

Drones challenge barred by act of state doctrine

20/01/2014 (*Public Law*)

The Court of Appeal today ruled that a claim challenging the legality under English law of UK participation in CIA drones strikes in Pakistan is not justiciable because determining it would involve impugning the sovereign acts of the US.

The claim was brought by Noor Khan, a resident of Waziristan whose father was one of more than 40 people killed in a drone strike in 2011. He sought declarations that the UK's reported practice of providing locational intelligence for such strikes was unlawful because it was likely to involve encouraging or assisting murder contrary to the Serious Crime Act 2007. Liability arose under Sch. 4 to the 2007 Act, it was argued, even if the principal act (committed by a CIA officer who was not a UK national) was not itself triable as murder in England & Wales. The defence of combatant immunity would not be available because the principal (a CIA officer, not a member of his country's armed forces) was not a combatant and because there was no "armed conflict" in Pakistan as that term was understood in international law.

After a 3 day hearing, permission to apply for judicial review was refused by the Divisional Court (Moses LJ and Simon J) in December 2012. After a further 2 day hearing in December 2013, the Court of Appeal (Lord Dyson MR, Laws and Elias LJJ) today refused permission to appeal.

Having accepted that the Appellant's arguments on the construction of Sch.4 to the 2007 Act were "persuasive", and that it was "certainly not clear that a defence of combatant immunity would apply", the Court of Appeal held that the claim was nonetheless not justiciable because "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". It did not matter that the relief sought was focussed on the legality under English law of the acts of UK officials (not on the legality of the acts of CIA officers, which would be matters for US and/or Pakistani law). "What matters," Lord Dyson concluded, "is that the findings would be understood by the US authorities as critical of them."

Martin Chamberlain QC, Oliver Jones and Professor Robert McCorquodale appeared for the Appellant Noor Khan, instructed by Leigh Day.

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