RECENT DEVELOPMENTS

R (Khan) v. The Secretary of State for Foreign & Commonwealth Affairs: U.K. Courts—The Pontius Pilate of Drone Strikes

I. OVERVIEW

More than forty people lost their lives when a missile from a drone, operated by the United States Central Intelligence Agency (CIA), struck a location in Datta Khel, Pakistan, on March 17, 2011.[1] Among those killed was the father of Noor Khan.[2] At the time of the strike, Khan's father was presiding over an outdoor meeting of the local *Jirga*, a peaceful council of tribal elders, whose functions included settling commercial disputes.[3] Various news outlets had previously reported that the General Communications Headquarters (GCHQ), an agency overseen by Her Majesty's Secretary of State for Foreign and Commonwealth Affairs, provides "locational intelligence" to the United States for use in conducting drone strikes in various places, including Pakistan.[4] In December 2011, Khan's solicitors wrote to the Secretary of State seeking clarification of the U.K. government's policies and practices in relation to passing information to U.S. agents for use in

1. R (Khan) v. Sec'y of State for Foreign and Commonwealth Affairs, [2014] EWCA (Civ) 24, [2014] 1 W.L.R. 872 (Eng.).
2. *Id.* at [1].
3. *Id.*
4. *Id.* at [2].

drone attacks in Pakistan.[5] Two months later, Khan received a reply from the Treasury Solicitor, refusing to make an exception to the "neither confirm nor deny" policy regarding responses to such inquiries.[6]

In response, Khan issued proceedings claiming judicial review of the Secretary of State's decision to provide intelligence to U.S. authorities for use in such drone strikes.[7] The divisional court dismissed this application for permission to apply for judicial review, and Khan sought leave to appeal.[8] Khan's reformulated claim for relief asked the court for a declaration that a U.K. national who kills a person in Pakistan by drone strike is not entitled to a defense of combatant immunity.[9] Thus, a GCHQ officer in the United Kingdom may commit an offence under §§ 44-46 of the Serious Crime Act 2007 when passing locational intelligence to U.S. government agents for use in drone strikes in Pakistan.[10] Alternatively, Khan sought a declaration that

> [i]n 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.[11]

Therefore, Khan asked that the court require the Secretary of State to publish and apply a lawful policy, setting out the circumstances in which locational intelligence may be transferred prior to directing or authorizing the passing of such information to an agent of the U.S. government.[12] The Court of Appeal (Civil Division) *held* that Khan's application for judicial review would have no real prospect of success because it would require the court to impermissibly interfere with

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5. *Id.* at [3].
6. *Id.*
7. *Id.* at [4].
8. *Id.* at [4]-[5]. In his first application for permission to apply for judicial review, Khan sought relief in the form of a declaration forbidding the Secretary of State from directing or authorizing GCHQ officers or other officials from passing such intelligence to the United States Government, on the grounds that

> [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 information will be used by the Central Intelligence Agency to target or kill that individual . . . is not entitled to the defence of combatant immunity;

and may be criminally liable. *Id.* at [4]. Accordingly, Khan sought a requirement that "the Secretary of State must formulate, publish and apply a lawful policy setting out the circumstances in which such intelligence may be transferred." *Id.*
9. *Id.* at [6].
10. *Id.*
11. *Id.*
12. *Id.*

international relations. *R (Khan) v. The Secretary of State for Foreign and Commonwealth Affairs*, [2014] EWCA (Civ) 24.

II. BACKGROUND

A. Judicial Review

In the United Kingdom, judicial review is a system by which the High Court of Justice, Queen's Bench Division, oversees decisions of public bodies and officials, including members of the executive.[13] An individual who feels that a government authority's action is unlawful may apply to the High Court for judicial review of that decision.[14] By virtue of the application process, courts are granted broad discretion in determining which applications warrant further consideration.[15] Judicial review, unlike the appeal process, does not examine the merits of the government authority's decision, and the court can only quash a decision if the public body had no power to make it.[16] This is known as *ultra vires*, of which there are two types—procedural and substantive.[17] Procedural *ultra vires* involves a "breach of natural justice," either in the authority's bias in reaching the particular decision or in unfair procedures.[18] Substantive *ultra vires*, on the other hand, can be found where the content of a decision is found to be outside the power of the public authority that made it.[19] In the past, the courts have frequently applied the principle established in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, which holds, "A decision is *ultra vires* if it is so unreasonable that no reasonable public body could have reached the decision."[20] This high degree of deference to the actions of public officials demonstrates the prevalence of the general notion of separation of powers and presents a heavy burden for individuals seeking judicial review of officials' actions and determinations.[21]

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13. CIV. P. R. 54.1 (U.K.); CATHERINE ELLIOT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 586 (12th ed. 2011).

14. ELLIOT & QUINN, *supra* note 13, at 586.

15. *Id.*

16. *Id.*

17. *Id.* at 586-87.

18. *Id.* at 586.

19. *Id.* at 587.

20. *Id.* at 588; *see* Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1947] 1 K.B. 223, 233-34 (Eng.); Council of Civil Serv. Unions v. Minister for the Civil Serv. [1985] 1 A.C. 374 (H.L.) 410 (appeal taken from Eng.).

21. SIMON HALLIDAY, JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW 132 (2004).

While the *Wednesbury* principle remains at the heart of judicial review in the context of most decisions made by public bodies, the courts have, in some recent cases, applied a higher level of scrutiny to determine the reasonableness of decisions interfering with fundamental human rights.[22] In such instances, the test is "whether a reasonable body could, on the material before it, have reasonably concluded that such interference was justifiable."[23] As the interference with human rights becomes increasingly substantial, the courts require additional justification in order to find the decision reasonable.[24] In *R v. Lord Saville of Newdigate*, the court held that a government tribunal's refusal of the Ministry of Defence's request to permit military witnesses involved in the "Bloody Sunday" massacre in Northern Ireland to give their evidence without disclosing their names did not attach sufficient significance to the safety of soldiers and their families.[25] The tribunal had failed to adequately justify the decision to refuse anonymity because its fundamental task of truth finding was not impeded by the condition of anonymity and disclosure of the soldiers' names presented a substantial risk to their safety.[26] The court stressed that "the individual's right to life is . . . the most fundamental of all human rights."[27] In so holding, the court established that where decisions of a public authority may affect fundamental human rights, those rights should be given precedence.[28] The decision in *Lord Saville of Newdigate* seems to go hand-in-hand with the principle of proportionality, a doctrine of European law, that is not yet controlling in U.K. domestic administrative courts (although numerous legal authorities have argued in its favor), but has been implemented in cases where human rights are at issue.[29] Under the European Convention on Human Rights, certain instances allow for some limitation of human rights, especially where the state's interests in national security or other necessities in a democratic society are concerned, but the limitation of those rights must be proportional to the state's objectives.[30] European courts have applied the test of proportionality in such instances, and U.K. courts, in interpreting

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22. ELLIOT & QUINN, *supra* note 13, at 588; *see* R v. Lord Saville of Newdigate, [2000] 1 W.L.R. 1855, 1877 (Eng.).
23. ELLIOT & QUINN, *supra* note 13, at 588.
24. *Id.*
25. *Lord Saville of Newdigate*, 1 W.L.R. at 1877.
26. *Id.*
27. *Id.* at 1876-77.
28. ELLIOT & QUINN, *supra* note 13, at 589.
29. HALLIDAY, *supra* note 21, at 137.
30. *Id.*

European law, have done the same.[31] The doctrine of proportionality, as practiced by the European courts, holds that public bodies may not cause a greater degree of interference with the rights or interests of individuals than is required to meet the state's objectives.[32]

In the context of U.K. judicial review, should the court find a government body's decision *ultra vires*, the court can grant relief in the form of a quashing order, mandatory order, or prohibiting order.[33] However, this relief is the prerogative of the court, and even if an applicant proves *ultra vires* on the part of the government body, the court may use its discretion to refuse or to grant a limited remedy.[34] It has been noted that courts often take a laissez-faire approach in matters involving national security.[35] In such instances, courts have been reluctant even to assess the strength of the evidence presented.[36] This has given rise to numerous occasions in which courts have refused to examine the case in order to assert whether decisions made in the interest of national security were rational, even in cases where the rights affected may be fundamental civil liberties.[37]

B. The Serious Crime Act 2007 and the International Criminal Court Act 2001

The Serious Crime Act 2007 (2007 Act) makes it unlawful to perform "an act capable of encouraging or assisting the commission of an offence"[38] if one "intends to encourage or assist its commission,"[39] or if one performs such an act and "he believes that the offence will be committed [and] that his act will encourage or assist its commission."[40] However, if the offence that one is assisting takes place outside of England and Wales, one is not guilty of encouraging or assisting crime "unless paragraph 1, 2 or 3 of Schedule 4 applies."[41] Schedule 4 outlines the application of the 2007 Act to extraterritorial actions. It provides that where the defendant's action takes place in whole or part in England or Wales, and the defendant "knows or believes that what he anticipates

31. *Id.* at 136-37.
32. ELLIOT & QUINN, *supra* note 13, at 590.
33. *Id.* at 590-91.
34. *Id.*
35. *Id.* at 594.
36. *Id.*
37. *Id.*
38. Serious Crime Act, 2007, c. 27, § 44(1)(a) (U.K.).
39. *Id.* § 44(1)(b).
40. *Id.* § 45(b)(i)-(ii).
41. *Id.* § 52(2).

might take place . . . outside England and Wales," the offence would be triable under the law of England and Wales if it were there committed.[42] Additionally, if relevant conditions are met that would make the act triable if it were committed in that place by a person who satisfies the conditions, the 2007 Act applies.[43] Relevant condition "relates to the citizenship, nationality or residence of the person who commits it" and applies if "what [the defendant] anticipates would amount to an offence under the law in force in that place."[44] In sum, under the 2007 Act, the defendant may be found guilty of encouraging or assisting crime for an act that takes place in England or Wales if it is proved that what the defendant intends or believes will occur would be a triable offense in England and Wales, or if it would be an offense under the law of the place in which the offense takes place if the person satisfies the relevant conditions.

Section 52 of the International Criminal Court Act 2001 (ICCA 2001) makes it a crime in the United Kingdom for a person to engage in conduct ancillary to an act of genocide, a crime against humanity, a war crime, or an act that if committed in the United Kingdom would constitute an offense, even if the act is not a crime in the place where it was committed.[45] Under the ICCA 2001, the term "war crimes" is defined as "[g]rave breaches of the Geneva Conventions . . . against persons or property protected under the provisions of the relevant Geneva Convention," including willful killing and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[46] Also included in the definition of "war crimes" in international armed conflicts is intentionally directing attacks against the civilian population, against civilians not taking direct part in hostilities, and intentionally directing attacks against civilian objects, which do not further military objectives "or with the knowledge that such attacks will cause incidental loss of life or injury."[47]

C. Combatant Immunity

Both U.K. and international law have long recognized combatant immunity as a defense in cases involving international armed conflict. In *R v. Gul (Mohammad)*, the court held that under U.K. domestic law, a

42. *Id.* sch. 4, § 1(1).
43. *Id.*
44. *Id.* sch. 4, § 2(b)-2(1)(d).
45. International Criminal Court Act, 2001, c. 17, § 52 (U.K.).
46. *Id.* sch. 8, art. 8.2(a).
47. *Id.* sch. 8, art. 8.2(a)-(b).

"terrorist" is not entitled to the defense of combatant immunity because his actions are not performed in the course of noninternational armed conflict.[48] Mohammed Gul had been found guilty of offenses under the Terrorism Act after the police executed a search warrant at his home and found material on his computer that showed videos of attacks by Al Qaeda, the Taliban, and other groups on coalition targets in Iraq, Afghanistan, and Chechnya, which Gul had uploaded to YouTube.[49] Gul claimed that he thought that force against the military was justified because those "fighting the Coalition forces were rightly resisting the invasion of their country."[50] Therefore, Gul argued that he was "not encouraging terrorism, but self-defence."[51] The court found that the acts of the insurgents constituted terrorism, that the actors were not entitled to combatant immunity, and that Gul was, in effect, encouraging terrorism.[52] Although the defense of combatant immunity does extend to the actions of those involved in internationally recognized armed conflict, whether it is international or noninternational, one who is involved in unrecognized international or noninternational armed conflict may be found guilty of a crime in the United Kingdom if he kills another outside of the United Kingdom.[53]

D. Discretion and Justiciability

As previously noted, U.K. courts are given broad discretion in determining which applications for judicial review warrant further consideration. U.K. courts have exercised this discretion by declining to determine whether U.S. drone strikes are lawful on the grounds that examination and judgment of "the validity of the acts of one sovereign state . . . would very certainly imperil the amicable relations between governments and vex the peace of nations."[54] This principle, referred to as "the Act of State doctrine,"[55] was expressed by the United States Supreme Court in *Underhill v. Hernandez*. However, it has likely been a

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48. *See* R v. Gul (Mohammed), [2012] EWCA Crim 280, [2012] 1 W.L.R. 3432 [51] (appeal taken from Eng.).

49. *Id.* at [3]-[6].

50. *Id.* at [7].

51. *Id.*

52. *Id.* at [49].

53. *See id.*

54. Buttes Gas & Oil Co. v. Hammer (No. 3), [1982] A.C. 888 (H.L.) 933 (appeal taken from Eng.) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918)) (internal quotation omitted).

55. *E.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1968); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 686 (1976).

tenet of international relations long before the Supreme Court rendered this ruling. In *Underhill*, the court stated:

> 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.[56]

In *Underhill*, the Court held that the plaintiff, a U.S. citizen, could not seek redress in U.S. courts against a Venezuelan general who took command of Bolivar, Venezuela, and subsequently refused to grant a passport to the plaintiff that would allow him to leave the city.[57] Because the general's acts were official acts of the government of Venezuela, the matter was not susceptible to adjudication in the United States.[58] In the time since this ruling by the Supreme Court, U.K. courts have reiterated this principle on several occasions in its own jurisprudence.[59] In *Campaign for Nuclear Disarmament v. Prime Minister of the United Kingdom*, the court dismissed Campaign for Nuclear Disarmament's (CND) application for judicial review when CND sought a declaration from the court that it would be in violation of international law for the United Kingdom to take military action against Iraq without a renewed United Nations Security Council resolution authorizing such action.[60] The court reasoned that as a matter of discretion, it would not make a determination on the issue because "to do so would be damaging to the public interest in the field of international relations, national security or defence."[61]

However, U.K. courts have carved out certain exceptions to this general rule in instances where such actions constitute a grave infringement on human rights or violate conventions, treaties, or other

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56. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

57. *Id.* at 252-53.

58. *Id.*

59. *See Buttes Gas*, A.C. at 931; Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No 2), [2012] EWCA (Civ) 855, [2014] Q.B. 485, [40]-[67] (Eng.); Kuwait Airways Corp. v. Iraqi Airways Co. (Nos. 4 & 5), [2002] UKHL 19, [2002] 2 A.C. 883, [24] (Lord Nicholls of Birkenhead) (appeal taken from Eng.) ("An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic or international law.").

60. R (Campaign for Nuclear Disarmament) v. Prime Minister of the U.K., [2002] EWHC (QB) 2759, 126 I.L.R. 727 (2002).

61. *Id.* at [47].

international protocol.[62] In *Oppenheimer v. Cattermole*, the House of Lords held that a German decree, passed in 1941, that deprived Jews who immigrated from Germany of their German citizenship should not be recognized by U.K. courts because the law constituted "so grave an infringement of human rights that the courts of this country ought to refuse to recognise this as a law at all."[63] In that case, Germany issued pensions to employees of Jewish religious communities as compensation for the injustice done to them during the late 1930s.[64] Oppenheimer was a beneficiary of these payments. However, under an agreement between the United Kingdom and Germany, if he had just been a U.K. national, the payment would have been subject to English income tax.[65] On the other hand, if he had previously had dual nationality in both the United Kingdom and Germany, these payments would have been exempt from U.K. income tax.[66] Cattermole, the U.K. tax assessor, argued that under the German decree, Oppenheimer ceased to be a German citizen when he emigrated to the United Kingdom and that as such he should be required to pay U.K. income tax on the money he received.[67] The House of Lords, in effect, held that regardless of Oppenheimer's loss of German citizenship under German law, under English law he remained a German national because the decree violated Oppenheimer's human rights.[68]

In *Secretary of State for Foreign & Commonwealth Affairs v. Rahmatullah*, Yunus Rahmatullah was captured in Iraq as a prisoner of war by British forces and handed over to U.S. forces who transferred and detained him at a U.S. base in Afghanistan without informing U.K. authorities.[69] Under a memorandum of understanding between the United States and the United Kingdom, any prisoner of war transferred by one to the other would be returned on request,[70] and the removal of transferred prisoners of war to territories outside of Iraq would only take place upon a mutual arrangement between the detaining and accepting powers.[71] Although the United States did not apply protections of the

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62. *See* Oppenheimer v. Cattermole, [1976] A.C. 249 (H.L.) (appeal taken from Eng.); Sec'y of State for Foreign & Commonwealth Affairs v. Rahmatullah, [2012] UKSC 48, [2012] 3 W.L.R. 1087 (appeal taken from Eng.).

63. *Oppenheimer*, [1976] A.C. at 278.

64. *Id.* at 249-50.

65. *Id.* at 251.

66. *Id.* at 250.

67. *Id.*

68. *Id.* at 278.

69. Sec'y of State for Foreign & Commonwealth Affairs v. Rahmatullah, [2012] UKSC 48, [2012] 3 W.L.R. 1087, [3]-[4] (appeal taken from Eng.).

70. *Id.* at [8].

71. *Id.* at [3].

Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC4) to members of Al-Qaeda, the court found that GC4, under U.K. law, applies to all personnel captured in Afghanistan.[72] The court next found that Rahmatullah's detention violated GC4, regardless of the fact that the United States believed that these protections did not apply.[73] Therefore, the court found that the U.K. government was under an obligation to request Rahmatullah's transfer back into U.K. custody in order to correct the breaches of GC4 and that the failure to do so was unlawful under article 45 of GC4.[74] The court held that the legality of the United States' detention is not what was under scrutiny in this case; rather, it was the "lawfulness of the U.K.'s inaction in seeking [Rahmatullah's] return that [was] in issue."[75] In *Rahmatullah*, unlike cases involving a request for the foreign secretary to exercise foreign diplomacy on behalf of a detainee,[76] the Secretary of State was not required to make any particular diplomatic move.[77] The case was therefore justiciable, and the appeals court properly issued the writ.[78]

III. THE COURT'S DECISION

In the noted case, the Court of Appeal (Civil Division) relied exclusively on the Act of State doctrine under which the courts will not sit in judgment on the acts of a foreign state.[79] The court held that, as a matter of discretion, the application for judicial review should be denied because it would have no real prospect of success.[80] Any ruling regarding the legality, under U.K. domestic law, of the GCHQ's role in delivering locational intelligence to CIA officials for use in carrying out drone strikes would violate the Act of State doctrine.[81] Similarly, the court held that any ruling on the legality, under international law, of the GCHQ's role in providing locational intelligence to the CIA for the purpose of carrying out drone strikes would be in violation of this principle.[82]

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72. *Id.* at [34].
73. *Id.* at [36]-[38].
74. *Id.* at [38].
75. *Id.* at [70].
76. *See* R (Abbasi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA (Civ) 1598, 126 I.L.R. 685 (2002) (Eng.).
77. *Rahmatullah*, [2012] UKSC 48 at [70].
78. *Id.* at [70]-[74].
79. R (Khan) v. Sec'y of State for Foreign & Commonwealth Affairs, [2014] EWCA (Civ) 24, [2014] 1 W.L.R. 872, [37], [44], [51] (Eng.).
80. *Id.* at [44].
81. *Id.* at [37].
82. *Id.* at [51].

Although the court noted that the U.S. view, that the defense of combatant immunity would be available to CIA officials executing drone strikes in Pakistan,[83] is not binding on U.K. courts, it found the availability of combatant immunity to CIA officials was a nonissue.[84] The court further noted that it is not clear whether the "defence of combatant immunity would be available to a U.K. national who was tried in England and Wales for the offence of murder by drone strike."[85] The court began its discussion of justiciability with the firm statement that it would not decide whether drone strikes committed by U.S. officials are lawful,[86] reasoning that such a ruling may be interpreted as a political act and may have far-reaching implications for diplomacy.[87] The court accepted the possible traction of the argument that Khan's case would not require a finding of offense, falling within the jurisdiction of the English court, by any U.S. officer. However, it refused to examine the facts alleged or to consider the lawfulness of GCHQ involvement in delivering locational intelligence to CIA officials because ruling on such a matter would require the court to consider "the hypothetical question of whether, subject to the defences available in English law, a U.K. national who kills a person in a drone strike in Pakistan is guilty of murder."[88] Therefore, should the court grant Khan's application for judicial review, such a determination would by implication "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."[89]

The court distinguished the present case from *Rahmatullah* on the grounds that, in that case, there was clear prima facie evidence that the applicant was being unlawfully detained, and the conclusion that the writ of habeas corpus should issue depended on the effect of the Geneva conventions rather than "an examination of the legal basis on which the US might claim to justify the detention."[90] Because the circumstances were "very different" in the present case, the court refused to apply these principles,[91] although both cases involved claims that judicial intervention

83. *Id.* at [18] (noting that there are viable arguments against the U.S. position).
84. *Id.* at [17]-[19].
85. *Id.* at [19].
86. *Id.* at [25].
87. *Id.* at [22].
88. *Id.* at [35].
89. *Id.* at [34].
90. *Id.* at [43].
91. *Id.*

would amount to an impermissible interference in the executive's domain of foreign relations.[92]

The court next examined Khan's secondary claim:

> [E]ven 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.[93]

As such, GCHQ officers may be guilty of offenses under section 52 of the ICCA of 2001, including conduct ancillary to crimes against humanity and/or war crimes.[94] The court quickly dismissed this claim on the same grounds as the first.[95] Although the mens rea of a person being prosecuted for conduct "ancillary" to a war crime or a crime against humanity is not defined in the statute, the court assumed that to render the conduct of a GCHQ officer unlawful, he must act with knowledge and intent that the recipient will use the information in order to commit a crime against humanity and/or a war crime.[96] Therefore, a finding that the GCHQ officer has done this would amount to a condemnation of the person who performs the drone strike, in that he or she is guilty of committing such a crime.[97] As a CIA official, the individual is implementing U.S. policy, and any such finding would involve a violation of the Act of State doctrine.[98]

Ultimately, the court noted that this case should not be given further consideration because doing so may open the door to a condemnation of U.S. policy in carrying out drone strikes, even if the court renders a judgment under the "disguise" of secondary liability through a legal fiction developed by lawmakers.[99] Because U.S. officials may interpret such findings as critical of U.S. policy, the court accepted the notion that the grant of judicial review may present serious implications for U.K. foreign policy, diplomacy, and national security, especially in regards to its diplomatic relations with the United States and the countries' bilateral relationship in the effort to combat terror.[100]

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92. *Id.* at [40].
93. *Id.* at [47].
94. *Id.*
95. *Id.* at [51].
96. *Id.* at [50].
97. *Id.* at [51].
98. *Id.*
99. *Id.* at [36].
100. *See id.* at [22].

IV. ANALYSIS

In the noted case, the court refused to consider the arguments put forth by Khan as a matter of discretion, ruling that Khan's claim could not succeed should his application for judicial review be granted.[101] Thus, the court effectively slammed the door on the challenge to the lawfulness of U.K. involvement in CIA drone strikes. The court did not address Khan's claims of *ultra vires* on the part of the Secretary of State, even though his allegations, if true, could result in such a finding. As previously expressed, the judicial review process in the United Kingdom grants broad discretion to the courts to determine which claims warrant consideration of their facts and whether remedies are available.[102] In exercising their discretion, U.K. courts frequently defer to public officials when national security or international relations are involved.[103] However, in light of the fundamental nature of the rights infringed upon by CIA drone strikes (aided by the Secretary of State's action), the growing international concern over the legality of drone strikes, and the United Kingdom's commitment under the ICCA 2001, the court should have employed the doctrine of proportionality. Had the court considered Khan's case through this lens, weighing the degree of interference with the rights of individuals against the measures necessary to carry out the state's objectives, the court likely would have come to the conclusion that the degree of interference far outweighs the state's objectives. For, as the court in *Lord Saville of Newdigate* stated, "[T]he individual's right to life is . . . the most fundamental of all human rights."[104] Although the official view of the United States is that drone strikes, including the one at issue, are in accord with international law because they are carried out in the course of an ongoing armed conflict with Al-Qaeda and target noncivilians, the court in the noted case pointed out that this view is not binding on U.K. courts.[105] Furthermore, the court shed some level of doubt on the veracity of the U.S. position by accepting that it is unclear whether combatant immunity would be a defense available to a U.K. national tried in the United Kingdom for the offense of murder by drone strike.[106]

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101. *Id.* at [44], [51].

102. ELLIOT & QUINN, *supra* note 13, at 588.

103. *Id.* at 594; *e.g.*, Sec'y of State for the Home Dep't v. Rehman, [2001] UKHL 47, [2003] 1 A.C. 153, 153; R v. Sec'y of State for Home Affairs, [1977] 1 W.L.R. 766, 783.

104. R v. Lord Saville of Newdigate, [2000] 1 W.L.R. 1855, 1877 (Eng.).

105. *Cf. R (Khan)*, [2014] 1 W.L.R. at [18].

106. *Id.* at [19].

The court began with the firm stance that it would not rule on the legality of U.S. drone strikes because doing so would violate the notion that courts will not sit in judgment on the acts of a foreign state.[107] The court's application of the principle, attributed to *Underhill*, seems overly broad in a very prominent aspect. While some relevant case law has expanded the principle, the direct language of *Underhill* reads, "[T]he courts of one country will not sit in judgment on the acts of the government of another *done within its own territory*."[108] Although most or perhaps all of the official action, including drone pilotage, occur within the borders of the United States, the situs of the injury is beyond U.S. borders. In applying *Underhill* as it did, the court seems to completely discount the fact that the U.S. action, which gives rise to notional culpability, actually takes place outside the borders of the United States; the drone strikes themselves may be in violation of international law, even though the decision to perform them takes place within the United States. Even if *Underhill* may be applied to an action of a foreign state beyond its own borders, it is not clear that the principle it established was intended to apply to instances of armed conflict, especially when acts of a foreign state infringe upon the right to life.

Furthermore, the court's refusal to determine the legality of U.S. drone strikes appears tenuous because the general rule that courts will not sit in judgment of the acts of a foreign state is subject to exceptions where foreign acts of state breach "clearly established rules of international law . . . as well as where there is a grave infringement on human rights."[109] It is undeniable that drone strikes are used in neutralizing "targets" without permitting due process of law or any form of habeas corpus, and there is a strong argument, deserving of consideration, that such action is being taken in the absence of an international armed conflict.[110] Perhaps more disheartening is the fact that recent counts and estimates show that hundreds of civilians have been killed by drone strikes.[111] In fact, a recent study places the number of civilians killed as a result of drone strikes in Pakistan for the year 2011 alone between 72 and 155.[112] Such facts call into question both the morality and legality of U.S. drone policy and whether acts carried out in

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107. *Id.* at [24]-[25].

108. Underhill v. Hernandez 168 U.S. 250, 252 (1897) (emphasis added).

109. *R (Khan)*, [2014] 1 W.L.R. at [28].

110. *Id.* at [17].

111. *Counting Drone Strike Deaths*, COLUM. L. SCH. HUM. RTS. CLINIC (Oct. 2012), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/COLUMBIAPakistanDataSetFINAL.pdf.

112. *Id.*

furtherance of this policy may constitute "war crimes" under the ICCA 2001. By extension, the Secretary of State's action in utilizing the GCHQ to aid in performing these strikes may also be culpable. The lack of transparency regarding drone-strike policy, strike results (including collateral damage),[113] and the GCHQ's involvement further adds to the argument that judicial intervention may be of great importance in shaping limits and standards crucial for the future of international safety and protection of innocents.

Although the previous argument deserves adequate consideration, the court may have granted Khan's application for judicial review on another basis, even though it refused to decide whether U.S. drone strikes are legal. The court found that any ruling finding secondary liability on the part of a GCHQ official would require the court to consider whether a theoretical U.K. official who carried out a drone strike would be guilty of murder in the United Kingdom.[114] This, the court held, would be interpreted as a condemnation of the United States.[115] Therefore, it did not examine the question of legality of U.K involvement under domestic law.[116]

However, there is precedent for finding the acts of U.K. officials in carrying out actions in accordance with the laws and policies of foreign states in violation of U.K. law where such actions are not deemed unlawful in the foreign state. In *Oppenheimer*, the House of Lords held that the U.K. tax assessor's action in denying a tax exemption to a German Jew, in accordance with a German statute that deprived the man of his German nationality as a result of his emigrating to the United Kingdom, was unlawful.[117] He remained a German national under U.K. law and should be conferred the benefits as such, even though he was no longer a German citizen under German law.[118] Although the court found that the statute was offensive to the man's human rights, in that it deprived him of his citizenship (which seems a much less serious deprivation than a deprivation of life), it was the tax assessor's action in denying the man the benefits of a tax exemption that the court found to be unlawful.[119] In the noted case, the court takes a vastly different approach. It refused to determine whether GCHQ involvement in drone strikes was offensive to U.K. law on the grounds that such a judgment

113. *Id.*
114. *R (Khan)*, [2014] 1 W.L.R. at [37].
115. *Id.*
116. *Id.*
117. *See* Oppenheimer v. Cattermole, [1976] A.C. 249 (H.L.) (appeal taken from Eng.).
118. *Id.* at 278.
119. *Id.*

may be viewed as offensive to the U.S. position on the legality of drone strikes under U.S. and international law.[120] The court's line of reasoning in the noted case turns the notion of judicial review on its head and fails to take adequate notice of the distinction between finding the actions of U.K. officials, in carrying out U.K. policies, in violation of domestic law and finding U.S. actions unlawful.

In the noted case, the court provided an extremely superficial view of the facts in *Rahmatullah*, in which the court found U.S. detention of a transferred prisoner of war in violation of GC4. The court's description in *Khan* failed to take into account the full scope of *Rahmatullah*. The court dismissed Khan's argument that the principles found in *Rahmatullah* should be applied to his claim on the ground that *Rahmatullah* involved the lawfulness, under the Geneva Convention, of the United Kingdom's inaction in seeking Rahmatullah's return that was at issue rather than the legality of his detention by U.S. forces and because "there was clear prima facie evidence that the applicant was being unlawfully detained."[121] While the first part of this position reiterates the statement of the court in *Rahmatullah*, closer examination of the facts of that case yields a situation that is much more similar to those in the noted case than the court seems willing to admit. In *Rahmatullah*, U.S. policy dictated that protections of GC4 did not extend to members of Al-Qaeda captured in Afghanistan.[122] However, the court in *Rahmatullah* determined that under U.K. law, GC4 applies to all personnel captured in Afghanistan.[123] It was only after this finding that the court could reach the conclusion that U.K. officials' inaction in failing to request Rahmatullah's transfer was unlawful under the United Kingdom's commitment to GC4.[124] This does not seem to match up with the court's interpretation in the noted case that there was "prima facie" evidence that Rahmatullah was being unlawfully detained. In *Rahmatullah*, like the noted case, the claimant alleged that the action, or inaction, of U.K. officials violated U.K. legal commitments because it failed to accord with GC4, and the court found that this rendered the officials' inaction unlawful, but this first required a finding that GC4 applied to Rahmatullah, a position entirely inconsistent with the U.S. stance on the issue.

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120. *R (Khan)*, [2014] 1 W.L.R. at [37].

121. *Id.* at [43].

122. Sec'y of State for Foreign & Commonwealth Affairs v. Rahmatullah, [2012] UKSC 48, [2012] 3 W.L.R. 1087, [34] (appeal taken from Eng.).

123. *Id.*

124. *Id.* at [36]-[38].

The court's ruling in the noted case also failed to take into account the fact that, in light of the U.S. position on the inapplicability of GC4 to members of Al-Qaeda, the United States could easily have perceived the court's ruling in *Rahmatullah* as a condemnation of its policies. The court considered the merits of the claimant's case in *Rahmatullah* and even directly contradicted U.S. policy.[125] While this could be just as detrimental to U.S.-U.K. relations as any ruling involving a legal fiction that determined a theoretical drone operator being prosecuted in the United Kingdom may be guilty of murder by drone strike, the court in *Rahmatullah* did not arrive at the conclusion that such a ruling would constitute an impermissible intervention on the part of the judiciary. Upon closer consideration, the court's refusal to apply the principles laid out in *Rahmatullah* is likely influenced by the fact that the United States has much more to lose should its ally condemn its policy regarding drone strikes and the collateral damage that comes along with it than it did on the issue in *Rahmatullah*: the unlawful detention of a single detainee. Although the claims at issue in the noted case may have a greater impact on U.S.-U.K. relations, the court's ruling in *Rahmatullah* demonstrates that the court in the noted case gives this factor much greater effect than it should be afforded and does not take into account other important considerations because U.S.-U.K. relations are at issue.

V. CONCLUSION

In the noted case, the court's refusal to grant Khan's claim for judicial review demonstrates a clear adherence to judicial restraint and separation of powers. Ruling on the issues at hand, rather than simply relying on the Act of State doctrine, would have implicitly required the court to make judgments regarding broader issues, such as the nature of the conflict against Al-Qaeda, and to examine U.S. drone-strike policy. In so doing, the court would clearly have stretched the limits of its ability to intervene in foreign affairs. However, when action of a foreign state deprives persons, including innocent persons, in the international community of the right to life, "the most fundamental of all human rights," measures must be taken to examine the legality and morality of those actions. The court, in the noted case, chose not to take the difficult step of requiring disclosure or establishing much-needed boundaries in drone warfare. Instead, it washed its hands of the blood spilt as a result of drone strikes, including that of Khan's father. The implications of this decision may result in more lives lost, especially as drone usage

125. *Id.*

continues to expand and increasing numbers of countries develop this technology. Here, the court missed an opportunity by sidestepping its obligation to require public officials to adhere to relevant international and domestic laws and to reconsider the far-reaching consequences and legality of unfettered drone use. This decision fails to take into account the vast number of civilian casualties and the violation of fundamental human rights, including the right to life. The court's ruling allows U.K. officials to continue to abet in dealing out death sentences from the sky without providing the accused an opportunity to plead his or her case. Furthermore, the decision serves to diminish innocents' ability to have their case heard in U.K. courts. Such persons are but "collateral damage," and the court has silenced their appeals for just treatment and meaningful clarification on U.K. policy in order to spare the United States from being confronted with the misgivings of its policies. This must be what Winston Churchill called the "Special Relationship."[126]

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126. *A Point of View: Churchill and the Birth of the Special Relationship*, BBC NEWS MAG. (Mar. 9, 2012), http://www.bbc.com/news/magazine-17272610.

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