opinions as to whether proposed conduct is lawful, save where it would serve a cogent public or private interest (*R (Rusbridger) v Attorney General* [2004] 1 AC 357 [23]). The principle that the courts will not make declarations as to future conduct or in relation to a future decision is often qualified by a reference to "exceptional circumstances" (*Rusbridger* [16], *CND* [52]), leaving the courts to ponder the few examples where courts have granted such declarations (some are given in *Rusbridger* [23] and [24]) and the many examples where the courts have refused.

30. The Guardian failed to obtain a declaration as to whether its advocacy for abolition of the monarchy was prohibited by the Treason Felony Act 1848, when read with Article 10 of the Convention, on the grounds that such a declaration was unnecessary [28] and raised no live, practical question [36]. The application in this case cannot be so lightly dismissed. But it does labour under the difficulty that it raises an issue as to whether the conduct impugned breaches the criminal law. Questions as to whether conduct amounts to a criminal offence are peculiarly sensitive to the facts of the particular case. Applications for an advisory opinion are more likely to be accepted in relation to issues of pure law; they are most likely to be rejected where the answer will depend on the facts (*Rusbridger* [23]).

31. Usually an application for a declaration which raises questions as to the criminal law will fail because a declaration from a civil court will risk usurping the function of the criminal courts. That is not a risk, as both sides recognise, in this case. There is no realistic chance of any employee of GCHQ being prosecuted. In this case the problem is different: the efficacy of the declaration will depend on the facts. Absent a declaration which identifies with particularity the factual circumstances in which the Serious Crime Act 2007 would be infringed, a declaration would be useless, inaccurate or misleading. If it is imprecise, it affords no guidance as to future conduct and if it is too wide it may be misleading by including lawful activity within the scope of criminal conduct.

32. The provisions of the 2007 Act on which the claimant relies demonstrate the problem. Section 44 provides:

> "**44 Intentionally encouraging or assisting an offence**
>
> (1) A person commits an offence if—
>
> (a) he does an act capable of encouraging or assisting the commission of an offence; and
>
> (b) he intends to encourage or assist its commission.
>
> (2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.
>
> **45 Encouraging or assisting an offence believing it will be committed**
>
> A person commits an offence if—
>
> (a) he does an act capable of encouraging or assisting the commission of an offence; and
>
> (b) he believes—
>
> (i) that the offence will be committed; and
>
> (ii) that his act will encourage or assist its commission."

33. Leaving aside, for a moment, the issues of jurisdiction, a declaration which merely replicates the wording of the statute is of no assistance whatever. Making a declaration which merely substitutes references to employees of GCHQ for "a person" would be an exercise in futility. In what circumstances is it suggested that a GCHQ employee will infringe the 2007 Act? What must he avoid doing? What, since *mens rea* is essential, must he avoid thinking?

34. Any court, be it a civil or criminal court, seeking to answer these questions is hardly encouraged to read:

> "The offences are rendered complex because the sections (and the rest of that part of the Act) include extended definitions of (i) what suffices as relevant conduct by D; and (ii) the sub-division of the elements of the offence to be committed by P, into conduct, circumstances and consequences. Unfortunately, several of the fundamental terms in the offences are left undefined, including core elements of the *actus reus*: 'encouraging' and 'assisting'. The Law Commission report No. 300 will serve as an interpretative document, but given the degree of difference between what was proposed and what was

> enacted, considerable caution is warranted. In addition, caution must be exercised in reading the statute itself since the true scope of the offences in ss44 to 46 cannot be appreciated without reference to the ensuing 20 sections". (*Smith & Hogan: Criminal Law 13th Edition p.464*.)

35. The alleged factual premise on which the claimant's application is based is that employees of GCHQ are passing on intelligence which may be used to find the location of those whom the US agents wish to target. The claimant says that the Secretary of State cannot escape merely by reliance on a policy of neither confirming nor denying the allegation. There is one example of a declaration granted in the face of the exercise of such a policy by the police. In *Re C's Application for Judicial Review* [2009] 1 AC 908 declarations as to the scope of the Regulation of Investigatory Powers Act 2000 in relation to surveillance and monitoring of legal consultations in prison were made and upheld, despite the fact that the police would neither confirm nor deny that such surveillance took place. It is of note that assurances were sought from the police that such surveillance would not take place and they were refused [1]. But the declarations in that case were not concerned with the facts but with the pure legal issue of the impact of Article 8(2) of the ECHR on the authorisation of surveillance under section 28 of RIPA 2000. No-one suggested (see the argument between pages 913-4) that the facts alleged should not be accepted.

36. But in the instant case the utility of the declaration does depend on factual precision. The mere assumption that targets are identified with the aid of intelligence from GCHQ is not a sufficient factual basis for a declaration. Whether an employee of GCHQ is guilty of an offence will depend upon the nature of the employee's activities, the effect of those activities in a particular case (encouragement or assistance) and that employee's state of mind (knowledge or belief). Since an employee is unlikely to be in a position to know whether or how intelligence is disseminated no sensible guidance could possibly be given as to the circumstances when intelligence may lawfully be passed on and when it may not. If GCHQ is run on anything like the system we have, over thirty years later, learnt was adopted in the huts of Bletchley Park, the notion that those obtaining the intelligence have anything other than an inkling of how it may be deployed is little more than fanciful.

37. It is hard to see the point of any declaration which merely says that those who pass on intelligence may be at risk of breaking the law, if their activities and their state of mind fall within the scope of sections 44 or 45 of the Serious Crime Act 2007.

38. The states of mind identified in sections 44 and 45 are crucial to criminal liability. That exposes this claim to difficulties similar to those faced by Woolf J in *Attorney-General v Able* [1984] 1 QB 357. The Attorney-General sought a declaration as to whether the supply of a booklet relating to suicide was an offence contrary to the Suicide Act 1961. Woolf J contrasted the application for a direction to the civil court with an Attorney-General's reference to the Court of Appeal (Criminal Division). On such a reference the Court of Appeal clarifies the law in relation to specific facts. Woolf J said:

> "If a civil court declares conduct criminal it performs the same task as a jury. If it declares that certain conduct is not criminal

> it performs the same task as a judge withdrawing a case from the jury."

The danger, as Woolf J saw it was:

> "While of course recognising the advantages of the law being clear in relation to future conduct, it would only be proper to grant a declaration if it is clearly established that there is no risk of treating conduct as criminal which is not clearly in contravention of the criminal law" (808A-B).

39. That is the very danger in the declaration sought in this case. Merely passing on intelligence could not amount to an offence under the 2007 Act unless a particular state of mind could be proved against the provider at the time of provision. So how is the declaration to be drafted to have any meaningful utility? If cast too wide it would not only be useless but, as Woolf J explains, it would be misleading, since it would risk including conduct which did not clearly contravene the criminal law.

40. Woolf J, in *Able*, set out the intention which must be proved and the consequences of distribution which must be proved in any particular case (812D-F). Even if they were proved, he acknowledged that there might be some exceptional circumstance which meant that the offence was not established (812G). He therefore concluded that the different forms of declaration submitted all suffered from the fatal defect that they indicated that an offence had been committed, when, in fact, no offence would be committed (813B). Accordingly, he refused to grant any declaration.

41. The same difficulty is apparent in the instant application. It is not possible to produce a meaningful declaration which accurately identifies the necessary *mens rea* without reference to specific facts.

42. Mr Chamberlain sought to diminish the apparent difficulty of composing a meaningful declaration by reference to a policy document published by the Government in relation to intelligence officers' work with foreign security services implicated in improper treatment of detainees (*Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and receipt of Intelligence Relating to Detainees*).

43. The contents were challenged by the Commission in *R v (Equality & Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389. The court did consider whether the policy accurately identified the *mens rea* necessary to establish secondary liability under s.134 of the Criminal Justice Act 1988 (assisting torture), although it rejected the complaint that the guide was erroneous. Mr Chamberlain argued that if the Government was prepared to publish such guidance, then the Secretary of State ought equally to be prepared to publish guidance in relation to the dissemination of intelligence to be used in drone attacks.

44. The Consolidated Guidance does not assist Mr Chamberlain. In the main, it sets out a series of procedural steps which officers should follow. The primary obligation is to consult senior personnel (Paragraph 11 and Table). The only cases where this will be unnecessary is where the officer knows or believes torture will take place, or judges that it will not. The Table starts with a prohibition: "if you know or believe torture

will take place… 1. You must not proceed and Ministers will need to be informed". This reveals that the author has never had the difficulty of explaining to a jury the difference between knowledge, belief and suspicion. Clearly, the Guidance is of greater use in its requirement to consult senior personnel.

45. Merely repeating the provisions of ss.44-46 of the 2007 Act in published guidance, and telling employees that if they intentionally encourage or assist an offence or encourage or assist an offence believing it will be committed is, as I have explained, of no utility whatever. Examination of the Guidance, which Mr Chamberlain holds out as an exemplar, merely shows that the claimant cannot overcome the difficulties inherent in a vague and, possibly misleading, declaration by seeking to transpose those difficulties into a written policy.

46. Mr Chamberlain suggests, by way of riposte, that there is a point in determining whether employees would have a defence of combatant immunity, a point which turns on the status of the conflict in North Waziristan in international law. But I can see no point in identifying whether the employees have a defence to a criminal charge in circumstances where there is no risk they will ever be prosecuted and where the existence of facts likely to found a criminal charge is a matter of imaginative conjecture.

The Only Means of Redress

47. Mr Chamberlain prayed in aid the fact that there was no likelihood of prosecution. He submitted that, absent any prospect of a criminal prosecution, a declaration is the only way the legality of passing information used for the location of drone strikes may be monitored. It is the only redress open to the claimant, at least in this jurisdiction. This was the key factor which persuaded Walker J in *R (Haynes) v Stafford Borough Council* [2007] 1 WLR 1365 to make declarations as to whether the local authority's grant of a pet shop licence to the Parrot Society involved the commission of criminal offences contrary to the Pet Animals Act 1951. There was, so the judge concluded, a public interest in resolving the issue and no other means of redress for the claimant.

48. I do not dispute that oversight of the legality of the operations of the Security and Intelligence Agencies and GCHQ is an important matter of public interest. But it is not correct to assert that a declaration is the only means of testing the lawfulness of the activities of GCHQ. There was debate as to whether a complaint to the Investigatory Powers Tribunal would be effective, or could resolve the issues in this application. It would be concerned only with a specific complaint about a specific incident. If, for any reason, it rejected the complaint (for example, because GCHQ was not involved in the attack on 17 March 2011 or because the activities were lawful) it could do no more than state that no determination had been made in the complainant's favour (s.68(4) Regulation of Investigatory Powers Act 2000). The complainant would never know why his complaint had been rejected.

49. GCHQ activities are, however, subject to the scrutiny of the Intelligence and Security Committee, by virtue of the Intelligence Services Act 1994 and of the Intelligence Services and Interception Commissioners, whose remit is to hold the Security Services and those responsible for intelligence accountable. There is no basis on which this court could or should conclude that a declaration would fill a void and impose the rule of law on a lawless territory. An abstract declaration would be far

less effective than the oversight of the Parliamentary Committee charged with ensuring, amongst other things, that legality does not give way to expediency. As Simon Brown LJ remarked in *CND*, the Government has access to the best advice "Why should it be thought that the advice obtained is likely to be wrong ?" [44].

Adjudicating on United States Activities

50. Faced with these obstacles, Mr Eadie QC suggests that the claimant is back where he started, facing the fundamental objection that he is asking the court to pass judgment on the activities of the United States. He suggested (recalling Simon Brown LJ in *R v DPP ex p Camelot* (1997) 10 (Admin) L Rep 93,104[32]) that the court should be all the more wary of accepting an invitation to launch these proceedings and negotiating the obstacles when the claimant's case involves determining the lawfulness of the actions of the United States in North Waziristan. Mr Chamberlain sought to avoid this suggestion by reference to the jurisdiction provisions of the Serious Crimes Act 2007.

51. The relevant provisions read:

> "**52 Jurisdiction**
>
> (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.
>
> (3) A reference in this section (and in any of those paragraphs) to what D anticipates is to be read as follows-
>
> (a) in relation to an offence under section 44 or 45, it refers to the act which would amount to the commission of an anticipated offence…."
>
> **"SCHEDULE 4 EXTRA-TERRITORIALITY**
>
> **Section 52(2)**
>
> (1) This paragraph applies if—
>
> (a) any relevant behaviour of D's takes place wholly or partly in England or 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 satisfies 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."

52. The "relevant condition" to which the claimant draws attention is s.9 of the Offences Against the Person Act 1861. By that section and s.3 of the British Nationality Act 1948, a British citizen may be tried in England or Northern Ireland for murder or manslaughter committed on land anywhere outside that territory. So Mr Chamberlain contends that an employee, D, could be tried because there are relevant conditions which would permit P, the principal, to be tried if he were a British citizen.

53. Let it be assumed that none of the US agents involved in drone strikes, if they are involved, are British citizens. On the basis of these provisions, Mr Chamberlain argued that an employee of GCHQ could be guilty of an offence under sections 44 or 45, even though those carrying out a drone strike with the aid of information supplied could not be guilty of any offence under the criminal law of England and Wales, because they are not British citizens and, accordingly, are not caught by s.9 of the 1861 Act.

54. It seems, as Mr Edis QC pointed out, curious that a defendant can be guilty of the offence of murder and subject to a mandatory life sentence when the principal is not guilty of any offence at all. I do not propose to resolve the difficulty. The very fact that there is enormous difficulty is significant in this case; it would be quite wrong to make a declaration in an area of law so fraught with difficulty that no prosecution under these provisions, a prosecution with requires the Attorney-General's fiat (section 53), has as yet been brought.

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. If, as I have concluded, any declaration could, at best, merely replicate the words of a congeries of criminal provisions which resist comprehension, save perhaps to the most sophisticated interpreter (and even he suggests that they are baffling), then what is sought is shown to be damaging to the public interest without any countervailing justification or advantage. And all of this in circumstances where the conduct of GCHQ is subject to oversight and there is no prospect of prosecution. In short, there is no need or reason, even if led by so skilful and firm a guide as Mr Chamberlain, to "go there".

58. I reach this conclusion without any need to consider the issue raised by Mitting J as to whether, if permission were granted, it would be possible to try the application for judicial review. The issue was raised after Ouseley J held, in *AHK v Home Secretary* [2012] EWHC 1117 (Admin), that, absent statutory provision, a closed material process is not available in judicial review proceedings, following the decision in *Al Rawi v Security Service* [2012] 1 AC 531.

59. If I revert to Lord Rodger's approach, which I mentioned at the outset, the real aim and target of these proceedings is not to inform GCHQ employees that if they were prosecuted, no defence of combatant immunity would be available. The real aim is to persuade this court to make a public pronouncement designed to condemn the activities of the United States in North Waziristan, as a step in persuading them to halt such activity. Mr Chamberlain knows he could never obtain permission overtly for such a purpose. His stimulating arguments have been an attempt to shroud that purpose in a more acceptable veil. That he has, in my view, failed, is no reflection on his admirably clear and attractive efforts. I would refuse permission.

Mr Justice Simon:

60. I agree.