IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case Nos: CO/2334-5/2022

IN THE MATTER OF APPEALS UNDER S.103 & 108 EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Appellant

v

GOVERNMENT OF THE UNITED STATES OF AMERICA

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

RENEWAL SKELETON

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1. Introduction

1.1. By order dated 24 July 2023, the Applicant has permission to submit a 10-page Skeleton Argument on these combined renewal applications.

1.2. This document does not duplicate the respective Grounds of Renewal (both dated 12 June 2023). Its purpose is to further develop three specific issues to assist the Court considering permission.

1.3. First, on s.103 ground 1: to emphasize that ***Voitenko*** and ***Klinko*** in fact form part of a line of authority representing clear international consensus that exposing state criminality is a political act / opinion. See Section 2 below.

1.4. Secondly, on s.103 ground 7: to draw attention to authorities (a) on article 5 ECHR and (b) ***Asfaw*** abuse, concerning criminal proceedings which place the UK in violation of unincorporated Treaty obligations prohibiting prosecution. See Section 3 below.

1.5. Thirdly, again on s.103 ground 7: to address the core underlying positions of the DJ on the status of article 4(1) of the US/UK extradition Treaty; that an unincorporated Treaty can never confer justiciable rights. The true position in law is that non-justiciability described in ***Rayner*** and ***Brind*** is not absolute and does not preclude all reliance upon the terms of such instruments. See Section 4 below.

2. S.103 ground 1: exposing state criminality is a 'political' opinion

2.1. It is acknowledged by courts globally that prosecution for exposing/challenging state-level pervasive criminality amounts to persecution for reasons of 'political opinion' under the Refugee Convention (from which s.81 derives). The case law also acknowledges that **(a)** the law does not require proof that the exposures are in fact true in order to qualify, and **(b)** the motives of the persecutor or persecuted may be mixed.

Australia[1]

2.2. In ***Minister v Y*** [1998] FCA 515 (Brazil), exposure of a state crime (murder by police) could properly be seen to be part of a campaign against the corrupt exercise of state power generally because it '*made [Y] a danger not only to the policemen involved in the incident which he had observed but to the Police Force in general and to the manner in which power is exercised in Brazil…effectively the expression of a political opinion against a pervasive aspect of the Brazilian state'*.

2.3. In ***Voitenko ('V') v Minister*** [1999] FCA 428 (Russia), the Full Federal Court confirmed that resistance to systemic corruption/criminality by local government officers in Russia could fall within the description 'political opinion' (per Wilcox J at §18). Hill J explained that *'the exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it…enjoys political protection…the risk of persecution can be said to be for reasons of political opinion'* (§32). Whitlam J held that *'a person who publicly campaigns against official corruption in a country, where such corruption is endemic and apparently tolerated by the government authorities, may well be thought to evince a 'political opinion'* (§39).

2.4. In ***Zheng v Minister*** [2000] FCA 670 (China), the Federal Court held that the case law, from within[2] and outside[3] the jurisdiction, *'demonstrates that exposure of corruption can, in a wide range of circumstances, lead to political persecution'*, and that *'exposure of corruption in circumstances where it permeates government as to become part of its very fabric can quite easily lead to a fear that the exposure, of itself, may be imputed to be an act of opposition to the machinery, authority or governance of the state'* (§32). Such exposure is different from the reporting (in issue in that case) of *'individual, rather than systemic, corruption'*, because that does not constitute '*any form of opposition to, or defiance of, state authority or governance'* (§33). See also ***W68/01A v Minister*** [2002] FCA 148 at §44-56 (Iran) (exposure of fraud committed by Security Services).

2.5. Australian case law also confirms that proof that exposures of state criminality are in fact true is not required in order to qualify as a political opinion. ***Ranwalage v Minister*** (1998) 159 ALR 349 (Sri Lanka) concerned accusing a Sri Lankan government minister of involvement in murder. The Federal Court observed that '*[i]n a political context, an assertion of fact can be perceived by those in authority…as just as dangerous, perhaps more so, than an expression of opinion (in the strict sense) and thus warranting the persecution of those who state such facts. A paradigm example from history is Emile*

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1. The cases discussed are authoritative according to the Australian Administrative Appeals Tribunal June 2023 Guide (link) (Chapter 11: on 'Harm resulting from exposing corruption').
2. ***Y*** (supra); ***Voitenko*** (supra); ***C and S v Minister*** [1999] FCA 1430 at §20-27 (Colombia: exposure of illegal activities involving local politicians); ***Ramirez v Minister*** [2000] FCA 1000 at §39-43 (Colombia: resistance to non-state actors).
3. Canada: ***Reynoso v Minister*** (1996) 107 FTR 220 at §10-11 (Mexico: knowledge of criminality of mayor); ***Berrueta v Minister*** (1996) 109 FTR 159 at §4-5 (Venezuela: non-state actors).; ***Vassiliev v Minister*** (1997) 131 FTR 128 (Russia: opposition to a corrupt state system through refusal to participate in it); ***Guzman v Minister*** (1999) 179 FTR 309 (Mexico: knowledge of corruption in tax department); ***Klinko*** (below). USA: ***Grava*** (below).

Zola's open letter 'J'accuse', published 100 years ago this year. This was not a statement of opinion, philosophy or belief but a denunciation of the French General Staff and an assertion of the innocence of Alfred Dreyfus. (The events which followed make the analogy all the more apt. Zola was prosecuted for libel and found guilty…He was, until his return to France the following year, a refugee in the modern sense.)'.

Canada[4]

2.6. ***Klinko v Canada*** [2000] 3 FC 32 (Ukraine) concerned a businessman who complained about widespread corruption amongst Ukrainian government officials, and suffered retaliation as a result. The Federal Court of Appeal held that *'the opinion expressed by Mr Klinko took the form of a denunciation of state officials' corruption…I have no doubt that the widespread government corruption raised by the claimant's opinion is a 'matter in which the machinery of state, government, and policy may be engaged''* (§34).[5] The Court went on to state that, *'[w]here, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of 'political opinion''* (§35). ***Klinko*** also emphasises that 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''* (at §33).[6]

United Kingdom

2.7. ***Storozhenko v SSHD*** [2001] EWCA Civ 895 (Ukraine) acknowledges that where an individual engages in a public campaign to expose institutionalised state corruption, a political opinion may be imputed. Considering the Australian and Canadian case law[7] Brooke LJ noted (§30-43) that successful cases involved public revelations about criminal activity of state agents, or about institutionalised state criminality, i.e. '*as part of a campaign against the exercise of state power in a country where corruption was part of government itself'* (§43).[8]

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4. ***Klinko*** is Canada's leading authority on the subject (per ***Marino Gonzales*** (2011) FC 389 (Mexico) at §64). The Canadian Immigration Board's publication from December 2020 (link) also cites ***Klinko*** as the principal authority on the subject (see Chapter 4, section 4.7).

5. ***Hathaway*** explains that '*political opinion encompasses 'any opinion on any matter in which the machinery of state, government and policy may be engaged'*" (Hathaway, The Law of Refugee Status (2nd ed., 2014), p406). This phrase, first set out in Goodwin-Gill's '*The Refugee in International Law*' (1983), was adopted by the Canadian Supreme Court in ***Canada (Attorney General) v Ward*** [1993] 2 SCR 689 and referred to by the UK Supreme Court in ***RT (Zimbabwe) v SSHD*** [2013] 1 AC 152 at §46. Addressing the specific context of whistle-blowers exposing corruption or criminality, ***Hathaway*** notes *'the existence of personal self-interest [in the whistle-blower] in no sense eclipses the fundamentally political character of the applicant's actions'* (Hathaway, p418-9).

6. Of course, even if the law were otherwise and the DJ were required to ascertain whether the Applicant's whistle-blowing disclosures were in fact true, the task here would have been straightforward: the disclosures were of the US government's own materials.

7. Canada: ***Vassilev***; ***Klinko***. Australia: ***Ranwalage; Y***; ***Voitenko; C and S***.

8. These principles and cases, in turn, have underpinned the Court's extension of protection to certain situations of persecution by reason of challenges to the criminality of even non-state actors: ***Gomez v SSHD*** [2000] INLR 549 at §28-49. In ***EMAP (Gang violence – Convention Reason) El Salvador CG*** [2022] UKUT 00335 (IAC), the Upper Tribunal recently observed that the breadth of definition of political opinion (*'relate[s] to the major power transactions taking place in that particular society*') derives in part from the '*emphasis required by the*

2.8. In ***Suarez v SSHD*** [2002] 1 WLR 2663 (Colombia), it was held that '*if the maker of a complaint relating to the criminal conduct of another is persecuted because that complaint is perceived as an expression or manifestation of an opinion which challenges governmental authority, then that may in appropriate circumstances amount to an imputed political opinion'* (§29). Challenging acts of personal criminality by renegade individual army officers did not by contrast rise to the level of holding a political opinion about abuse of power by organs of the state itself (e.g. *'general disapproval of the actions of the army or of the government of the country'*) (§40-2).

United States of America

2.9. The case law of the various circuits of the US Court of Appeals acknowledging that opposition to state-level criminality constitutes a political opinion, for the purposes of qualifying for asylum, is legion. It includes but is not limited to:

(i) ***Grava v INS*** 205 F.3d 1177 (2000) (Philippines). The 9th Circuit held that '*where the whistle blows against corrupt government officials it may constitute political activity sufficient to form the basis of persecution on account of political opinion…Thus, official retaliation against those who expose and prosecute governmental corruption may, in appropriate circumstances, amount to persecution on account of political opinion'* (§11). The Court footnoted that *'many persecutors have mixed motives. In such instances, personal retaliation against a vocal political opponent does not render the opposition any less political, or the opponent any less deserving of asylum'* (fn. 3). The Court held that *'the salient question'* was whether the petitioner's actions *'were directed toward a governing institution, or only against individuals whose corruption was aberrational'* (§12).

(ii) ***Hasan v Ashcroft***, 380 F.3d 1114 (2004) (Bangladesh). The 9th Circuit held that a reporter raised '*indisputably political issues'* when she accused a local political leader of '*organizing a cadre of 'terrorism, repression, and extortion*'', of '*misappropriation of public money*', and of making his political office '*an office of corruption'*; and was attacked and publicly threatened with arrest as a result. The Court held that exposure of criminality was '*a political statement despite the fact that she did not espouse a political theory…Taken as a whole, the article describes an institutionalized level of corruption that goes far beyond an individual, anomalous case…exposure of [a powerful political leader's] corruption is inherently political*'.

(iii) ***Zhang v Gonzales*** 426 F.3d 540 (2005) (China). The 2nd Circuit (CJ Sotomayor as then) held that *'As other circuits have recognized,*[9] *opposition to endemic corruption or extortion, no less than opposition to other government practices or policies, may have a political dimension when it transcends mere self-protection and represents a challenge to the legitimacy or authority of the ruling regime'* (§16).

Federal Court of Appeal decision in Klinko' (§74) that the law does '*not depend on the machinery of government actually being engaged [in the subject matter of the whistleblowing]: it was enough that it 'may be' so'* (§67).

9. E.g. ***Marquez v INS*** 105 F.3d 374, 381 (7th Cir.1997) (*[w]idespread corruption may not be a ground for asylum, but political agitation against state corruption might well be*,' and a person who '*spoke out repeatedly as a public gadfly about reforming a corruption-ridden government*' could qualify for asylum).

(iv) In ***Rodas Castro v Holder*** 597 F.3d 93 (2010) (Guatemala), the 2nd Circuit held that *'by opposing [police] corruption, he was in essence opposing the regime of President Portillo and, more generally, those who sought to thwart the development of a stable rule-of-law democracy in Guatemala'*. The Court held that the petitioner's *'particular actions had a political cast: by reporting his allegation…to a United Nations watchdog agency…designed to support human rights and the rule of law, [the petitioner] could well have been perceived as striking a political blow against the Guatemalan government'*.

(v) In ***Ruqiang Yu v Holder*** 693 F.3d 294 (2012) (China), exposing embezzlement by officials in a state-run factory was deemed by the 2nd Circuit a *'political protest'* which *'may have been perceived as such by the authorities',* observing that the petitioner *'had no personal, financial motive to oppose the corruption, [but] undertook to vindicate the rights of numerous other persons as against an institution of the state (a state-owned factory), and suffered retaliation by an organ of the state – the police'.* The case involved *'a challenge to the legitimacy of the government's entrenched modes of conduct'.*

European Union

2.10. Publicly challenging a state for human rights abuses can constitute '*an act of political dissent*'/*'a political opinion'*: ***Admedbekova*** [2019] 1 CMLR 32 (Azerbaijan) §84-87.

2.11. In ***PI*** [2023] 3 CMLR 15, the CJEU recently affirmed that active opposition or resistance to the illegal acts of even a non-state group wielding the machinery of the state via corrupt connections can fall within the concept of political opinion, for the purposes of qualifying for refugee status, *'insofar as [it is plausible that the whistle-blower's actions] are perceived by the actors of persecution as opposition or resistance as part of a matter related to those actors or their policies and/or methods'* (§37-40). This is so, according to the Court, even where the whistle-blower's motivations for acting were purely personal/economic (§37).[10]

3. S.103 ground 7: Grounding in domestic law

3.1. The DJ held (in heavy and erroneous reliance on ***Norris***)[11] that, even where the Act is silent on this, an unincorporated extradition Treaty constitutes non-justiciable subject matter under the 2003 Act, even under article 5 and/or ***Asfaw*** abuse. Swift J upheld that ruling. It was wrong in law. There existed at least three routes to justiciability.

3.2. Direct incorporation: **First**, it is at least arguable that the 2003 Act has directly incorporated article 4(1) of the US/UK Treaty. It is well settled law (including from ***Rayner*** and ***Brind***) that a statute enacted to give effect to the UK's obligations under a Treaty is strongly presumed to have legislated, and should be construed where possible, to conform with that Treaty. In the case of the political offence prohibition, it was the government's own position during the passage of the Act,[12] and since, that the political

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10. See also the Advocate General's review of, inter alia, ***Klinko*** on active (or even implicit) denunciation of state-level criminality as political opinion at §AG53-56.
11. S.103 Renewal Grounds §7.18 – 7.20.
12. In its March 2001 review, the Home Office had recommended retention of the political offence prohibition for Part 2 territories (link, §14 and 108). When the draft Bill was published in June

offence prohibition has been enacted by, because it is implicit in, s.81.[13] Insofar as Parliament was contemplating cases where the politically motivated conduct is itself the subject of the prosecution, that is this case.

3.3. Article 5: **Secondly**, the DJ's ***Rayner/Brind*** conclusion that the Treaty exists only in international law, even if correct, did not end the article 5 ECHR analysis (cf. judgment §61). Deprivation of liberty may be lawful in terms of domestic law but still be arbitrary (***Ex parte Evans (No. 2)*** [2001] 2 AC 19 per Lord Hope at p38E; ***West v Hungary*** (2019) 5380/12 at §49). In assessing arbitrariness and lawfulness the ECHR '*must also take the relevant rules of international law into account*' (***Szabo v Sweden*** (2006) 28578/03; ***Veermae v Finland*** (2005) 38704/03 (Prisoner Transfer Conventions)). Strasbourg interprets the ECHR in light of article 31 VCLT and the duty to take account of '*any relevant rules of international law applicable in the relations between the parties'* (***Cyprus v Turkey*** (2014) 59 EHRR 16 at §23). Article 5 'lawfulness' is therefore measured in Strasbourg not only against national law, but also against '*other applicable legal standards, including those which have their source in international law'* (***Medvedyev v France*** (2010) 51 EHRR 39 at §79-103 (Convention on law of sea; diplomatic notes); ***Adamov v Switzerland*** (2011) 3052/06 at §62-68 (MLA Convention); ***Ilias v Hungary*** (2017) 47287/15 at §63 (EU law)).

3.4. Extradition ordered in arbitrary or unreasonable contravention of the governing Treaty therefore necessarily involves arbitrariness under article 5. The ECtHR has examined extraditions against bilateral treaties (***Čalovskis v Latvia*** (2014) 22205/13 at §181-191; ***Gordyeyev v Poland*** (2005) 43369/98), multilateral treaties (***Shchebet v Russia*** (2008) 16074/07 at §67-69), the ECE (***Garkavyy v Ukraine*** (2010) 25978/07 at §70-77), and the EU FD (***Paci v Belgium*** (2018) 45597/09 at §64, 69-75; ***West*** (supra) at §47-56). Moreover, Strasbourg applies these same principles to the UK, despite its dualist system, including under the 2003 Act: ***Woolley v UK*** (2013) 56 EHRR 15 at §77-86 (unincorporated ECE).

2022 containing no political offence prohibition, the Select Committees understood that the prohibition had thus been reflected in the extraneous considerations clause (see the Report of the Joint Committee on Human Rights, 26.7.02 (HL 158 / HC 1140: link) at §21 '*This might be sufficiently wide to bar extradition to category 2 territories for political offences*', reiterated by the Home Affairs Select Committee Report 5.12.02 (HC 138 session 2001-02: link) at §128). On Second Reading on 9.12.02, the Government was thus expressly asked whether the extraneous considerations bar (by now extended to Part 1) would allow the judge '*to look at whether the charge of xenophobia is ipso facto a charge that relates to the political opinions of the person in question*' (Vol 396, Col 54), and the responsible minister (Under-Secretary of State for Home Affairs, Bob Ainsworth) responded: '*The Bill contains clear safeguards on … whether people could be extradited for reasons of their political opinions … I refer him to clause 13 on extraneous considerations, under which extradition will not be allowed of people being prosecuted or punished for crimes that are accounted for by their race, religion, nationality or political opinions. Extradition is specifically barred when those cases apply'* (col 116: link). I.e. politically motivated crimes, in addition to politically motivated requests. The understanding that ss.13/81 implicitly incorporated the political offence prohibition thus underpinned the 2011 Report of the Scott Baker Independent Review (link: see §C.42).

[13]. In 2019, asked explicitly about the Treaty's political offence prohibition status in domestic law, the Government reiterated in writing that '*The consideration of whether an offence for which extradition is requested is a political offence is implicit in UK law under section 81 of the 2003 Extradition Act*' (Minister of State for Security, Brandon Lewis, 1.11.19: link).

3.5. Abuse: **Thirdly**, contrary to DJ judgment §57-59, the UK courts have repeatedly confirmed the ***Asfaw*** power to stay proceedings where the result will be exposure to trial in breach by this country of a specific unincorporated (or inadequately implemented) international Treaty obligation not to do so (e.g. ***Kebeline*** (supra) at p371A-B per Lord Steyn; ***Asfaw***). It is clear that '*[t]he jurisdiction to stay may, in certain circumstances, be invoked where to try a defendant would involve a breach by this country of a specific international obligation not to do so*' (***R v Ahmed*** [2011] EWCA Crim 184 per Hughes LJ at §24). The Court of Appeal has recently re-emphasised '*the importance of a class of case where the executive is proposing to prosecute a defendant in breach of a specific international obligation not to do so*' (***R v BKR*** [2023] 2 Cr App R 20 per Edis LJ at §43). '*The test for limb two abuse is clearly established on the highest authority, including in the particular context of international Treaty obligations'* (***ibid*** at §50-56).

3.6. It is that principle of law (which the DJ declined to acknowledge or apply) which has, for example, underpinned the line of recent Court of Appeal authority over the past decade confirming that criminal prosecution in the face of the UK's unincorporated Treaty obligations regarding modern slavery is an abuse. The Court of Appeal has held that ***Adimi*** and ***Asfaw*** stand as authority for the proposition that '*the power to stay for 'abuse' exists as a safety net to ensure that [an unincorporated Treaty] obligation is not wrongly neglected in an individual case to the disadvantage of the defendant … The power to stay is a power to ensure that the Convention obligation … is met'* (***R v M(L)*** [2011] 1 Cr App R 12 per Hughes LJ at §15-19). In this sense, the abuse jurisdiction is a '*mechanism'* through which '*the implementation of [an otherwise unincorporated Treaty obligation] is achieved'* (***ibid*** at §7).

3.7. This '*does not involve the creation of new principles. Rather, well-established principles [concerning limb two abuse] apply in the specific context of the [unincorporated Treaty] obligation, no more, and no less'* (***R v N*** [2013] QB 379 per Lord Judge CJ at §21 and ***R v AAD*** [2022] 1 WLR 4042 per Fulford LJ at §117 & 127 & 136-137). '*The court protects the right of the [defendant covered by the Treaty obligation] by overseeing the decision of the prosecutor and refuses to countenance any prosecution which fails to acknowledge and address the … the international obligations to which the United Kingdom is party'* (***R v L(C)*** [2013] 2 Cr App R 23 per Lord Judge CJ at §16). '*The law [of abuse] was developed so as to ensure that the UK complied with its international obligations where the [domestic law] was not available'* (***R v AFU*** [2023] 1 Cr App R 16 per Carr LJ at §105).

4. S.103 ground 7: The Treaty was justiciable

4.1. A binary approach to justiciability was said by the DJ (judgment §42-47) to derive from ***Rayner*** and ***Brind***, in which unincorporated treaties are *never* justiciable domestically (and which the DJ utilised to delimit her approach to article 5 and abuse). That binary approach does not in fact represent the law in any event. Besides being inconsistent with all of the case law discussed at Section 3 above, the binary approach is contrary to the common law more generally.

4.2. True, the exercise of the royal prerogative to *conclude* international treaties and agreements is non-justiciable. There is however in law a *'second principle (which is a corollary of the first) [which] is that if the international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law*

then the Courts acquire the right and duty of supervision' (***Heathrow Airport Ltd. v HM Treasury*** [2021] EWCA Civ 783 per Green LJ at §138).[14]

4.3. *'Over the past century, and more, a variety of circumstances have been identified where the Courts will interpret and take account of international law which has neither been formally incorporated into domestic law (e.g. through legislation), or otherwise relied upon by decision makers to shape and influence domestic measures and acts'* (***Heathrow Airport*** (supra) at §146). The modern authorities are reviewed in ***Heathrow Airport*** at §149-164 and include:

(i) Cases in which the ECHR was held to confer human rights protections in domestic law prior to its incorporation under the Human Rights Act 1998 (***R v SSHD, ex parte Launder*** [1997] 1 WLR 839; ***R v DPP, ex parte Kebilene*** [2000] 2 AC 326).

(ii) ***Kuwait Airways Corp v Iraqi Airways Co.*** [2002] 2 AC 883, in which Lord Steyn at §114 described the submission, that because a Treaty was unincorporated it must be disregarded, as '*marching logic to its ultimate unreality*'. The UN Resolution at issue concerned a matter of public policy to which the Government had publicly adhered as indicating its position, and adoption of an approach contrary to the Resolution would place the UK in breach of its international obligations.

(iii) ***Ecuador v Occidental Exploration Production Co*** [2005] QB 432, in which Mance LJ held at §31-47 that the principle of non-justiciability in ***Rayner*** and in ***Brind*** was not absolute and did not preclude reliance upon the terms of such instruments, where necessary to determine a person's rights under domestic law. Where an international obligation, intended to create individual rights enforceable against the state, gains '*a foothold'* in domestic law, it could become justiciable.

(iv) ***R (Corner House Research) v SFO*** [2009] 1 AC 756 accepts that there may be '*compelling reasons'* for provisions of unincorporated treaties, raising issues capable of being adjudicated by a court in the normal way by reference to an existing body of case law, being justiciable (even where the Treaty provided its own mechanism for resolution of such issues), per Lord Brown at §65-66.

(v) In ***R (ICO Satellite Ltd) v Ofcom*** [2010] EWHC 2010 (Admin) at §92-95, Lloyd Jones J held that there are '*undoubtedly circumstances in which the courts of England and Wales will decide questions as to the extent of the obligations of the United Kingdom or, indeed, other States under treaties which have not been implemented into domestic law*'.

4.4. ***Heathrow Airport*** summarises the effect of these of authorities at §164: *'[n]umerous cases have emphasised that when determining justiciability context is critical…judges have cautioned that Lord Oliver's articulation in [Rayner] was never intended as some inflexible and rigid diktat. The decided cases fully bear this out*'.

4.5. The correct approach therefore is to recognise, per ***Heathrow Airport*** (supra) at §165, that '*the two main considerations which flow out of the case law are therefore: (i) the extent to which the [unincorporated Treaty] has been grounded into domestic law*

[14]. See also ***R (Friends of the Earth) v Secretary of State for International Trade*** [2022] EWHC 568 (Admin) per Stuart-Smith LJ at §106-124.

('grounding'); and (ii) whether there is anything about the [unincorporated Treaty] which makes it unsuited to adjudication ('intrinsic non-justiciability').'

4.6. In terms of '*grounding'* in addition to the factors discussed in Section 3 above, in domestic law it is legally significant in the present case that:

(i) **First**, the Treaty expressly contemplates the creation of individual rights (including under article 4(1)) that are enforceable in domestic law before domestic courts, against one or other of the two signatory states (per ***Occidental***).

(ii) **Secondly**, the UK has seen fit firmly to endorse the whole Treaty as governing and shaping its policy concerning extraditions to and from the USA (per ***Heathrow Airport*** at §166). It has never resiled from any of the terms of the Treaty (***ibid*** at §168). In particular, the UK state has seen fit firmly to endorse the political offence prohibition.[15] Further, there is no domestic common, constitutional or statute law with which the article 4(1) principles collide, and which otherwise stand in the way of the Government's committed adherence to the Treaty's provisions (***ibid*** at §170). As discussed fully in the renewal grounds, the 2003 Act does not address, still less disapply, the prohibition.[16]

(iii) **Thirdly**, the nature and extent to which the Treaty played a part in the decision to authorise the Applicant's extradition (per ***Heathrow Airport*** at §166 & 171-2) is obvious: the Treaty operates in domestic law as the very foundation for UK state action against Applicant; it is the basis on which USA is designated at all under Part 2 of the 2003 Act, and the lynchpin on which the 2003 Act is therefore available for use against him by the UK and US authorities, per ***Occidental***.

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[15]. The political offence prohibition is a general principle of law to which the UK government has firmly asserted its adherence over the course of almost two centuries. So far as its relations with the USA is concerned: the prohibition has been a feature of UK/US treaties consistently since 1886. For the rest of the world: The UK has multilateral extradition arrangements with all 128 member states of the Commonwealth, the Council of Europe (plus four non-members), and the EU. All those arrangements allow for the political offence prohibition (see respectively article 12 of the London Scheme 1966, article 3 of the European Convention on Extradition 1957, article 602 of the Trade & Co-operation Agreement 2020). The UK additionally has 25 other extant bilateral extradition agreements with Algeria, Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Hong Kong SAR, Iraq, Kosovo, Liberia, Libya, Mexico, Morocco, Nicaragua, Panama, Paraguay, Peru, Philippines, Thailand, Uruguay, collectively dating from 1874 to 2013. All incorporate the political offence prohibition. Of the UK's extant standing extradition arrangements with 156 foreign countries and overseas territories, only the treaties with Kuwait (2016) and the UAE (2006) omit the political offence prohibition. Moreover, in all its dealings with all states with whom it maintains extradition relations (including Kuwait and the UAE), the UK is a member country of Interpol which enforces the political offence prohibition at the point of circulation (article 3 of its Constitution: see Repository of Practice (link)). The same is true of the UK's membership of the UN (article 3(a) of the UN Model Extradition Treaty 1990). The UK also adheres to the principle in other legal contexts: the Refugee Convention exempts, for all UN states, political offences from those that disqualify for refugee status (article 1F).

[16]. Cf. the statutory provisions in play in ***R (Norris) v SSHD*** [2006] EWHC 280 (Admin) which expressly disapplied the Treaty provision in question (to provide a *prima facie* case); as in ***R v Lyons*** [2003] 1 AC 976. The 2003 Act by contrast is simply silent with regards the political offence prohibition. In such cases, it is constitutionally permissible to apply the Act in accordance with the Treaty: ***Lyons*** (supra) at §33 (Lord Hoffman), §13-16 (Lord Bingham).

(iv) **Fourthly**, the resultant executive and legislative action (under the 2003 Act) affected the position of the Applicant as an individual, because it took away his right to liberty and exposed him to removal (per ***Heathrow Airport*** at §166). *'[W]hen Government does rely upon otherwise unincorporated international law to change or affect the nature of domestic rights and responsibilities or the status of individuals [then] the courts have a supervisory role*' (per Green LJ at §173).

(v) **Fifthly**, the Applicant is not using the Treaty as a sword asserting a cause of action against the state (or indeed anyone). He is deploying the Treaty instead as a shield against state intervention (in fact, state intervention based on the *same* Treaty). '*A sword case is where a claimant relies upon a provision of international law that has not been incorporated or otherwise grounded into domestic law as a basis for a claim. A shield case is one where to defeat a claim a defendant relies upon a provision of unincorporated international law that, equally, has not been grounded into domestic law. [Rayner] was an example of a sword action'* (per ***Heathrow Airport*** at §167-168 & 176).

(vi) **Sixthly**, the DJ as decision-maker in this case (s.103) is at the international level an arm of the state: see ***Heathrow Airport*** (supra) at §126-127 & 176; citing ***Kuwait Airways*** (supra) per Lord Steyn who held (at §114) that where the state had expressed its endorsement of a principle of international law found in an unincorporated instrument, '*it would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the [instrument]*.'

4.7. In terms of '*intrinsic justiciability*' it is (per ***Heathrow Airport*** at §166) significant that:

(i) **First**, the meaning or otherwise of 'political offence' is not a politically aspirational issue; it is capable of definition (it is a hard-edged rule which is 'truly justiciable'); and is indeed the subject of clear guidance from case law. As in ***Heathrow Airport*** at §174 '*in relation to intrinsic justiciability and where the [article 4(1) prohibition] sit[s] on the spectrum of soft to hard laws, it is far closer to the prescriptive, hard edged, end of the scale. [It is] intended to be legally certain and predictable and have binding effect in specific situations. [It is] capable of being litigated and there is a copious body of guiding case law'.* In fact, neither the DJ nor Swift J has held that article 4(1) does anything other than clearly prohibit this extradition.

(ii) **Secondly**, there exists no other tribunal to which the UK courts are required (by the Treaty or otherwise) to afford deference with regards the meaning of 'political offence' in this case (***Heathrow Airport*** at §175).

(iii) **Thirdly**, once surrendered, the Applicant has no further or alternative recourse to the substance of the prohibition contained in article 4 of the Treaty (per ***Heathrow Airport*** at §175).

4.8. Applying the case law concerning the *limits* to the ***Rayner/Brind*** non-justiciability principle, the DJ was wrong in law to prevent the Applicant deploying article 4 of the Treaty as a shield against extradition proceedings brought against him on foot of the *same* Treaty. The DJ should have held that article 4 renders the extradition request barred by s.81; detention pursuant thereto arbitrary and in breach of article 5 ECHR; and it also constitutes an abuse of process.