IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case No: CO/2335/2022

IN THE MATTER OF AN APPEAL UNDER S.103 OF THE EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Appellant

v

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

GROUNDS OF RENEWAL

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1. Introduction

1.1. On 20 April 2022, DJ Goldspring sent Mr Assange's case to the SSHD, for reasons which are contained in the earlier 132-page judgment of DJ Baraitser (**'the DJ'**) dated 4 January 2021. Mr Assange sought to appeal that decision on nine grounds.

1.2. On 6 June 2023, Swift J refused permission to appeal on all grounds.

1.3. Pursuant to Crim PR r.50.22, Mr Assange renews his application for permission to appeal on all grounds except ground 8.

2. Ground of Appeal 1: s.81 and exposing state criminality

2.1. During 2010-2011, Julian Assange and Wikileaks were responsible for the exposure of criminality on the part of the US Government on an unprecedented scale. '*WikiLeaks...exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians'* (Feldstein, EB/10, §4).

2.2. Mr Assange's political opinions: Following evidence from *inter alia* Noam Chomsky and Daniel Ellsberg, the DJ acknowledged that Mr Assange's 'political opinions' pertained to opposition to war crimes and human rights abuses (Judgment §156). According to the evidence accepted by the DJ, Mr Assange was '*obviously opposed to war crimes and interested in the exposure and rendering accountable for those'*. Opposition to state criminal acts is, at law, a '*political'* opinion: ***Vassiliev v Minister of Citizenship and Information*** (Federal Court of Canada, 4 July 1997); ***Demchuk v Minister of Citizenship and Immigration*** (1999) 174 FTR 293; ***Suarez*** [2002] 1 WLR 2663 at §30.

2.3. DJ also acknowledged that these political opinions underpinned the conduct the subject of this request: '*Mr. Assange was disclosing information about the past conduct of the US government and its agencies in order to seek their reform...he expressed a wish to expose criminal conduct of the sort revealed by the Manning disclosures'* (Judgment §147).

2.4. The nature of the disclosures: The unchallenged evidence before the DJ established that all five of those 'national security' publications that are the subject of this extradition request each exposed apparent US Governmental involvement in crimes of the very first order of magnitude.

2.5. The cables for example: *'revealed evidence of renditions and torture, dark prisons, drone killings, assassinations'* which specifically *'contributed to [subsequent] court findings that ... criminal proceedings should be initiated against senior US officials involved in such strikes'* for engaging in '*blatant violation of basic human rights'* including '*a blatant breach of the absolute right to life'* and *'a war crime*'. Without the WikiLeaks disclosures, it '*would have been very, very different and very difficult*' to uncover or prevent this crime. The importance of the cables in revealing abhorrent crimes (and successive measures taken by the US state to cover them up) is also evident, for example, from the damning judgment of the Grand Chamber of the ECtHR in ***El Masri v Macedonia*** (2013) 57 EHRR 25 concerning Macedonia's co-operation in the US illegal rendition program.

2.6. The release of the Rules of Engagement: was integral to and co-terminous with the disclosure of the now infamous '*collateral murder video',* US army helicopter video footage from Iraq in 2007 in which unarmed civilians (including journalists and children) were deliberately machine-gunned. The video was *'heralded by some as the most important revelation since Abu Ghraib'* according to the Guardian. According to the unchallenged evidence before the DJ, '*it would be hard to overstate how important [the combined disclosures were in revealing] unlawful [acts which] had a profound effect on public opinion in the world*'. Mr Assange was invited to address the European Parliament on these disclosures.

2.7. The Guantánamo Detainee Assessment Briefs: revealed that multiple Guantánamo detainees had been the subject of prior rendition and detention in CIA '*black sites'* before their arrival there. That is to say, according to the unchallenged evidence before the DJ, '*criminal offences of torture, you know, kidnapping, renditions, holding people without the rule of law, and, sad to say, murder ... just criminality'.*

2.8. The Afghan War diaries: revealed '*what seemed to be war crimes'* including *inter alia*: the existence of '*black unit'* Task Force 373 operating 'kill or capture lists' hunting down targets for extra-judicial killings and killing of civilians. Mr Assange himself commented in a press conference in July 2010 *'we would like to see ... the revelations that this material gives to be taken seriously, investigated by governments and new policies put in place as a result, if not prosecutions of those people who committed abuses'.* Based in part on WikiLeaks' disclosures, the ICC is currently investigating *'...War crimes by members of the United States armed forces on the territory of Afghanistan, and by members of the [CIA] in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004'.*

2.9. The Iraq War diaries: revealed systematic torture of detainees (including women and children) by Iraqi and US forces (including '*serious abuse by US Forces appearing in the Iraq War Logs, including electric shocks, water torture and mock executions*') and civilian killings. The unchallenged evidence was that the Iraq war diaries were the '*largest single contribution to knowledge about ... a war crime'*. This evidence was widely reported as having contributed to the withdrawal of the US from Iraq. Mr Assange was invited to speak to the UN on these disclosures, where he called on the US to investigate alleged abuses by US troops in Afghanistan and Iraq as evidenced in the material published ('*Torture is outlawed under US law. But the law means nothing if the law is not upheld by a government'*). The Iraq war diaries attracted worldwide opprobrium for torture and war crimes committed by or acquiesced in by the US, leading to calls (including from the UK government) for investigations into the conduct of allied troops.

2.10. Overall, the unchallenged evidence was that the WikiLeaks disclosures of 2010-2011 were '*the most important truthful revelations of hidden criminal state behaviour'* in US history. For his disclosures of state criminality, Mr Assange was awarded, *inter alia*, the Sydney Peace Medal, the Walkley Award for Most Outstanding Contribution for Journalism (Australia's Pulitzer), and has been nominated, year-on-year, for the Nobel Peace Prize.

Exposing criminality is a protected political activity under s.81

2.11. On the unchallenged facts before the DJ, Mr Assange is being prosecuted 'on account of' (in fact, prosecuted for) his exposure of alleged US Government involvement in gross crimes of universal jurisdiction. As a matter of clear law, the request offends s.81. The act of exposure of state criminality is a protected political act: ***Voitenko v Minister for Immigration and Multicultural Affairs*** [1999] FCA 428, Hill J stated at §32-23; ***Grava v Immigration and Naturalization Service*** (2000) 205 f.3d 1177 (USCA, 9th Cir., March 7) at p2; ***Klinko v Canada (Minster of Citizenship and Immigration)*** [2000] 3 FCR 327 at §24-31.

2.12. The DJ: failed entirely to acknowledge these principles or this case law, despite having it repeatedly drawn to her attention. Her judgment simply fails to address this issue. Her decision was manifestly deficient and (because there is no answer to this issue) manifestly wrong.

2.13. The US argument: Is that it was agreed below that it was no part of the DJ's functions to adjudicate on the *truth* or otherwise of the exposures [DGO §18-19]:

(i) First, without a judgment from the DJ on the issue, it is impossible to know whether this was or was not the actual basis on which she failed to follow the authorities.

(ii) Secondly, if it was her unarticulated reason, it was plainly wrong in law. See ***Klinko*** (supra) at §33: the law '*does not require that the state or machinery of state be actually engaged in the subject-matter of the opinion. It is sufficient in order to meet the test that the state or machinery of state 'may be engaged*'.

(iii) Thirdly, even if some form of factual judgment on the truth of the exposures is required to engage s.81 (which it is not), it existed here. As the various witnesses explained to the DJ, based on Mr Assange's disclosures, various national and supranational courts have found that the criminality exposed by Mr Assange did in fact occur. For example, Mr Stafford-Smith told the DJ (in unchallenged evidence) that the Pakistani High Court had found that the USA had indeed engaged in '*war crime*' and held that '*criminal proceedings should be initiated against senior US officials involved'*. Likewise, the Grand Chamber of the ECtHR found in ***El Masri*** (supra) that Mr El Masri's allegations were true.

2.14. Swift J at §3: Concludes that the DJ was '*not required to address every point'*, and the criticism that this matter was not dealt with at all, is '*not a valid point'*. It is, with respect, insupportable to conclude that the DJ was '*not required'* to address an issue of law which should and would have led to discharge. It is moreover simply inaccurate to hold that this was an issue '*canvassed at the extradition hearing but rejected by the DJ*'. She did not '*reject'* this argument; she failed to address it.

Section 81 and a State-level plan to preserve impunity for criminality

2.15. Even if prosecution of the act of exposing state criminality were not itself prohibited at root by the Act (which it is), the *conduct* of this particular prosecution disclosed the clearest case of politically motivated prosecution. In sum, it is perfectly obvious that the USA was motivated to bring this prosecution by the maintenance, at any cost, of its impunity for the crimes Mr Assange had revealed (which is, of course, an unlawful political motivation, in law), as well as to deter any further discloures.

2.16. The course of this case since 2011 is simply extraordinary. The evidence before the DJ showed, *inter alia*:

(i) Active US political interference with any domestic judge who sought to investigate or prosecute those matters Mr Assange helped expose (e.g. in Germany, Spain, Poland and Italy); including steps to coerce and intimidate (and even prosecute) prosecutors at the ICC who in 2016 had taken up investigation of Mr Assange's Afghan disclosures of US '*war crimes of torture, cruel treatment, outrages upon personal dignity, and rape'* (despite years of US pressure to prevent it doing so, and the CIA's destruction of evidence).

(ii) Extraordinary illegal plans in 2017 to silence Mr Assange himself. This was the unchallenged evidence of 'Witness 2', a member of the Spanish contractor 'UC Global' responsible for security at the Ecuadorian embassy in London, whom the US had covertly engaged to infiltrate the embassy. This evidence is breathtaking. What began with unlawful surveillance of his lawyers, elevated (according to the unchallenged evidence) to active plans, which Witness 2 heard discussed by Spanish contractors, to kidnap Mr Assange, and '*poison'* him.

(iii) For reasons which were never disclosed or explained by the US government during the proceedings below, the Trump administration elected in 2017 to initiate a criminal prosecution instead (and in so doing reversed a 2013 decision taken by the previous administration not to prosecute). The DJ was aware that the Washington Post reported direct '*pressure'* being put on prosecutors by '*the new*

leaders of the justice department' to indict, in the face of '*vigorous debate'* from '*career professionals'* who were '*sceptical'* about its legality.

(iv) The prosecution that ensued in December 2017 was then accompanied by wide ranging political public attacks upon those who expose US government crimes, including journalists, as the *'enemy of the people'.*

(v) As the Trump administration's denunciations of Mr Assange in particular increased, a Superseding Indictment was introduced in May 2019, adding 17 additional charges of espionage (a 'pure political offence' in law), which (the Washington Post reported) caused prosecutors to resign in protest.

2.17. Overall, the chronology revealed by the largely unchallenged evidence before the DJ was clear and compelling. The evidence showed that the US was prepared to go to any lengths (including misusing its own criminal justice system) to sustain impunity for US officials in respect of the torture/war crimes committed in its infamous 'war on terror', and to suppress those actors and courts willing and prepared to try to bring those crimes to account. Mr Assange was one of those targets.

2.18. The DJ at §152-192: The DJ's conclusion on this central issue (as being '*pure conjecture'*) is not the result of a proper consideration of the issues or evidence. Respectively:

(i) Save for one passing reference to President Trump's '*denunciations of'* the ICC at §173(f), the DJ considered none of the evidence regarding the sustained US efforts to obtain/maintain impunity for, and silence judicial inquiry into, its crimes. In so doing, she closed her eyes to the crucial backdrop of (and motivations for) the decision to prosecute Mr Assange.

(ii) Her review of UC Global evidence (at §183-192) omitted entirely the plots to kidnap/murder Mr Assange which it disclosed. The implications of those feature nowhere in her decision under s.81. And even the limited Embassy evidence the DJ did address (unlawful surveillance) was approached by her as a discrete separate issue (at §181-192) which she declined to act upon as being '*partial and incomplete evidence'* (§183), despite having been read to her as agreed evidence.

(iii) As to the various threats issued by the CIA, the DJ concluded that '*the intelligence community do not speak for the Administration*' (§156, 174). The CIA is an arm of the US Government. CIA director Mr Pompeo (who, to the knowledge of the DJ, regularly labelled Mr Assange an '*enemy and traitor'*) became the Trump administration's Secretary of State.

2.19. Swift J at §3: Refused permission to appeal the DJ's decision on the basis that the DJ's decision was '*one of fact and evaluation ... not, even arguably, capable of being undermined by any of the arguments*'. The difficulty with that analysis is:

(i) First, '*The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make*

the decision wrong, such that the appeal in consequence should be allowed' (***Love v USA*** [2018] 1 WLR 2889 at §26).

(ii) Secondly, the DJ failed to evaluate any of the '*crucial factors'* at all, with the consequence that her judgment fails to even consider whether or not the decision to prosecute / extradite Mr Assange was part of an overall campaign to maintain impunity for US government agents implicated in the crimes Mr Assange had helped disclose.

2.20. For the avoidance of doubt, the aspects of the chronology that the DJ *did* consider, unrelated to crimes revealed and impunity sought, was riddled with factual error. Examples include:

(i) §173(b): President Trump's call for Mr Assange to face the death penalty in 2010 had nothing to do with leaking his '*taxes'* (which WikiLeaks threatened in 2017).

(ii) §173(c): Multiple government denunciations demonstrated '*particular hostility towards Wikileaks and Mr. Assange*', including Mr Pompeo ('*These enemies and traitors must be punished ... I pursued Assange's extradition hard'*).

(iii) 173(f): The selective nature of this prosecution (i.e. other publishers of the same material were not prosecuted) is evidence manifestly *supportive* of political motivation.

(iv) §184-185: Ecuador did not consent to the US surveillance in its Embassy. Neither is it factually accurate that Ecuadorian officials have not accused the US of wrongdoing.

(v) §191: Mr Pompeo has published memoirs *admitting* to pressuring Ecuador to revoke Mr Assange's asylum ('*I lobbied the Ecuadorians to kick Assange out'*).

(vi) §192: Officials from the DoJ had, on the evidence before the DJ, put improper '*pressure'* on federal prosecutors to bring these charges (see §175(a)). Mr Pompeo has likewise confirmed the same in his published memoirs.

2.21. Fresh evidence: In September 2021, Yahoo News published the findings of an independent investigation into the events of 2017, having interviewed more than 30 former US officials including members of the CIA, some of whom are named. The report corroborates entirely, and adds very significantly to, Witness 2's evidence regarding the extraordinary US plans he overheard to kidnap / rendition / murder Mr Assange in 2017.

2.22. Swift J at §4: Holds that this fresh evidence (of the investigation report, and of Mr Dratel explaining the legal aspects of it) '*is not a point of substance'*. With respect, the report shows:

(i) First, that designation of Mr Assange by the CIA as a '*non-state hostile intelligence service'* had (unbeknown to the parties and the DJ) legal significance, enabling the CIA to engage in direct action against Mr Assange without Congressional approval (at p2, 13-16). Had the DJ been aware of these matters,

she could not conceivably have concluded that describing Wikileaks as a '*non-state hostile intelligence agency'* had no particular relevance (§174(a)). Neither, had the DJ been aware of these matters, could she conceivably have concluded that '*the intelligence community do not speak for the Administration*' (§156, 174). According to the report '*the president asked whether the CIA could assassinate Assange and provide him 'options' for how to do so'.*

(ii) Secondly, Witness 2 could speak only to second-hand discussions s/he overheard in Spain by UC Global. What s/he did not witness, and could not assist the DJ with, was the *source* of those discussions. That is what is now provided by multiple former U.S. officials, who speak to the nature, extent and origin of US government plans to kidnap (p2, 18), rendition (p18) or assassinate (p1, 20) Mr Assange. Those plans, according to the fresh evidence, even had the personal imprimatur of the US President: '*The Trump administration even discussed killing Assange, going so far as to request 'sketches' or 'options' for how to assassinate him. Discussions over kidnapping or killing Assange occurred 'at the highest levels' of the Trump administration, said a former senior counterintelligence official. 'There seemed to be no boundaries''*. Had the DJ been aware of these matters, she could not conceivably have concluded that the (agreed) evidence of 'Witness 2' was '*partial and incomplete evidence'* (§183). Or that '*there is little or no evidence to indicate hostility by President Trump towards Mr. Assange or Wikileaks'* (§156, 173, 192).

(iii) Thirdly, the report expressly discloses that the *reason* US charges were put in place (only) in December 2017 was in anticipation of (and in preparation for) Mr Assange being kidnapped and renditioned to the US (p3, 21-22). Had the DJ been aware of these matters, she could not conceivably have concluded that it is *'pure conjecture to draw inferences from the timing of these charges'* (§156); or that '*there is insufficient evidence that prosecutors were pressurised into bringing charges by the Trump administration'* (ibid); or *'it is pure conjecture to link US policies to improper pressure to prosecute Mr. Assange'* (§173(f)). Bringing charges in an attempt to legalise a CIA kidnap plot does not, with respect, sound much like '*bring[ing] these charges ... in good faith'* (§156).

(iv) Fourthly, the fresh evidence explains the obstacles (some reported as having been erected by the UK) which caused the US Government's kidnap/rendition/murder plans to stall, and be replaced in late 2017 with a decision to pursue prosecution/indictment/extradition instead. Had the DJ been aware of these matters, she could not conceivably have simply omitted consideration of the US kidnap/rendition/murder plans altogether from her s.81 decision in the way that she did.

2.23. Swift J at §4: Next held that the fresh evidence did not satisfy the ***Fenyvesi*** criteria. Of course, the report post-dates the extradition hearing and was not available to the Applicant at the time.

2.24. Swift J adopts the US submission [at DGO §25-30] that the report '*is not fresh evidence of fact but simply yet another recitation of opinion by journalists*' and as such '*speculation'* from (it is claimed without explanation or justification) '*supporters of the [Applicant]*'. None of that is remotely accurate. The independent investigative

report represents the recollections of fact of over 30 former US government officials. Mr Pompeo himself is on record stating that aspects of the report are '*true'*. The content of the report represents evidence deliberately withheld from the DJ by the US government. The fact that it is not first-hand evidence does not rob it of evidential value under s.81 (***Ex p Schtraks*** [1964] AC 556; ***R(B) v Westminster Magistrates' Court*** [2015] AC 1195, §21-23). It is especially unjust to exclude this material which goes to an issue which was adduced as agreed evidence below, but which the DJ nonetheless declined (or at best failed) to have regard to.

3. Ground of Appeal 2: Article 7 ECHR

3.1. The prosecution which ensued is legally unprecedented and was entirely unforeseeable as a matter of law. In 2010 publishing leaked US national security information was both legal and commonplace. Rendering it criminal violates the core precepts of Article 7 ECHR.

3.2. Article 7 is an '*essential element of the rule of law'* and requires that an individual must be able to '*know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable*'. While Article 7 does not prohibit '*the gradual clarification of rules of criminal liability through judicial interpretation from case to case*', the resultant development must be *'consistent with the essence of the case and could reasonably be foreseen*' (***SW v United Kingdom*** (1995) No. 20166/9 at §34-36).

3.3. The DJ heard unchallenged expert evidence concerning the '*routinized'* practice in the US of obtaining and publishing classified information, with no prosecution for the act of obtaining or publishing (as opposed to the act of leaking) state secrets ever having occurred previously. According to the agreed evidence before the DJ, the prosecution of Mr Assange as publisher '*crosses a new legal frontier'* and '*breaks all legal precedents'*.

3.4. The DJ also heard evidence concerning the legislative history of s.793 of the Espionage Act, and the unchallenged evidence publishers were expressly excluded from its intended ambit. Thus, no Grand Jury had ever returned an indictment such as this. To explain that '*unbroken line of practice of non-prosecution*', the expert witnesses drew to the DJ's attention to high First Amendment case law which underpinned it (***US v Morison*** (1988) 844 F.2d 1057; ***NY Times Co v US*** (1971) 403 US 713).

3.5. The evidence before the DJ was, accordingly, that, in 2010-2011, the relevant time under consideration, it was '*completely unforeseeable'* that such an indictment could or would be issued against a publisher for obtaining, receiving or publishing leaked classified information.

The test under Article 7

3.6. Swift J at §5: Held first that the DJ was correct to require Mr Assange to establish a '*flagrant violation'* of Article 7 under ***R (Ullah) v Special Adjudicator*** [2004] AC 323. ***Ullah*** is not binding authority for the proposition that the '*flagrant violation'* threshold applies to Article 7 in the extradition context. The observations of Lord

Steyn (who was the only member of the Appellate Committee to address Article 7) were *obiter* and unreasoned. In ***Arranz v Spain*** [2013] EWHC 1662 (Admin), Sir John Thomas P stated that there was '*some force in the argument*' that the approach under Article 7 should (given its absolute nature) be the same as the approach under Article 3 (real risk), and that '*it must be for the Supreme Court to determine whether it should reconsider the guidance given by Lord Steyn in a case where Article 7 is actually in issue*' (§38). That is this case.

The merits

3.7. Swift J at §5: Next held that the DJ's application of the facts was '*not, even arguably, [in]correct'*. That was an express endorsement of '*the Judge's analysis from §252'* to §262, in which she held that '*the flagrant denial threshold has not been reached in this case ... primarily because Mr. Assange's Article 7 rights are protected in America by the US Constitution and, in particular, by the Fifth Amendment'* (Judgment §252). The DJ offered ***Morison*** (supra) as an example of the US Court applying the Fifth Amendment (Judgment §254-262). According to the DJ, the US Court will assess in substance whether Mr Assange's Article 7 ECHR rights have been violated, and there is thus '*no need for an extradition court to embark on the detailed discussion on ... foreseeability*' (Judgment §262).

3.8. The DJ at §252-262 (and Swift J's endorsement of it) was wrong:

(i) The duty of the judge under s.87 was to determine, for herself, on the evidence before her, whether Mr Assange's extradition was compatible with Article 7 ECHR. No authority justifies abrogating that responsibility to another court, in another country, not party to the ECHR, applying different laws, in this way.

(ii) Neither (even if she could do so), could the DJ in this case reliably conclude that a US Court will, by coincidence, fulsomely apply the requirements of Article 7. The Fifth Amendment might have similarities with Article 7 but it is governed by a different body of principles and case law (which are unknown to this Court and were unknown to the DJ). Nothing in the limited Fifth Amendment caselaw to which the DJ referred, for example, suggests that a US court would distinguish (legitimate) '*gradual clarification of the rules of criminal liability through judicial interpretation from case to case'* from (illegitimate) development of the law inconsistently with the essence of the offence and which could not reasonably be foreseen (per ***SW*** etc.). On the contrary, the Fifth Amendment focusses instead, it seems, on the breadth of the statute and whether it could or should apply to the scenario in question.

(iii) It is striking that the example chosen by the DJ for analysis of the Fifth Amendment was ***Morison***; in which (although the DJ doesn't cite this), the Court of Appeals said that publishers fell outside the scope of the espionage statute, based on prevailing precedent and practice.

3.9. In short, if the DJ was of the view that a US would or could *uphold* a Fifth Amendment claim in this case, then extradition was barred. If on the other hand the DJ was of the view that a US could or would *reject* a Fifth Amendment claim in this case, she was duty-bound to consider whether, on its merits, Article 7 nonetheless

barred surrender. The DJ failed to undertake the necessary Article 7 analysis. Had she done so, the evidence was all one way. This prosecution is, in truth, a clear violation of Article 7 ECHR principles.

4. Ground of Appeal 3: Article 10 ECHR

4.1. Publishing leaked national security information was (and is) legal and commonplace *because* it is conduct protected by universally recognised and entrenched principles of free speech.

4.2. The disclosure and publication of State-held information plays a vital role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests (see the case law examined in ***Stoll v Switzerland*** (2008) 47 EHHR 59, e.g. at §43). '*Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as 'public watchdog' and the ability of the press to provide accurate and reliable information may be adversely affected'* (***ibid*** at §110; ***Goodwin v UK*** (1996) 22 EHRR 123 at §39).

4.3. As the UN Human Rights Committee (HRC) has confirmed, freedom of speech protections apply to all publishers, including for example internet *'bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere'*.

4.4. What Article 10 requires of the publisher is to act '*in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism'* in light of present-day conditions (***Stoll*** at §103-104). '*It is not for [the courts] to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists'* (§146).

4.5. The courts must always make a distinction between the obligations of the journalist and their source, who has obligations of secrecy to the state (***Girleanu v Romania*** (2019) 68 EHRR 19 at §90; ***Pasko v Russia*** (2009) App 69519/01 at §87). '*There is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest'* (***Stoll*** at §106).

4.6. This legally unprecedented prosecution seeks to criminalise the application of ordinary journalistic practices of obtaining and publishing true classified information of the most obvious and important public interest. According to the agreed evidence before the DJ, the focus of the indictment is *'almost entirely on the kinds of activities that national security journalists engage in routinely and as a necessary part of their work'* including '*cultivating sources, communicating with them confidentially, soliciting information from them, protecting their identities from disclosure, and publishing classified information'*.

4.7. Whatever the potential scope of the UK's OSA on its face, it has likewise never been deployed to prosecute much less convict the act of obtaining or publishing (as opposed to leaking) classified information. The core reason for that it is fundamentally inconsistent with (and a flagrant denial of) press freedoms. As in the US, instances of obtaining and publication of classified information by the UK press are legion but never prosecuted. In this jurisdiction, this prosecution would be (and extradition here facilitates) a flagrant violation of Article 10 ECHR (s.87 of the 2003 Act).

4.8. Swift J at §6: Held that the DJ's '*evaluation of the facts of this case is [not] arguably wrong'*.

The DJ's Ruling on 'solicitation'

4.9. The DJ at §96-118: Counts 1, 3-14, 18 seek to prosecute Mr Assange for the *'solicitation'* of materials *'restricted from public disclosure by law'* (Indictment, §2), and relate to activities such as the publication of a '*draft most wanted list'*, the provision of a confidential dropbox, and encouraging phrases used in online chats about documents. The DJ erred in both law and fact in her approach to Article 10 under these counts.

4.10. First, she failed to recognise that soliciting, encouraging, even helping, whistle-blowers to share information, and providing them with a safe means to do so, all fall squarely under the core journalistic activity of the '*gathering of information'* protected by Article 10 by long established authority (***Tarsasag v Hungary*** (2011) 53 EHRR 3 at §27; ***Girleanu*** (supra) at §68-72). '*It is well-established in the jurisprudence of the ECtHR that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom*' (***Stunt v Associated Newspapers*** [2018] 1 WLR 6060 at §94). There exists no principle of Article 10 jurisprudence whereby the duties of confidence owed by a whistle-blower state employee (and thus liability under that state's Official Secrets legislation) can be somehow transferred to a publisher who owes no such duty, through the act of encouraging or assisting the leak. Telling a whistle-blower that '*curious eyes never run dry'*, or providing a drop-box facility to her, are the stuff of every-day investigative journalism; are in fact mild examples of it, and are plainly within Article 10: see ***Stoll*** (supra) at §140-144.

4.11. Secondly, eschewing this established authority, and particularly failing to engage with the facts of ***Stoll***, the DJ wrongly sought to equate this case with ***Brambilla v Italy*** (2006) App 22567/09, in which the ECtHR found that journalists who had been involved directly in criminality, namely the illegal tapping of police communications, were outside the protection of Article 10. Those are not the facts of this case.

4.12. None of the Manning disclosures are alleged to have been obtained by hacking or other separate criminality. In particular, the DJ wrongly approached the 'passcode hash' allegation as one of the direct '*hacking'* of government computers (i.e direct involvement in criminality in the ***Brambilla*** sense), despite this not being the US Government's own case. It was, in prosecutor Kromberg's own words, a '*form of anti-forensics'* which could have '*made it more difficult for investigators to identify Manning as the source of disclosures of classified information'* [CB/12 at §10-15].

Steps taken to protect whistle-blowers from identification is, according to well established Article 10 case law, another core journalistic activity (***Goodwin v United Kingdom*** (supra) at §39; ***Sanoma Uitgevers B.V. v Netherlands*** [2011] EMLR 4 at §50; ***Görmüş v Turkey*** (2016) App 49085/07 at §39).

4.13. Likewise, the DJ misdirected herself by referring to wider hacking allegations in this context, which had nothing to do with allegations relating to Chelsea Manning, or these counts.

4.14. Thirdly, in considering the case of ***R v Shayler*** [2003] 1 AC 247 and the Official Secrets Act 1989, the DJ was led into error by her own *'concern'* that the OSA would be '*undermined'* if Mr Assange were not equally liable as Chelsea Manning for her disclosures. The true position is that no journalist who received (indeed, paid for) Shayler's disclosures was prosecuted alongside him for related offences, nor have they ever been, nor could they be, as a result of Article 10.

The DJ's Ruling on 'naming informants'

4.15. The DJ at §119-137: Counts 15-17 seek to prosecute Mr Assange for publishing US government documents on the Wikileaks website, containing the names of government informants, which the DJ erroneously considered not to be protected by Article 10. The DJ's specific errors of law and fact were as follows.

4.16. First, while accepting that Mr Assange's Article 10 rights were engaged by these charges, the DJ came to the view that equivalent charges under the OSA would be compatible with Article 10 based in part on a 1998 White Paper. Of course, as Lord Hope said in ***Shayler*** (supra) at §41, the White Paper in question failed to consider Article 10 at all.

4.17. Secondly, the DJ wrongly took ***Stoll*** to support her position, whereas ***Stoll*** expressly holds that the publication of entire unredacted documents ensured *greater* accuracy and therefore attracts *greater* Article 10 protection (see also ***Girleanu*** (supra)). There is no ECHR case law suggesting that publishing information without redactions is to be considered irresponsible journalism in general. In erecting ***Stoll*** as such an authority, the DJ erred in law. The only aspect of Stoll's prosecution which was held to be compatible with Article 10 was his act of publishing *misleading and untrue* claims about the content of the materials he had obtained.

4.18. Thirdly, ***Stoll*** confirmed that where there has been a disclosure of state secrets, domestic courts must be entitled to weigh the public interest in their publication. Whereas the DJ's treatment of ***Shayler*** as foreclosing any such exercise where the OSA is concerned, is entirely contrary to ***Stoll*** §101-139 (and other clear ECtHR authority such as ***Guja v Moldova*** (2011) 53 EHRR 16). According to the Grand Chamber, there '*must be'* a weighing by the domestic court of the interest in the publication against that in state secrecy.[1] ECHR case law does not allow for a general public interest exception. The error in seeking to derive contrary principles from ***Shayler*** is all the more egregious given that ***Shayler*** was avowedly not concerned

[1]. So too, pursuant to ***Stoll***, is the absence of any proportionality test in the US (***US v Morrison*** (supra)) itself a prospective flagrant violation of Article 10, which the DJ foreclosed consideration of.

with the legality of publication at all (see Lord Bingham at §37; Lord Hope at §50; Lord Hutton at §117).

4.19. Fourthly, the DJ, in stark contradiction to her approach on ***Shayler,*** wrongly found that *'traditional press'* could themselves '*strike a balance',* and that in choosing not to publish the same materials as WikiLeaks, they somehow demonstrated the correct (and only) choice that could be made by a journalist. The DJ thereby reasoned that Mr Assange's failure to make that choice somehow meant he was outwith the protections of Article 10. The DJ did not (and could not) address the fact that a number of other press bodies did in fact publish the same unredacted documents as Mr Assange but did not themselves face prosecution.

4.20. Fifthly, and further, on the evidence before the DJ, numerous internet outlets published the same materials *before* WikiLeaks. Once information that ought to be secret has lost its secret character (including by publication in another jurisdiction), measures to protect the information becomes unnecessary and therefore an unjustified interference with Article 10 (***Sunday Times v United Kingdom*** (1992) 14 EHRR 229, §55). The ECtHR case law is very clear that information which is already in the public domain cannot be considered a state secret and cannot be punished as espionage (***Stoll*** (supra) at §40, 159).

Disproportionate Sentence

4.21. The expert evidence before the DJ was that the likely sentence in the US will be measured in the region of 30-40 years' imprisonment, or even life, without parole. It is a core feature of Strasbourg's Article 10 analysis that any *'penalty imposed in this sphere must be proportionate to the legitimate aim pursued'* (***Handyside v United Kingdom*** (1979-80) 1 EHRR 737, §49). In addition to the length of the sentence, the Strasbourg will have regard to the effect of the conviction itself on investigative journalism and its deterrence for other publishers and journalists in participating in debates of public importance and performing its important watchdog role (***Stoll*** (supra) at §154; ***Gîrleanu*** (supra) at §96-99). The DJ failed to address this altogether under Article 10.

4.22. Ground of Appeal 6: The same facts also give rise to a real risk of violation of Article 3 ECHR (***Altun v Germany*** (1983) 36 DR 209 at p233; ***A v Switzerland*** (1986) 46 DR 265 at p271; ***Soering v UK*** (1989) 11 EHRR 439 at §104).

5. Ground of Appeal 5: no First Amendment rights at all

5.1. The evidence showed, in fact, that the US protections for free speech (the First Amendment) may not be available to Mr Assange at all. Mr Kromberg has attested on oath that the US prosecution may argue at trial that '*foreign nationals are not entitled to protections under the First Amendment'* [Kromberg 1, CB/12, §71].

5.2. The rights of foreign citizens brought to the US for prosecution being abridged under the Constitution in this way is squarely prohibited by s.81(b) which provides that extradition is barred altogether if the defendant '*might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his ... nationality'*.

5.3. It is also obvious that extradition to any trial which may not even consider the substantive rights embodied by the ECHR is fundamentally contrary to both the scheme of the 2003 Act, and offensive to the HRA 1998.

5.4. Swift J at §8: Holds that the DJ's rejection of the risk of this happening, as a matter of fact, does not disclose any error.

5.5. The DJ at §263-265: Represents a judicial exploration of US law ('fact') unsupported by any evidence or submissions whatsoever, and which is in the result plainly wrong:

(i) First, the USA's evidence positively asserts that it can happen. That is not '*immaterial*' (Judgment §195). What the prosecution posits is a trial in which, even if the Espionage Act would be unconstitutional under the First Amendment as applied to a US citizen who published truthful information, it would not be unconstitutional applied to a non-US citizen who published outside the US.

(ii) Secondly, the position of the US government below was that it can happen (and it sought to justify that outcome in ways which the DJ rightly rejected).

(iii) Thirdly, in the circumstances, the DJ set about her own unilateral interpretation of the Supreme Court's recent decision in ***USAID v Alliance for Open Society*** (2020) 140 SC 2082 to conclude it is '*no authority ... which supports the notion that a US court would remove the protections of the US Constitution*' (Judgment §263). Yet the US told her that '*The Supreme Court referred in the course of its judgment to it being long settled, as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution*' (US Closing Submissions §399). There was, in the end, no dispute between the parties as to the legal veracity of the US threat concerning the First Amendment. It is real as a matter of US law. It was simply not open to the DJ to form her own contrary view about foreign law, without expert evidence.

(iv) Fourthly, the US prosecutor is not in fact the only US official to have propounded '*the notion*' of a trial for Mr Assange bereft of First Amendment protections. In April 2017, the future US Secretary of State had also asserted that Mr Assange '*has no First Amendment freedoms*' because '*he is not a US citizen*'. The DJ simply dismissed this evidence without explanation as '*immaterial*' (Judgment, §195).

5.6. The implications of this, moreover, extend beyond Mr Assange's Article 10 ECHR rights. It would potentially effect, for example, the trial court's treatment under the Fourth Amendment of the admissibility of his LPP materials seized from the Embassy: ***US v Verdugo-Urquidez***, 494 U.S. 259 (1990), likewise holds that Fourth Amendment protections do not apply to searches and seizures by United States agents of property owned by a non-resident alien in a foreign country. In short, as a '*foreign national*' operating abroad now on trial in the US, Mr Assange's trial will operate substantively differently to that which a US citizen would face. Both ss.81(b) and 87 prohibit extradition in such circumstances.

6. Ground of Appeal 4: Article 6 ECHR

Trial

6.1. Coercive plea bargaining: The US Federal System operates to secure guilty pleas through coercive plea-bargaining powers; fuelled by swingeing potential sentences and overloaded indictments designed to increase sentence exposure. All those factors are being exploited by the US in Mr Assange's case, and multiple witnesses warned the DJ about their combined coercive effect.

6.2. Jury: Mr Assange's trial will, moreover, be before a jury drawn from a pool that has a high concentration of defence and intelligence employees and ex-employees, contractors, and their relatives, in a courthouse just fifteen miles away from the CIA headquarters.

6.3. Presumption of innocence: Jurors in Mr Assange's case will be prejudiced irretrievably by public denunciations of him made by the President downwards, including as someone who '*has as [his] motive the destruction of America'*. Such intemperate public denunciations violate the presumption of innocence (***Allenet de Ribemont*** (1996) 22 EHRR 582).

6.4. Tainted evidence: Mr Assange will then be liable to be tried on the basis of evidence obtained from Chelsea Manning by what the UN Special Rapporteur has confirmed as inhuman treatment (cf. ***Othman v UK***).

6.5. Swift J §7: Held that '*there is no error apparent in the DJ's reasoning'* in respect of these issues.

6.6. The DJ at §225-234, 240-242: However, the DJ made the following errors:

(i) First, she wrongly focused on the presence of procedural rules which require courts to be satisfied that plea agreements are entered into voluntarily, ignoring the reality that when faced with a swingeing sentence after trial, defendants willingly and voluntarily enter into plea agreements because Hobson's Choice is not a real one. The US Supreme Court has admitted that theirs is *'a system of pleas, not trials*'. Various witnesses also attested that those pressures to plead guilty are intensified in cases such as this, by the effects of pre-trial detention in solitary confinement in a '*cage the size of a parking space, deprived of any meaningful human contact'*. The result is a system in which the plea rate is over 97%; higher than any other country, including Russia. The DJ had regard to none of this.

(ii) Secondly, the judge erred in ignoring the overloaded indictment, and prejudicial government statements (an error linked to her failure above to have proper regard to the holistic chronology of this prosecution).

(iii) Thirdly, generalised jury selection procedures are meaningless where the pool from which they are selected contains a very high concentration of a pool of government, military and intelligence contractors, and their families.

(iv) Fourthly, the DJ's finding in relation to Ms Manning's treatment is flatly undermined by the findings of the UN Special Rapporteur.

The flagrantly unfair sentencing process

6.7. In criminal matters, Article 6 covers the whole of the proceedings in question, including appeal proceedings and the determination of sentence (***Dementyev v Russia*** (2013) App 43095/05 at §23).

6.8. There was an uncontroverted body of evidence before the DJ that, if Mr Assange were convicted after his extradition, he faces sentence **(a)** for conduct he has not been charged with, nor extradited for, potentially even conduct in respect of which he has been acquitted, **(b)** following a judicial fact-finding exercise on the balance of probabilities, **(c)** based upon evidence he will not see, **(d)** and which may or may not have been be legally obtained.

6.9. For uncharged conduct: The evidence before the DJ confirmed that there exists a long and consistent line of US authority holding that, in determining the appropriate sentence in respect of which a defendant has been convicted (or to which he has pleaded guilty), a US court may increase that sentence up to the statutory maximum (here, 175 years) by reference to other, uncharged *'relevant conduct'*, even conduct in respect of which a defendant has been acquitted. The government is not required until after trial to identify what relevant conduct they may ask a sentencing court to consider. Neither are extradited defendants protected - by treaties containing the rule of specialty - from this US domestic practice of '*sentence enhancement'* by reference to uncharged conduct. On the contrary, this is a practice applied liberally by US courts to extraditees, including for completely unrelated conduct (see e.g. ***US v Lazarevich*** 147 F.3d 1061 (9th Cir. 1998); ***US v Garcia*** 208 F.3d 1258 (11th Cir. 2000); ***US v Garrido-Santana*** 360 F.3d 565 (6th Cir. 2004)).

6.10. The witnesses before the DJ identified multiple real examples of uncharged WikiLeaks publications in Mr Assange's case which could operate in law to trigger an increased sentence under these laws, including **(a)** publication of the Detainee Policies in 2012, **(b)** revelations of US espionage against European leaders, **(c)** revelations of US espionage against the European Commission, the European Central Bank and French industry, **(d)** the 2017 publication of US spying during the French presidential election campaign, or **(e)** publication of the DNC emails during the 2016 US presidential campaign. Publication of the CIA's 'vault 7' would constitute another obvious example. The DJ's observation (at §239) that '*the defence has not identified any particular conduct outside the conduct in the request which would result in a court 'upwardly enhancing' Mr. Assange's sentence*' – was plainly and demonstrably wrong.

6.11. Following a judicial finding which applies civil standards of proof. For the above to occur, the sentencing judge need merely conclude that such conduct is established by the '*preponderance of evidence'*, which the US Supreme Court has translated as: '*…based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong…*' (***Blakely*** (supra) per Scalia J).

6.12. Based upon evidence he will not know about or see: Because it involves classified 'national security' information, there are severe restrictions on what Mr Assange may be shown and see. Witnesses explained to the DJ the US Classified Information Procedures Act and the '*severely limited access'* to classified material that Mr Assange will have. His lawyers are forbidden by law from communicating with him about it. Even his counsel may be shut out of access to material deemed 'not helpful' to the defence (all allegations which result in sentence enhancement are, by definition, not exculpatory). In Mr Assange's particular case, therefore, the '*enhancement'* of his sentence may well occur by reference to materials, evidence, allegations or assertions that he will never even know about. In fact, the US judge may 'enhance' sentence even by reference to materials he has previously ordered to be withheld from Mr Assange's lawyers.

6.13. Which may or may not have been be legally obtained: It may, moreover, be premised on illegally obtained evidence. Witnesses explained that the Fourth Amendment exclusionary rule regarding illegally obtained evidence which usually operates during the trial phase, does not apply at the sentencing stage. See, e.g. ***United States v Brimah*** 214 F.3d 854, 858 (7th Cir. 2000). Recall, for example, that Mr Assange's legally privileged communications were the subject of unlawful electronic surveillance by Spanish agents operating on behalf of the US government during Mr Assange's asylum in the Ecuadorian embassy.

6.14. Swift J §7: Held that '*there is no error apparent in the DJ's reasoning'* in respect of '*excessive sentencing'* in §236 of the DJ's reasoning.

6.15. The DJ at §236: Issued a jurisdictional ruling in which the she regarded her power to examine the issue as foreclosed by the decision in ***Welsh v SSHD*** [2007] 1 WLR 1281 concerning specialty. ***Welsh*** does not consider, nor has any other decided extradition case considered, the implications for Article 6 of a sentencing regime that permits the imposition of additional punishment for a crime for which the requested person has not been charged. This is, with respect, not about '*excessive sentencing'*. It is about the fundamental principle asserted by Lord Bingham in the ***R v Kidd*** [1998] 1 WLR 604 that '*it is inconsistent with principle that a defendant should be sentenced for offences neither admitted nor proved by verdict'*.

6.16. Permission to appeal was granted on this very issue on 25 September 2020 by Sir Ross Cranston in the case of ***Jabir Saddiq (aka Motiwala) v USA***, where there was a real risk of a 'terrorism enhancement' for a defendant not charged with any terrorism offence. The issue is thus (according to that decision) an arguable one, and remains undecided by this Court because that request was ultimately withdrawn by the USA.

6.17. It is doubly offensive to ECHR standards to detain or punish someone by reference to allegations they cannot know about or respond to: see for example ***A v United Kingdom*** (2009) 49 EHRR 625, GC; ***SSHD v AF (No 3)*** [2010] 2 AC 269, HL.

7. Ground of Appeal 7: The request is prohibited by the treaty

7.1. The offences with which Mr Assange is charged are all 'political offences', extradition for which is squarely prohibited by the terms of Article 4(1) of the Treaty. The law is set out in Part 2 of the Applicant's Grounds of Renewal under s.108.

7.2. The DJ at §41-60: Holds that she is bound by law to give effect to an extradition request which she knows to be prohibited by treaty and by international law.

7.3. Swift J at §10: Holds that '*there is no error in the [DJ]s' reasoning on this matter ... The 2003 Act is the governing instrument'.*

7.4. The DJ and Swift J erred in law as to the scope of the powers of the extradition court. The 2003 Act may be the governing instrument, but it does not follow that it is exhaustive of the DJ's powers. When enacting the 2003 Act, Parliament was aware that its operation was also impacted and governed by principles surrounding abuse of process (***R (Kashamu) v Governor of Brixton Prison*** [2002] QB 887). In any event, the 2003 Act expressly incorporates Article 5 ECHR. None of the cases considered at (Judgment §42-55) consider the implications of either of those powers.

Article 5 ECHR

7.5. Detention pursuant to an extradition request the execution of which is flatly prohibited by the terms of the governing treaty (and in turn on principles of 'political' offending founded in international law and applied the world over) – is arbitrary within the meaning of Article 5 ECHR.

7.6. Article 5(4) ECHR requires an independent impartial '*court'* (in adversarial proceedings) to determine the Article 5 compatibility of detention for the purposes of extradition: ***R (Kashamu) v Governor of Brixton Prison*** [2002] QB 887 at §27-36. That is the jurisdiction provided by s.87 of the 2003 Act.

7.7. The Privy Council in ***Fuller v Attorney-General of Belize*** (2011) 32 BHRC 394 held that the ***Kashamu*** principle was applicable to encompass '*...Both the lawfulness of the detention and the lawfulness of the extradition [which] are a matter for the courts and not the executive'* (§50-51).

7.8. In ***Pomiechowski v Poland*** [2012] 1 WLR 1604, Lord Mance therefore stated at §24-26 '*...Where detention and the extradition proceedings as a whole stand and fall together, according to whether or not they involve an abuse of process, then **Fuller** suggests that article 5.4 may be an effective means by which a root and branch challenge to extradition may be pursued...*'

7.9. Prior to the HRA 1998, it was well recognised in extradition law that extradition treaty protections additional to those found in the statute had to be given effect to by the magistrate. See, e.g. ***R v Governor of Pentonville prison, ex parte Sotiriadis*** [1975] AC 1, per Lord Diplock at p33H-34C; ***In re: Nielsen*** [1984] AC 606 per Lord Diplock at p616B-C.

7.10. In ***R v Governor of Pentonville prison, ex parte Sinclair*** [1991] 2 AC 64, that jurisdiction was transferred from the court to the SSHD. By reason of Article 5(4) ECHR, the jurisdiction has however transferred back to the DJ. ***Kashamu***, ***Fuller***, and their combined implications for the location of the duty to monitor Treaty compliance (per ***Sinclair***), was not considered in ***Norris.***

7.11. The DJ at §61: The DJ's analysis of the implications of Article 5 is, with respect, seriously lacking. The DJ rejects Article 5 solely on the basis that '*Parliament has made its intentions clear'* in the 2003 Act. Parliamentary intention was, of course, that the DJ have full jurisdiction to consider Article 5 (see s.87).

Abuse of Process

7.12. It is, in any event, an abuse of process for the USA to request extradition for conduct prohibited by the terms of the relevant Treaty. Article 1 provides that '*the Parties agree to extradite to each other, pursuant to the provisions of this Treaty*'.

7.13. The DJ had implied power, outwith the terms of the 2003 Act, to restrain the USA from abusing the process of international cooperation: ***R (Bermingham) v SFO*** [2007] QB 77. In other words, the abuse of process jurisdiction begins where the provisions of the Extradition Act end. As Laws LJ observed at §118, a proposed extradition must therefore be '*properly constituted according to the domestic law of the sending state and the relevant bilateral treaty*'.

7.14. The abuse jurisdiction exists fundamentally to uphold the rule of law (a principle wider than simply enforcing an individual's rights). That is why, according to the House of Lords, proceeding in breach of the terms of the provisions of an unincorporated Treaty or Convention that confers rights on the citizen, is capable of being an abuse of process in the criminal context: see ***R v Asfaw*** [2008] 1 AC 1061, concerning a prosecution that bypassed the protections of the Refugee Convention (at §31-34 per Lord Bingham, §70-71 per Lord Hope, §118 per Lord Carswell).

7.15. The DJ at §57: In the present case the DJ mentions ***Asfaw*** in passing (referring to it as 'Afwar') but fails entirely to explain why it is inapplicable here. ***Asfaw*** is binding authority from the House of Lords.

7.16. Neither, for the avoidance of doubt, is ***Asfaw*** the only authority which has found that unincorporated international obligations can create rights and impose duties, enforceable through the doctrine of abuse: see ***R v Mullen*** [2000] QB 520 at p535E and 537G; ***Thomas v Baptiste*** [2000] 2 AC 1; ***Neville Lewis v Att. Gen. Jamaica*** [2001] 2 AC 50 at p84G–85C.

7.17. The DJ's decision addresses none of the relevant authorities on abuse of process and, as a result, propounds a binary (and erroneous) account of the status of unincorporated treaty provisions. The DJ's decision is contrary to authority, and wrong.

7.18. Norris: The sole extradition authority cited by the DJ in purported support of her approach serves, in fact, only to underline its illusory foundation. ***Norris*** concerned a Treaty (the 1972 US/UK Treaty) which required a *prima facie* case to be provided. The 2003 Act was not merely silent on that issue; it expressly precluded the operation of that right (by s.84(7) and the designation order made thereunder). In circumstances where Parliament had spoken unequivocally and clearly in ruling out a defendant's right to derive rights from the Treaty, this Court unsurprisingly held at §35 and 144 that the express provisions of s.84(7) of the Act and the designation order made thereunder prevailed over the provisions of article IX of the 1972 Treaty. None of that, of course, assists the USA here. Here, the US can point to no provision of

primary legislation (indeed no provision of delegated legislation) that expressly excludes reliance on the political offence exception contained within the Treaty (e.g. ***Warner v Trinidad*** [2022] UKPC 43 at §46).

7.19. The position in this case is that **(a)** the USA and the UK have agreed a Treaty which expressly provides for the political offence exemption, and **(b)** the operation of that exemption is (unlike in ***Norris***) not 'in conflict' with the Act. The 2003 Act does not '*preclude'* reliance on the exemption found in article 4 of the Treaty. And the law of abuse therefore permits (indeed requires) it: ***Asfaw***. That is doubly true of a Treaty agreed *after* the enactment of the 2003 Act (***Warner*** (supra) at §37).

7.20. Of course, the other notable aspect of ***Norris*** is that it contains no analysis of the law of abuse (abuse was not relied on in ***Norris***; unsurprisingly given that abuse cannot overrun a clear statutory exclusion).

8. Ground of Appeal 9: Articles 2 and 3 ECHR

8.1. Swift J at §4: Because the fresh evidence concerning the plans to kidnap / render / assassinate Mr Assange in 2017 was not admitted, Swift J held that Ground 9 (which focusses on what those governmental plans say about the future risks to Mr Assange, rather than the past motivations of this prosecution) '*do[es] not arise'*.

8.2. The Strasbourg Court may foreseeably take a different view of what may properly be inferred for the future in a state where, from evidence from former US government officials, the sitting US President can be party to / responsible for plans for Mr Assange's extra-judicial murder. The Applicant renews his application to admit this evidence, and then for permission to appeal, in order to exhaust his domestic remedies for Strasbourg in respect of Articles 2 and 3 ECHR.

9. Conclusion

9.1. In all the circumstances, it is respectfully submitted that each renewed Ground of Appeal detailed above is reasonably arguable, and leave to appeal should be granted.

Tuesday, 12 June 2023

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