Chapter 5: The scope of the public law principles

Advisory declarations: \( R \) (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 3728 (Admin)

The claimant challenged (what he called) the ‘decision’ of the Secretary of State to supply the Government of the United States of America with intelligence liable to facilitate drone strikes in Pakistan. As Moses LJ put it (at [2]), the claimant argued that: ‘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.’ However, as Moses LJ went on (at [13]) to observe, the real purpose of the proceedings was ‘to persuade a court to do what it can to stop further strikes by drones operated by the United States’. This created a ‘formidable difficulty’ for the claimant, in that the court would not sit in judgment on the sovereign acts of a foreign state. On the other hand, said Moses LJ (at [22]):

the mere fact that the issues are those which the courts [as Lord Bingham put it in \( R \) (Gentle) v Prime Minister [2008] UKHL 20, [2008] 1 AC 1356 at [8]] “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.

Moses LJ observed (at [28]) that the claimant sought to ‘secure a foothold in domestic law’ by arguing that it was necessary (as he put it at [26])

to decide on the nature of the United States' attacks in North Waziristan [in Pakistan] 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.

However, Moses LJ went on to say that any declaration would have to be in such broad terms as to amount to little more than a statement to the effect that contravening the legislation would be unlawful—his point being that whether unlawful acts were actually being committed turned upon highly fact-sensitive matters that would fall for consideration only in the context of a particular prosecution. Moses LJ concluded:

[56] ... 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 [counsel for the claimant], to "go there".