IN THE HIGH COURT OF JUSTICE **CO/2334/2022**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPEAL UNDER SECTION 103 OF THE EXTRADITION ACT 2003

JULIAN ASSANGE

Appellant

-v-

THE UNITED STATES OF AMERICA

Respondent

FIRST RESPONDENT'S GROUNDS OF OPPOSITION PURSUANT TO CRIMINAL PROCEDURAL RULE 50.21

The Respondent was directed by the Court to serve its Respondent's Notice and Grounds of Opposition by 4:30pm on 31/10/2022.

The Respondent regrets that these submissions are lengthier than the usual form of a Respondent's Grounds of Opposition. This was necessary given that much of the appeal is simply re-argument of matters about which the District Judge heard lengthy oral evidence and dismissed the Appellant's submissions. This notice sets out why the District Judge was correct to conclude as she did but also seeks to ensure that the High Court understands the broader evidential background against which the District Judge gave her ruling.

References are to tabs and page numbers in the Appellant's Evidence Bundle [AEB/T/P], Amended Application Bundle [AAB/T/P], or to the Core Bundle [CB/T/P]

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I. INTRODUCTION

1. The Respondent objects to the grant of leave on each of the eight grounds of appeal now advanced by the Appellant. The prolixity of the appellate submissions should not obscure that the Judge's rulings rested upon the application of well established principles; the rejection of a series of extreme or unsubstantiated propositions and upon her having heard a large number of witnesses in support of the Appellant's claims. None of the grounds of appeal are reasonably arguable.

2. The Lord Chief Justice observed of the first instance extradition proceedings in this case in *United States of America v Assange* [2022] 4 W.L.R. 11 [43]: "*Of significance in this case is that Mr Assange put forward numerous grounds for resisting extradition. He took every conceivable point*." The same approach is taken in this appeal.

3. On 30 June 2022 the Appellant filed an Appellant's notice with a three-page accompanying "Grounds of Appeal" document identifying 12 grounds of appeal. On 26 August 2022 the Appellant filed a "Perfected Grounds of Appeal" (referred to as the PGOA in this Notice) document running to 149 pages identifying eight grounds of appeal. The PGOA simply repeat verbatim many of the points taken at first instance and it is difficult to discern what the precise ground of appeal is in respect of each point. It appears that the Appellant's ultimate contention is that that the judge wrongly rejected his arguments:

   (1) *Ground 1:* that the request was being made for the purposes of prosecuting or punishing Julian Assange for his political opinions contrary to section 81(a) of the Extradition Act 2003 ("EA2003");

   (2) *Ground 2:* that his extradition breached Article 7 of the ECHR;

   (3) *Ground 3:* that his extradition breached Article 10 of the ECHR;

   (4) *Ground 4:* that his extradition breached Articles 5 and 6 of the ECHR;

   (5) *Ground 5:* that his extradition was not otherwise compatible with the ECHR;

   (6) *Ground 6:* that if convicted he would be subject to a grossly disproportionate sentence;

(7) *Ground 7:* that the United Kingdom and United States of America Extradition Treaty ("the Treaty") prohibits extradition for political offences; and

(8) *Ground 8:* that the extradition request deliberately misstates the core facts (*Zakrewski* abuse).

4. Aside that this appeal is the re-litigation of points taken at first instance, it is also an attempt to reargue the findings of fact that the Judge made after seeing and hearing the witnesses and giving a thorough and extensive judgment. This attempt to reargue the entire case is misplaced. Lord Burnett LCJ said in in *Love v USA* [2018] 1 WLR 2889 at §§25-26:

> "25 The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question . . . differently (emphasis added) give a clear indication of the degree of error which has to be shown. <u>The appeal must focus on error: what the judge ought to have decided differently</u>, so as to mean that the appeal should be allowed. <u>Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence.</u> The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw's* case or *Belbin's* case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing,.. [Emphasis added]

5. The extradition hearing before the District Judge was extensive and oral evidence was given on all issues which the Appellant seeks to appeal. The extradition hearing took place over the course of 4 days between 24 and 27 February 2020 and then between 7 September and 1 October 2020. The written judgment of the District Judge runs to 410 paragraphs over 131 pages. All issues were comprehensively dealt with by the District Judge. The extradition hearing is not a trial and the District Judge had only to decide the issues set out in the statutory scheme under the EA2003.

6. The conduct for which the United States of America seeks to prosecute the Appellant is consistently and repeatedly misrepresented by the Appellant throughout the PGOA. The Appellant's case on Convention rights, also rests upon a wholesale mischaracterisation of the prosecution case. The PGOA proceeds as though the Appellant is being prosecuted for mere publication, having been provided with the materials by Bradley Manning (now known, and referred to as Chelsea Manning), as opposed to his being prosecuted for aiding

and abetting, or conspiring with, Manning to unlawfully obtain them (with Manning undoubtably committing serious criminal offences in so doing) and then disclosing the unredacted names of sources (thus putting those individuals at grave risk of harm). The District Judge's ruling was (unsurprisingly) an emphatic rejection of the Appellant's attempts to characterise the allegations he faces in the United States as merely routine journalism or merely assisting a whistle blower.

7. But, in addition to this, the Second Superseding Indictment which the Appellant faces, alleges that he did not just conspire with Manning to steal and disclose classified information. As set out in the Affidavit of Gordon Kromberg in support of extradition in relation to that indictment, the evidence shows that, from the point in time that the Appellant started WikiLeaks, he and others at WikiLeaks sought to recruit individuals with access to classified information to unlawfully disclose such information to WikiLeaks, and sought to recruit, and worked with, hackers to conduct malicious computer attacks for purposes of benefiting WikiLeaks. This was before the Appellant ever communicated with Manning about providing classified information or hacking computers. After Manning was arrested, the Appellant sought to recruit other hackers and leakers of classified information. Individuals with whom the Appellant is alleged to have conspired were Jeremy Hammond, "Sabu," and "Laurelai," all of whom were hackers located in the United States at the time they committed the overt acts alleged in the Second Superseding Indictment [see Kromberg Affidavit in support of the Second Superseding Indictment at §14 CB/ T12/P793]. This aspect of the allegation is set out in further detail below.

8. The issues raised on behalf of the Appellant were summarised succinctly by the District Judge at [§33] of her Judgment [CB/T3/P22]. The PGOA are confusing (in that they do not follow how the matters were put before the District Judge (although frequently they nonetheless repeat submissions which were made). They appear to elide and obfuscate the approach taken by the Appellant before the District Judge. However, the point is repeated that with focused consideration, it is clear that permission to appeal should not be granted.

9. These Grounds of Opposition will deal with the Appellant's grounds *seriatim* and then the application to admit fresh evidence.

II. OVERVIEW OF THE CONDUCT FOR WHICH EXTRADITION IS SOUGHT

10. The extradition of the Appellant is sought by the United States of America so that he may be tried for offences related to one of the largest compromises of classified information in the history of the United States. The alleged conduct which forms the basis of the request relates to the encouragement and assistance from 2009 to 2015 which the Appellant provided to Manning in unlawfully obtaining and receiving classified information and the Appellant's subsequent publication, through the 'Wikileaks' website, of a large part of that information. However, as set out above the allegations which the Appellant faces go beyond this and encompass the allegations that the Appellant conspired with Hammond, Sabu, and Laurelai to commit computer intrusions to benefit WikiLeaks. The Appellant used the "Most Wanted Leaks" as a means to recruit individuals to hack into computers and/or illegally obtain and disclose classified information to WikiLeaks. The information that Assange obtained from Manning and disseminated included classified information which contained the unredacted names of human sources who provided information to United States forces in Iraq and Afghanistan, and to U.S. State Department diplomats around the world. These human sources included local Afghans and Iraqis, as well as journalists, religious leaders, human rights advocates, and political dissidents from repressive regimes.

11. At the time, the volume of classified materials which were compromised by their provision to the Appellant was unprecedented. It included four almost complete databases classified up to the SECRET level, including approximately 90,000 Afghanistan war-related significant activity reports, 400,000 Iraq war-related significant activity reports, 800 Guantanamo Bay detainee assessment briefs, 250,000 U.S. State Department cables, as well as Iraq war rules of engagement files.

12. The conduct alleged against the Appellant includes that he conspired with and aided and abetted Chelsea Manning in unlawfully obtaining and then providing classified information to the Appellant; that the Appellant received this information knowing it to have been obtained unlawfully; and that the Appellant communicated a large volume of this information to the public at large. By this conduct, the Appellant threatened damage to the strategic and national security interests of the United States and put the safety of individuals at serious risk. It is specifically alleged against the Appellant that by publishing this information on the Wikileaks website, he created a grave and imminent risk that the human sources named therein would suffer serious physical harm and, or

arbitrary detention. It is further specifically alleged that the Appellant knew (as must have been obvious) that the disclosure of this information would be damaging to the work of the security and intelligence services of the United States. A full recitation of the allegations against the Appellant can be found in the amended opening note served at first instance, which is appended to this document as Appendix 1.

III. GROUND 1: SECTION 81(A) OF THE EA2003

13. The starting point for this ground is the statutory test and recognition that it is a finding of fact by the District Judge. Notwithstanding the length of the submissions on this ground the PGOA does not set out the statutory test nor provide any focused argument as to how the District Judge erred. Section 81(a) of the EA2003 reads:

> "A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—
>
> (a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions."

14. It is clear this requires a finding of fact by the District Judge that the extradition request was made for the purpose of prosecuting or punishing the Appellant on account of his political opinions. She rejected this in express terms. Having set out the statutory test at [CB/T2/P58, §152] the District Judge examined the competing submissions of the parties and her conclusions between [CB/T2/P59, §154] and [CB/T2/P74, §192]. The District Judge heard voluminous oral evidence on the issue. The approach of an appellate court to a judge's findings of fact is well trodden ground. Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484 , 487-488, is the oft quoted starting point. He said:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

15. The Appellant, recognising the difficulties in mounting an appeal after the judge below has made finding of facts particularly having heard extensive oral evidence on the issue, now seeks to advance the argument that the United States of America is guilty of state criminality and the District Judge did not deal adequately with that submission. The Appellant has picked through the voluminous evidence the Appellant presented and sought to identify any point the District Judge did not specifically mention. This is in reality a reasons challenge on a finding of fact. As Lord Lloyd said in *Bolton Metropolitan District Council and others v Secretary of State for the Environment* [2017] P.T.S.R. 1091,1095 a decision maker:

> "What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the "principal important controversial issues". To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden."

16. The Appellant had to prove on a balance of probabilities that the extradition request was in fact made for the purpose of prosecuting or punishing him on account of his political opinions. This means the request was made in bad faith and would not have been made if a person did not have the political opinions he holds.

17. That extradition is barred under section 81(a) of the EA2003 is not made out merely by demonstrating that a defendant, whose extradition is sought holds political opinions offensive to a requesting State or that he stands in wholesale opposition to the State which seeks his extradition or that he is viewed with opprobrium by politicians. Section 81(a) requires the defence to demonstrate the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his political opinions. In short, the prosecution must be a tool of oppression, brought to punish for political reasons rather than for any genuine reason expressed in the extradition request.

18. The PGOA fail to mention that the Appellant specifically conceded before the District Judge that the Appellant was not asking for findings of fact to be made in relation to the alleged wrongdoing of the United States of America. This is clear from the transcript. The matter arose when the evidence of Mr El Masri was to be called who alleged he had been renditioned and tortured by the United States of America and that the United States of America had put pressure on the Government of Germany. Mr Summers KC on behalf of the Appellant said:

MR SUMMERS: In short, the defence are prepared to accept that the court need not make findings in relation, or at least based on his evidence, as to the truth or otherwise of his allegations of torture and rendition.[1]

…

MR SUMMERS: In short, it is not a necessary finding for your determining whether the exposure of ongoing war crimes or attempts to subvert the criminal justice system are protective conduct for the purposes of article 10.[2]

…

JUDGE BARAITSER: Mr Summers, are you going to be asking for a finding from me that the United States Government placed pressure on the German Government in a particular way?

MR SUMMERS: I would invite you ---

JUDGE BARAITSER: Yes or no.

MR SUMMERS: --- to find that that is what the WikiLeaks disclosures revealed. That is the evidence as it happens that was given by Mr Goetz and not challenged.

JUDGE BARAITSER: Well, it is highly unlikely that I am going to make such a finding. I am certainly willing to look at the content, if you wish me to, of the particular relevant cables and what they said, but that is not going to lead to a finding one way or the other about the consequences of those cables passing from one government to another; namely, that pressure was put upon the German Government in a particular way.

MR SUMMERS: No, what is relevant for my case is that that is what the WikiLeaks' materials revealed. Whether it is true or not, I agree, is not necessary for you to resolve,[3]

…

JUDGE BARAITSER: Well, there is no dispute therefore about its content and I am not going to make a determination about their consequence and therefore there is no dispute between the parties. Is that a fair summary of the position?

MR SUMMERS: That is the position as we understood it.

19. The Appellant's contention that there is a "right to truth" and that it was the "duty of the Appellant" as a United Kingdom resident to assist the United Kingdom authorities to fulfil and prevent the criminality of the United States of America is fundamentally misplaced[4]. As the District Judge made clear she was not going to determine whether the United States of America had committed wrongdoing. It follows the assertion that the District Judge

[1] Transcript 18.12.20 at page 31
[2] Transcript 18.12.20 at page 32
[3] Transcript 18.12.20 at page 33
[4] PGOA at 4.20; 4.22; and 4.23

failed to appreciate that exposure of state-level crime was relevant to and directly engaged s.81[5] and that he failure to do so was "extraordinary"[6] is misplaced.

20. The task of the District Judge was to determine as a fact whether the extradition request was made for the purpose, not of prosecuting the Appellant for breaching United States criminal law, but to prosecute or punish him on account of his political opinions. The District Judge fully and properly carried this out. Her summary at [CB/T2/P60, §156] shows she fully considered the matter:

> "In summary, I accept that Mr. Assange has political opinions, outlined and explained to the court by defence witness including Professor Rogers, Noam Chomsky and Daniel Ellsberg (see Consolidated Annex). However, I am satisfied that the federal prosecutors who decided to bring these charges did so in good faith. There is insufficient evidence to establish that a decision was made not to prosecute Mr. Assange under the Obama administration; after Ms. Manning was convicted and sentenced in 2013 the investigation against Mr. Assange continued until a complaint was brought in December 2017. There is insufficient evidence that prosecutors were 10ressurized into bringing charges by the Trump administration; there is little or no evidence to indicate hostility by President Trump towards Mr. Assange or Wikileaks, throughout his election campaign he repeatedly and publicly praised Wikileaks, and although the intelligence community have spoken in hostile terms about Mr. Assange and Wikileaks, the intelligence community do not speak for the administration. I do not find the nature of the charges to be indicative of improper motives by prosecutors, and I consider it pure conjecture to draw inferences from the timing of these charges or the amendment of the indictment. Finally, the allegations of US interference at the Ecuadorian Embassy in London are currently being investigated by a court in Spain and I do not think it appropriate to make findings of fact on the basis of partial and untested evidence. I deal with each of these issues below."

21. On all the evidence, having heard and seen the witnesses, she came to the correct decision. There is no error in her finding of fact. She found the decision of the prosecutors to prosecute the Appellant was made in good faith.

22. The District Judge found that the Appellant was not being prosecuted because of his 'political opinions', but that he was being prosecuted because he is alleged to have committed serious criminal offences. This decision is unimpeachable and there is no error to show that the District Judge got it wrong.

[5] PGOA at 5.1
[6] PGOA at 5.2

A. The fresh evidence

23. The test for admissibility of fresh evidence in appeal proceedings is set out in *Szombathely City Court v Fenyvesi* [2009] 4 All E.R. 324. The material must not have been available to the party at the time of the first instance hearing (§32) and must in any event be "decisive" in the sense that it would have resulted in the District Judge deciding matters before him/her differently (§§21 and 35).

24. To the extent that the Appellant's application rests upon the issuance of the Second Superseding Indictment which expanded the counts he faces in the United States, the Court is asked to note that on 14 August 2020 the District Judge offered the Appellant an opportunity to apply to adjourn the case (having regard to the Second Superseding Indictment) and gave him a full seven days to consider the position. On 21 August, those representing the Appellant confirmed that they did not seek an adjournment of the hearing in September. On the first day of the hearing (7 September 2020) the District Judge refused when an application to adjourn was then made. She noted that an additional 19 days had elapsed within which the Appellant had had ample time to make a further application to adjourn. Moreover, she made a specific finding that the Appellant had proceeded and approached the hearing on the basis that no further time would be requested [Ruling recorded in the transcript of 7 September 2020 at page 39].

25. The "Yahoo article" is not fresh evidence of fact but simply yet another recitation of opinion by journalists on the matters already before the District Judge.

26. The Appellant seeks to say that the fresh evidence shows that the term 'hostile intelligence agency' is a legal term of art. This is a hopeless submission. This article simply repeats the assertion that the CIA were considering rendition of the Appellant from the embassy. This assertion was already before the District Judge who dealt with it in her judgment at [CB/T2/PP70-73, §§181 to 191]. Contrary to the submissions of the Appellant[7], She dealt with kidnap/rendition/murder allegations in her judgment:

> "The defence submits that Mike Pompeo was leading the pursuit of this prosecution. They rely in particular on a speech from 13 April 2017 during which he described Wikileaks as <u>a "non-state hostile intelligence agency"</u> and stated, "we have to recognise that we can no longer allow Assange and his colleagues the latitude to use free speech values against us. To give them the space to crush us with misappropriated secrets is a perversion of what our great Constitution stands for. It ends now". However, at this time Mr. Pompeo was Director of the Central Intelligence Agency ("the CIA"). After

[7] PGOA at 7.25

his appointment to Secretary of State in April 2018 there are no reports of hostile comments made in relation to Mr. Assange or to Wikileaks"[8]

…

The defence submits that the actions taken by the US against Mr. Assange whilst he was in the Ecuadorian embassy were the actions of a lawless state. They point to the US engaging in unlawful surveillance including monitoring conversations with his lawyers, and a reported plot to kidnap and poison him. They rely on the evidence of two anonymous witnesses who worked for Undercover Global, a private security firm owned by David Morales. The witnesses gave evidence about an agreement between Mr. Morales and Sheldon Adelson, an American casino magnate and financial backer of President Trump, to monitor Mr. Assange at the embassy. They described Mr. Morales making covert sound and video recordings across the embassy, with special attention paid to Mr. Assange's lawyers, and providing these to his "American friends" which the defence submits are the US government. They also argue that the US bullied and bribed the Ecuadorian authorities to ensure Mr. Assange's expulsion from the embassy.

…

Secondly, the defence alleges that the US has disregarded international law by unlawfully entering the Ecuadorian embassy and violating the sanctity of the protection it has provided. I am not aware of an objection or complaint raised by Ecuador either to the US or to the UK authorities. Neither the Ecuadorian government nor its officials accuse the US of wrongdoing and no account is offered for the alleged presence of monitoring equipment in its embassy. The allegation made by the defence involves sensitive issues between states, including the extent to which one state consented to the surveillance of its embassy by another.[9]

Thirdly, if the US was involved in the surveillance of the embassy there is no reason to assume this related to these proceedings. The US would be aware that privileged communications and the fruits of any surveillance would not be seen by prosecutors assigned to the case and would be inadmissible at Mr. Assange's trial as a matter of US law. Mr. Kromberg set out the procedures which prevent prosecutors from receiving and viewing privileged materials. He also set out the US statutory provisions and case law which would enable Mr. Assange to apply to exclude any evidence at his trial which is based on privileged material.[10]

A possible alternative explanation for US surveillance (if there was any) is the perception that Mr. Assange remained a risk to their national security. In February 2016: WikiLeaks published a series of documents which are said to have shown National Security Agency bugging meetings and intercepting communications with the leaders of governments from around the world;

Thereafter, on 30 October 2018, she received an angry phone call from Mr. Schwartz who told her that Mr. Assange was not going to be pardoned. He said it would be the "Manning case" that he would be charged with and that "they would be going after Chelsea Manning". He also told her that the US government "would be going into the

[8] Judgment at [174(a)]
[9] Judgment at [184]
[10] Judgment at [187]

> embassy to get Assange" and when she expressed her concern that this would amount to kidnapping he had said "not if they let us". On 10 September 2019, during a further conversation with Mr. Schwartz, he had told her Ambassador Grenell had coordinated for Mr. Assange to be removed from the embassy and on direct orders from the president.[11] [Emphasis added]

27. There is no possibility that yet another speculative report produced by what appear to be supporters of the Appellant would have a decisive effect on the appeal and accordingly does not meet the *Fenyvesi* test.

28. To the extent that Mr. Dratel [AAB/PP21 et seq] comments on the "yahoo" article, his evidence is also inadmissible. He is a lawyer who seeks to give "expert" opinion on a website article. Much of this is mere speculation. The remainder adds nothing to the content of the article itself. He has no personal knowledge of the issues he speculates on. His speculation on the knowledge, or otherwise, of prosecutors of any "plot" to kidnap the Appellant by a different government body is an irrelevance. Those charged with prosecuting the Appellant have laid charges in the appropriate way and sought extradition through appropriate channels. It does not assist this court to receive speculation on their knowledge or otherwise of allegations against different agencies, those allegations being themselves unproven.

29. It is also observed that insofar as the Appellant's case at first instance was that he was being subject to a political prosecution because he was a target of the then President of the United States, that there has since, been an election in the United States. It is of note, in this regard, that Mr. Dratel's report concentrates on the supposed actions of President Trump and Director Pompeo [AAB/T5/P37, §§43 et seq], neither of whom remain in office. Regardless, the prosecution of the Appellant remains extant. This is precisely because, per the District Judge's overall conclusions, it is a prosecution brought on an objective evidential basis in order to prosecute the Appellant for criminal offences.

30. As to the remaining "fresh" evidence:

    (1) The statement of Sveinn Andri Sveinsson [AAB/T6/P58] establishes, at its height, that Sigurdur Ingi Thoradson has been convicted of criminal offences, including a fraud which involved pretending to be the Appellant, and that the Appellant has not been charged with a criminal offence in Iceland. Neither of these matters has any relevance to the issue of punishment for Mr. Assange's

[11] Judgment at [189]

political beliefs. Nor is it clear why (as the Appellant claims) this information should have been included in the extradition request. It is frankly irrelevant and inadmissible. At its height it goes to the credibility of a witness, classically a matter for the trial court and not the extradition courts.

(2) The statement of Ogmundur Jonasson [AAB/T7/P96] establishes at its height that, in 2011, FBI agents wished to interview an Sigurdur Thordarson "to use him in a form of entrapment so that he would contact Julian Assange of Wikileaks so that evidence could be provided in a criminal case against [him]". The "form of entrapment" or what this is supposed to mean is not set out. The witness objected to this, and the FBI agents left Iceland. Yet again, this has no relevance to the issue of punishment for Mr. Assange's political beliefs. Neither, again, is it clear why (as the Appellant claims) this information should have been included in the extradition request. It is, again, irrelevant and inadmissible.

(3) The second statement of witness 2 [AAB/TT7&8/P101], to the extent that it merely provides commentary on the "yahoo" article, is inadmissible and irrelevant. To the extent that it repeats that allegations which were already before the Court (and considered by the District Judge), it adds nothing. It is unclear whether there is any further detail, relevant to an issue, which the Appellant relies on. The Appellant does not identify any. In any event, witness 2 was well known to the Appellant's lawyers prior to the extradition hearing, and the evidence would have been available to them. On any analysis, this statement fails the admissibility test set out in *Fenyvesi*.

(4) The transcripts of the proceedings in *Hammond* [AAB/TT13&14/P162 et seq] take matters no further. It appears to be said by the Appellant that a "coercive measure" was taken by US prosecutors to obtain evidence [annex 1 to perfected grounds pp4 to 5]. This allegation is said to be sustained by the transcript of a hearing at which counsel for the US, Mr. Kromberg appeared. The Appellant quotes selectively from the transcript. The full quotation, as opposed to the partial one relied on by the Appellant, from the proceedings is "*The reason that we were moving the way we're moving is that we — we have time constraints on us that we're not at liberty to describe with a witness here. If it's appropriate, if the Court is interested, we can explain, but we believe it needs to be done in September, which was why we didn't agree to postpone it until January, as Ms.*

Kellman first asked, and we have not agreed to postpone until October. If the witness declines to testify tomorrow, it's true, then the next opportunity won't be until the second week in October. We hope that doesn't happen. We hope that, as the Court says, he testifies and we get him out of here and he goes back to where he came from." The proceedings were in open court and subject to judicial oversight. There does not appear to be any improper or coercive step taken by prosecutors. Nor does this evidence have anything whatsoever to do with the issue of punishment for political beliefs. Lastly, there is no good reason why this extract from proceedings would ever be included in an extradition request (as the Appellant maintains it should have been). The evidence is irrelevant and inadmissible.

31. The statement of Mr. Rusbridger will be addressed below, in relation to article 10.

32. For the above reasons, none of the fresh evidence relied on by the Appellant should be admitted.

B. Section 16 of the PGOA

33. Although not pleaded as a freestanding ground of appeal, it would appear that the Appellant seeks to raise a further objection to extradition in section 16 of the PGOA, returning to s.81 of the EA 2003. There is unfounded criticism of the District Judge that she should have returned to s.81 because cumulatively the conduct or content of the prosecution demonstrated that this was an illegitimate prosecution.

34. The District Judge having rejected all the factors relied upon by the Appellant did not have to decide what they might say cumulatively if she had found them to be made out. The Appellant must face the fact that the District Judge made a finding of fact and that finding of fact cannot be arguably challenged on appeal. The Appellant seeks to rely on matters already raised individually in his appeal (and going to different grounds of the appeal) as cumulatively sustaining the submission that the request is politically motivated [PGOA §16.7]. For the reasons set out above, none of these complaints (taken individually) have any merit. For the same reasons, their cumulative impact does not sustain any suggestion of bad faith.

35. Moreover, the Appellant suggests that the conduct of the prosecution during proceedings further supports the contention that the request is designed to prosecute the Appellant on the grounds of his political opinions.

36. The Respondent relies on the written submissions above. The Appellant will not be prosecuted or punished for his political opinions and the District Judge was right to find so.

37. As to the Second Superseding Indictment, the Appellant makes two complaints [PGOA §16.12 et seq]. The first is that the request is late [§16.14(i)] and the second is that "essential details" were "withheld" from the District Judge.

38. As to the lateness of the indictment, the Appellant has shown no prejudice to his case occasioned by timing. This is, in this respect, irrelevant. Certainly, it cannot sustain a submission that the Appellant would be prosecuted or punished on the grounds of his political opinions.

39. As to the "essential" information "withheld" from the District Judge, the Appellant has provided an Annex document setting out a series of contentions drawn in the main from publicly available material. None of this material is of a nature that would ordinarily be included in an extradition request. There is no sensible suggestion that it has been "withheld". It has no bearing on the extradition scheme. None of it makes good the suggestion that the Appellant would be prosecuted or punished for his political beliefs (to which, see above "Fresh Evidence").

40. It follows an appeal on Ground 1 is not reasonably arguable.

IV. GROUNDS 2 AND 3: (ARTICLES 7 AND 10 OF THE ECHR)

A. The nature of the allegations the Appellant faces

41. The PGOA on Grounds 2 and 3 are particularly prolix and compendious. The point is reiterated that the reasons why these grounds of appeal are unarguable, having regard to these rights, are however matters of established principle.

42. Moreover, the appeal on these grounds is premised upon the wholesale mischaracterisation of the prosecution case and upon obscuring findings of fact by the District Judge which make these arguments unsustainable.

43. Here, perhaps more so than any other part of the appeal, the Appellant's submissions give the appearance that the Appellant is akin to a journalist being prosecuted for merely publishing materials provided to him by Ms Manning, as opposed to his being prosecuted for aiding and abetting, or conspiring with, Ms Manning to unlawfully obtain classified

information from Department of Defense systems (including an attempt to commit computer intrusion into such a computer) and then disclosing the unredacted names of sources to the world at large (thus putting those individuals at grave risk of harm).

44. The essence of the conduct of which the Appellant is accused is captured at §4 of the original affidavit in support of extradition. The terms of this Affidavit were also incorporated by reference by Mr Kromberg in his affidavit in support of the second superseding indictment [see original Kellen Dwyer, Affidavit in Support of Request for Extradition, 4 June 2019 CB/T12/P827, §4 (incorporated by reference in Mr Kromberg's affidavit of 20 July 2020 at CB/T12/P793, §12)]:

> "Wikileaks is a website that solicits and publishes documents that have been stolen, obtained by illegal computer hacking, disclosed in violation of law or otherwise obtained illegally. In at least one instance, ASSANGE agreed to assist a member of the US Army in committing an unlawful computer intrusion in order to further their scheme to steal classified documents from the United States and publish them via Wikileaks. In addition, ASSANGE did in fact publish classified documents that were stolen from the United States via Wikileaks, knowing that the documents were unlawfully obtained classified documents relating to security, intelligence, defense and international relations of the United States of America, including documents containing the unredacted names of people who provided intelligence to the United States and its allies. By outing these human sources, many of whom lived in warzones or repressive regimes, Assange created a grave and imminent risk that the innocent people he named would suffer physical harm and/ or arbitrary detention. The disclosure of these classified documents was damaging to the work of the security and intelligence services of the United States of America; it damaged the capability of the armed forces of the United States of America to carry out their tasks; and endangered the interests of the United States of America abroad and Assange knew publishing them on the Internet would be so damaging."

45. At § §14- 15 of his Affidavit in support of the Second Superseding Indictment [CB/T12/P793], Mr Kromberg stated as follows:

> 14. ASSANGE, however, did not just conspire with Manning to steal and disclose classified information. The evidence shows that, from the time ASSANGE started WikiLeaks, he and others at WikiLeaks sought to recruit individuals with access to classified information to unlawfully disclose such information to WikiLeaks, and sought to recruit - - and worked with - - hackers to conduct malicious computer attacks for purposes of benefiting WikiLeaks. In other words, before ASSANGE first communicated with Manning about providing classified information or hacking computers, ASSANGE already was engaged in a conspiracy with others to do so as well. Moreover, after Manning was arrested, ASSANGE sought to recruit other hackers and leakers of classified information, by publicizing his willingness to help such individuals avoid identification and arrest.
>
> 15. Among the individuals with whom ASSANGE conspired were Jeremy Hammond, "Sabu," and "Laurelai," all of whom were hackers located in the United States at the

> time they committed the overt acts alleged in the Second Superseding Indictment. These individuals are discussed further below. In addition, several of the computers that are listed in the Second Superseding Indictment as targets and intended targets of computer intrusions were computers located in the United States and owned by U.S. business and/or U.S. government entities."

46. At Section F of the original affidavit in support of extradition (***Assange revealed the name of human sources and created a grave and imminent risk to human life***) [§39] [Kellen Dwyer, Affidavit in Support of Request for Extradition, 4 June 2019 CB/T12/P841], it is stated:

> "The significant activity reports from Afghanistan and Iraq wars that Assange published included names of local Afghans and Iraqis who had provided information to the U.S. and coalition forces. The State Department cables that Wikileaks published included names of persons throughout the world who provided information to the U.S. government in circumstances in which they could reasonably expect that their identities would be kept confidential. These sources included journalists, religious leaders, human rights advocates and political dissidents who were living in repressive regimes and reported to the United States the abuses of their own government, and political conditions within their countries, at great risk to their own safety."

47. By publishing these names without redaction, the Appellant "created a grave and imminent risk that the innocent people he named would suffer physical harm and/ or arbitrary detention" [§39]. The United States thus devoted enormous resources to identifying people who would be at risk if and when they were outed as being sources for the United States [§44]. The affidavit also sets out the basis upon which the United States alleges that the Appellant knew that his dissemination of the materials without redaction of identifying information would put sources at risk (not least that a letter was sent to Assange and his counsel, on 27 November 2010, by the State Department setting out in terms what those risks were) [see §44].

48. In his Affidavit in Support of Extradition [19 February 2020 CB/T12/PP996 et seq], and Declaration of 17 January 2020 at §§27 to 29 Mr Kromberg responded to the arguments advanced on behalf of the Appellant, in respect of his rights to freedom of expression (and specifically that the Appellant was being criminalised for journalistic activity). He summarised the position thus [§§19 - 21][12]:

> "19. Rather the charges against Assange focus on his complicity in Manning's theft and unlawful disclosure of national defense information (Counts 1-4, 9-14), his knowing and intention receipt of national defense information from Manning (Counts 6-8), his agreement with Manning to engage in a conspiracy to commit computer

[12] The lengthier parts of this citation are omitted [they are at page 930 onwards of the Core Bundle]. Emphasis per the original.

hacking, and his attempt to crack a password hash to a classified U.S. Department of Defendant (sic) account (Counts 5 and 18).

20. The only instances in which the superseding indictment charges Assange with the distribution of national security information to the public are explicitly limited to his distribution of "documents classified up to the SECRET level containing the names of individuals in Afghanistan, Iraq and elsewhere around the world, who risked their safety and freedom by providing information to the United States and our allies to the public. " ……..

21. In short, Assange was charged for publishing specified classified documents that contained the *un-redacted names of innocent people* who risked their safety and freedom to provide information to the United States and its allies……"

49. In the Affidavit in support of Extradition [17 January 2020 CB/T12/PP919 et seq], Mr Kromberg provided further detail as to the "grave and imminent" risk that the Appellant created by publishing the stolen material, without redaction of underlying identifying information, that individuals outed by the Appellant [see CB/T12/P930, from §25]. This further detail included that:

(1) Subsequent to Wikileaks publishing the Afghanistan significant activity reports (on 25 July 2010) the US Department of Defense established an "Information Review Task Force" ("IRTF"). This body was charged with assessing the risk posed to individuals revealed as sources. The IRTF identified hundreds of Afghans and Iraqis whom it assessed were potentially endangered by the publication [§27].

(2) Upon learning of the compromise of the diplomatic cables, the US Department of State established a "Wikileaks Persons at Risk Task Force" which identified hundreds more individuals who could be endangered if the cables were published. At risk in this context meant "death, violence or incarceration" [§28].

(3) The State Department determined that well over a hundred people were placed at risk from the disclosures. For some the response included assisting individuals or their families to move to other countries.

(4) The United States is also aware that individuals identifiable from the classified materials have subsequently disappeared (although the United States could not prove, at the time of the Affidavit that their disappearance was as a result of their being outed). [§32]

(5) The United States is aware of individuals investigated and/ or arrested because they were named in the State Department Cables [§33]. People were also

threatened and harassed by non- state actors. The example provided is that of academics and human rights activists in China. [§35]

(6) Materials leaked were utilised by terrorist and hostile organisations including al-Qaeda (see reference to correspondence found during the raid on Osama bin Laden's compound in May 2011) and to the Taliban [§36].

(7) The United States Department of Defense identified hundreds of Iraqis and Afghans "whose lives and freedom" were endangered by the Appellant [§39].

(8) The lives and freedom of many individuals in Iran were put at risk [§45].

(9) The lives and freedom of many individuals in China were put at risk [§50]

(10) The lives and freedom of many individuals in Syria were put at risk [§55]

(11) By disclosing unredacted "Leahy Vetting Requests" [§61], and thereby, the names and personal identifying information of particular individuals who received counter terrorism and/ or counter narcotics training from the United States, put those individuals at grave risk [§63-64]

50. The District Judge summarised the nature of the allegations against the Appellant in her Judgment [at CB/T2/PP15 to 17, §§12 – 18] and the damage alleged against him [at CB/T2/PP17 to 18, §§19- 22].

51. On the basis of how the United States puts its case the District Judge rejected defence arguments which sought to characterise the Appellant's alleged conduct as merely assisting whistle blowing [CB/T2/PP41 to 43, §§96- 102]. The District Judge rejected [CB/T2/P44, §§103- 104] the contention that the Appellant's agreement with Ms Manning to crack a password hash [see allegation set out at §16] was a journalistic step to protect a whistle blower. She found that it was a step to further the conspiracy by making it more difficult to attribute which account had accessed unauthorised materials.

52. The Appellant's submissions are simply an attempt to re-ventilate evidence and the same lengthy submissions which the District Judge rejected.

B. Grounds of Appeal relating to Article 7

53. The Appellant's Grounds of Appeal in relation to Article 7 may be summarised as follows:

(1) The Judge erred in her approach to Article 7 because she asked whether there was a real risk of a *flagrant* breach of Article 7 [PGOA at §9.29- 29.30];

(2) The Judge was wrong to rely upon the rights that the Appellant would have under the United States Constitution in order to find that there was no real risk of a breach of Article 7 rights by extradition [PGOA §9.31];

(3) By reference to the District Judge's findings on bad faith, the Appellant extrapolates that had the Judge considered substantive points on Article 7 she would have rejected them on the same basis that she rejected bad faith and that she would have been wrong to so because [PGOA §9.33- 9.41]:

- The Judge was wrong to observe that the United States had denied that the prosecution was unprecedented [PGOA §9.34];
- The Judge was wrong to refer, in her conclusions to a DOJ memorandum which considered criminal liability for outing the names of sources [PGOA §9.35];
- The Judge was wrong to observe that cases which raise novel points are not unusual- but that Article 7 prohibits prosecutions premised upon novel theories which could not have been reasonably foreseen [PGOA §9.36];
- The Judge was wrong to consider that the United States case of *Bartnicki v. Vopper*, 532 U.S. 514 raised novel issues of law.
- That the Judge's reference to the case of United States v. Rosen, 445 F. Supp. 2d 602, 620 (E.D. Va. 2006) was "another false attempt to find legal precedent where none existed" [PGOA §9.39];
- That the evidence before the Judge demonstrated that the prosecution was "completely unforeseeable" [PGOA §9.41].

54. Overarchingly, the Appellant suggests that the United States took "no issue" with the Appellant's contentions about the unprecedented nature of the prosecution. But as may be apparent from the above, the United States' position was that the Appellant was being prosecuted for his complicity in Ms Manning's criminality and for publishing the classified material in an unredacted form thus putting individuals at risk, prosecution for which was neither unprecedented nor unforeseeable (and not so in the context of publishing either). This is developed below.

Summary as to why grounds 2 and 3 are unarguable

55. Six overarching observations follow (and which are dispositive, without more, of the appeal on grounds 2 and 3).

56. **First**: to the extent that the appellate submissions rest upon the characterisation of the Appellant as though this conduct is akin to that of a journalist to whom secret materials

are leaked and who in the course of journalism publishes it, those were rejected by the District Judge for reasons which were unimpeachable [Judgment at CB/T2/PP53-55, §§131- 137]

57. The submissions upon appeal are artificial and apt to distort the correct application of law in this field. It is respectfully submitted that the Court must approach this issue (and the District Judge's decision) having regard to the reality of the allegations which the Appellant faces as reflected in the extradition request.

58. **Second**, standing back from the Appellant's case on Article 7 (and setting to one side the distinct considerations which apply to reliance upon Article 7 rights in the *extradition* context), it amounts to the surprising contention that the Appellant (or any putative publisher/ disseminator of information in his position) could not have reasonably foreseen that assisting, encouraging or otherwise being complicit in illegal acts to obtain classified material (and the wholesale dissemination thereafter of unredacted material) risked the commission of criminal offences (here the offences of conspiracy to commit computer intrusion and offences of unauthorised obtaining and receiving and disclosure of national defence information).

59. The contention that a journalist would essentially be immune from the operation of criminal law in these circumstances, is without more, simply not credible. Moreover, the United States filed evidence before the District Judge pointing out the established principles of US law and jurisprudence of the United States Courts which demonstrate this proposition is (unsurprisingly) unsustainable as a matter of United States law. This was referred to by the District Judge (and in relation to "void for vagueness" protections [see for example CB/T2, §§271; 180; 393; 254). Put in domestic law terms per Article 7, the prosecution of the Appellant under the Espionage Act, 18 U.S.C. Sec. 793(d) and (e) and the computer intrusion provisions is consistent with the essence of those offences and could reasonably be foreseen.

60. **Third**, the Appellant's Article 7 submissions in fact rely upon the repeated mantra that the prosecution of the Appellant is the *unprecedented* prosecution of a publisher (to the extent that this ground of appeal is entitled "***An unprecedented prosecution***" [§1.12 of the PGOA]. Setting to one side that there are a number of characteristics which distinguish Wikileaks and the Appellant from a publisher in usual sense of that word and setting to one side that the prosecution rests upon established principles which apply in this context; the obvious answer is that what the accused did was unprecedented [see Dwyer Affidavit

§5, CB/T12/P838]: "*These charges relate to one of the largest compromises of classified information in the history of the United States*".

61. Regardless, it is in the nature of criminal law, that it will be applied in a range of factual circumstances and that some will be novel. Article 7 expressly foresees this.

62. On this point, in order to make good the submission that the Appellant's extradition would nonetheless be incompatible with Article 7, the Appellant relied upon a series of commentators to say that his prosecution was unprecedented. However, their qualification to give evidence on the *legal* question of whether the ambit of United States law is sufficiently certain, is not accepted (and a number of these individuals are, in any event, associated with Mr Assange).

63. **Fourth (and a complete answer to the appeal on Article 7),** whether there is a real risk that the Appellant will be exposed to a breach of Article 7, is answered by the United States Constitution. In summary, the Appellant is not at risk of being prosecuted on the basis of an arbitrarily uncertain criminal law because he is protected by the "void for vagueness" protections under the Fifth Amendment to the US Constitution. "*A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement*" [Kromberg at CB/T12/PP946-7, at §69]. The District Judge was correct to find that this was (regardless of all of the other prosecution points) a complete answer to the Article 7 point.

64. As regards Article 10, **fifth,** the Appellant's argument does not confront that the essence of the allegations which he faces are concerned with his complicity in the offences amounting to unlawful intrusion of the computer system holding classified materials; the theft of the classified materials from the United States or that the only allegations which he faces in relation to "publication" are limited to his dissemination of the *unredacted* material which put individuals at risk.

65. **Sixth,** aside the question of whether this conduct attracts the protections of Article 10 at all, the fundamental obstacle to the Appellant's case is that he would not be able to rely upon Article 10 as a defence to a prosecution under the Official Secrets Act 1989 in analogous circumstances. Moreover, it is fanciful to suggest that on the facts of this case such a prosecution, in this jurisdiction, would be incompatible with Article 10 (still less that extradition would amount to the nullification of those rights).

66. In summary, the District Judge was correct to conclude that the Appellant's extradition would not be incompatible with his Article 7 and 10 rights.

C. Ground 2 (Article 7)

1. *Article 7 as a matter of European convention law*

67. Article 7(1) reflects the principle, found in other provisions of the Convention, in the context of requirements that interferences with or restrictions in the exercise of fundamental rights must be "in accordance with law" or "prescribed by law", that individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. Equally Article 7 caselaw recognises that there must be flexibility for law to develop and be subject to a process of judicial refinement:

68. This requirement is met where the individual can know from the wording of the relevant provision, if needs be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable; *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91, ECHR 2013; *S.W. v. the United Kingdom* , 22 November 1995, §§ 34-35, Series A no. 335-B; and *C.R. v. the United Kingdom* , 22 November 1995, §§ 32-33, Series A no. 335-C).

69. The law must be able to keep pace with changing circumstances. Many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice; *The Sunday Times v. United Kingdom* (A/30): 2 E.H.R.R. 245 at. §49.

70. In common law systems like those of the United Kingdom and the United States, the European Court recognizes that the law may be developed by the Courts and applied to circumstances not foreseen when a provision was enacted (or when, as a matter of common law, it first developed: *SW v UK* (Judgment at 36/34):

> "There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

71. Many laws are therefore inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. *Kafkaris* [at §138].

72. It is the object and purpose of Article 7 of the Convention, that no-one should be subjected to arbitrary prosecution, conviction or punishment. *SW* at [44/42].

73. The District Judge correctly recited the requirements of Article 7 at §§246- 248.

2. ***Article 7 in extradition law***

74. It is not the role of the extradition court to adjudicate upon whether United States law meets the requirements of the European Convention; *Soering v United Kingdom* (1989) 11 EHRR 439 §91. The extradition court is concerned only with the question of whether extradition is incompatible with the Appellant's Convention rights. As is apparent from the above cited cases, where it is argued that domestic law does not meet the requirements of certainty or, specifically, that the law has been extended excessively so as to encompass behaviour previously not criminal (per *SW*), the European Court considers closely the evolution of the law. It also has regard to the findings and analysis of the domestic court as to the content of its *own* law (and accords a degree of deference to that judgment). Self-evidently an extradition Court cannot replicate that approach, it does not have the benefit of the analysis and opinion of the *requesting state's* court as to whether *its* law meets the requirements of certainty on the facts of a given case.

75. As regards the correct test to be applied, the House of Lords in *R(Ullah) v Special Adjudicator* [2004] AC 323 (per Lord Steyn at §45 with whom Lord Carswell expressly stated at §67 that he agreed in respect of Articles 2,4,5,7 and 8. Lord Bingham and Baroness Hale agreed generally) indicated that the test of real risk of a *flagrant* violation applied in respect of Article 7.

76. This remains the correct test. In *Arranz v Spanish Judicial Authority* [2013] EWHC 1662 (Admin) where the High Court considered the argument that the *flagrant* breach test did not apply, the PQBD considered it [§38]:

> "…clear that Lord Steyn was laying down the approach the courts should take in cases where Articles of the Convention, including Article 7 were in issue. It would not be consistent with the principles on which this court should operate for us to depart from the guidance expressly given in relation to Article 7."

77. The District Judge did not err in applying the flagrant breach test, she was bound to do so. But (and this was the Respondent's submission at first instance) whether the Court applied the *flagrant* breach test or the lesser threshold, was immaterial. The submission that the Appellant did not know or could not have reasonably foreseen that assisting Ms Manning's criminal activity, going so far as to attempt to crack a password hash, and then disclosing, through the unredacted classified materials, the names of informants to the world at large might be against the criminal law (whether it be law related to the misuse of a computer or the law relating to the disclosure of classified materials) is unarguable.

3. *The flawed premise of the Article 7 appeal*

78. The question of whether a law meets the requirements of certainty is not answered by general assertions that the prosecution of a publisher for the publication of secret materials is *unprecedented*. It is the nature of criminal law that it will be applied in a range of factual circumstances *and that some will be novel* – the question is whether the application of law to the given facts is consistent with the essence of the offence and could reasonably be foreseen. *SW v UK* (1995) 21 EHRR 363 is a case in point. The applicants in that case argued their convictions for rape within marriage were incompatible with Article 7 because, at the time of the commission of those offences the marital rape exception still applied. That argument was rejected in short terms by the European Court on the basis that the evolution of the law had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law [43/41].

79. The Appellant seeks to demonstrate that United States law does not meet the requirements of Article 7 by reference to commentary by a number of individuals who disavowed that they were giving expert evidence in any legal capacity (an exception to this is Mr Jaffer the limits of whose evidence is considered separately below) and some of whom could not be considered expert owing to their association with the Appellant.

80. In other words, the Appellant seeks to establish, in this appeal, that the content of United States law is uncertain not by reference to jurisprudential or textual analysis of Court decisions but rather to what witnesses (a number of whom are non-lawyers and non-experts) say about jurisprudence. The same witnesses are relied upon extensively, in relation to Article 10, to support the contention that what the Appellant did was no more than what is routine for journalists.

81. It is important to note that although submissions were made to the District Judge, and these witnesses were examined as to their lack of independence or lack of qualification, the District Judge did not make findings about whether these witnesses could give expert evidence. The Appellant thus had the benefit of the doubt in this regard. Nonetheless it is important that this Court knows in respect of the witnesses who are relied upon extensively to support these grounds of appeal:

(1) Mr Trevor Timm [relied upon in the PGOA: § § 2.5, 9.8, 9.9, 9.14, 9.16, 9.25, 9.41, 10.18. (ii) iii) iv) 10.28, 10.32 10.51 10.53. 10.55 10.63. 10.62.]:

(2) Co-founded and is the executive director for an organisation "Free the Press Foundation" (which in Mr Timm's words works to preserve and strengthen First Amendment rights) [AEB/T32/P700].

(3) Which organisation provided funding for the Appellant's costs in the extradition proceedings (this funding was approximately $100,000) [transcript at AEB/T42/P1323line 222].

(4) Mr Timm accepted that he had an interest in the outcome of the extradition proceedings [AEB/T42/P1324 lines 18 to 24]

(5) Mr Carey Shenkman: [relied upon in the PGOA: § §9.11, 9.13. (i) (ii) (iii), 9.16, 9.17, 9.18, 9.21, 9.23, 9.26, 9.39. (i) (ii) (iii) (iv) (v) (vi), 9.41. (ii) 10.28, (iii) 10.30, 10.51, 10.53, 10.61. (v), 15.83(iii)]:

(6) Had previously acted for Mr Assange [see Transcript 17 September, AEB/T49/P 1561 line 1. "Q. If we look at the last page, 'Carey Shankman is a first amendment and human rights lawyer and member of Julian Assange's legal team.' Correct? A That is what that by-line says"].

(7) Had published strong opinions on the case to the extent of accusing the UK of arbitrarily detaining the Appellant when he evaded the Swedish extradition proceedings by remaining in the Ecuadorian Embassy [see transcript 17 September AEB/T49/P1561 line 26].

(8) Is not qualified as an expert. He stated in express terms that he was giving evidence as a "*historian*" [see AEB/T49/P1581 line 19].

(9) His description of himself as a "*constitutional historian*" is entirely self-description. He is not even an academic [transcript 17 September AEB/T49/P566,line 26 onwards]: "Q. When you describe yourself as a

constitutional historian, what is the basis of that, Mr Shenkman? A. I mean, the last decade, reading a lot of books and giving a lot of talks and writing a lot of papers that folks are hopefully reading about constitutional issues and also my experience as a constitutional litigator that has happened (inaudible)".

(10) Whilst it may not matter given that Mr Shenkman sought to distance himself from giving expert legal evidence [AEB/T49/P1567 line 4 and 1581/19 (supra)] Mr Shenkman was a lawyer of only six years- experience when he gave evidence.

(11) Professor Feldstein (who is relied upon by the Appellant for the purposes of his political motivation argument but also relied upon in relation to Articles 7 and 10 at PGOA §§9.25; 10.18. (i) (ii) (v) 10.27. (i) 10.31. (i) 10.29. 10.31. (i) 10.49. 10.53. (ii) 10.55. 10.59. (i) 10.60]:

(12) Is not a lawyer – "*That is correct. And I have been careful not to offer a legal interpretation*" [AEB/T39/P1203, line 1]. Professor Feldstein is a Professor of Journalism.

4. ***The extradition of the appellant is compatible with Article 7***

82. It is the repeated mantra of the Appellant that there has never been a prosecution of a publisher under the Espionage Act. Put within the framework of the "void for vagueness" protections under the Fifth Amendment to the US Constitution or Article 7, the Appellant's contention is that it is uncertain whether the Espionage Act could be applied to a publisher for publishing national defence information in circumstances where the publisher is implicated in the criminal acts of the leaker and publishes the names of informants which appear in classified materials.

83. Although the Judge dismissed the Appellant's case on Article 7 having regard to the nature of the allegations he faces and having regard to the analogous protections available to him under the Fifth Amendment to the Constitution, as would be available under the Convention, it is important to note that the United States filed evidence to demonstrate that the Appellant was wrong to suggest that his prosecution for this conduct was unforeseeable rather it is based upon established jurisprudence: [See Kromberg Declaration of 17 January 2020 at CB/T12/P922, §7]:

(1) There is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement

against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

(2) Regardless of whether one considers the Appellant to be a journalist, it is well-settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information. See *Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (noting that the First Amendment does not protect those who "obtain[] … information unlawfully");

(3) *Cohen*, (supra): "The press may not with impunity break and enter an office or dwelling to gather news.");

(4) *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972): Justice White at 691-92 (note that this is, for ease, a fuller citation than the citation in the Declaration at §7):

> "It would be frivolous to assert--and no one does in these cases--that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition "is to U it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends . . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." Toledo Newspaper Co. v. United States, 247 U.S. 402, 419-20, 62 L. Ed. 1186, 38 S. Ct. 560 [(1918)]. *fn18"

(5) *Zemel v. Rusk*, 381 U.S. 1, 17 (1965): observing that the First Amendment "right to speak and publish does not carry with it the unrestrained right to gather information," for example, "the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right".

(6) Numerous people have been charged in the United States for conspiracy to commit computer hacking even though they engaged in that hacking purportedly to obtain newsworthy information or for political purposes. *See, e.g.*, *United*

States v. Liverman, 16-cr-313 (E.D. Va. 2016) (defendant sentenced to five years' imprisonment for conspiring to hack the email account of a former CIA director and causing the hacked materials to be distributed online, among other crimes); *United States v. Hammond*, 12-cr-185 (S.D.N.Y. 2012) (defendant sentenced to ten years' imprisonment for conspiring to hack websites related to U.S. law enforcement and U.S. cybersecurity and intelligence contractors for the stated purpose of exposing alleged corruption, among other crimes).

84. Furthermore as regards publishing the name of those who provide intelligence [Kromberg at CB/T12/P923, §8]:

(1) Distributing the names of individuals who provide intelligence to the United States is not protected speech under the First Amendment. In *Haig v. Agee*, 453 U.S. 280 (1981), the U.S. State Department revoked the passport of Phillip Agee, a former intelligence officer who engaged in a campaign to identify and disclose the identities of CIA agents operating abroad. *Id.* at 283. The Supreme Court found that his speech was "clearly not protected by the Constitution." *Id.* For support, the Supreme Court quoted the well-settled principle that "'[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.'" *Id.* (quoting *Near v. Minnesota*, 283 U.S. 697 (1931)). The Supreme Court added that "[t]he mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law." *Id.* at 309.

(2) The U.S. Court of Appeals for the Fourth Circuit upheld the conviction of a former intelligence officer who willfully caused a reporter to publish information about an intelligence source. See *United States v. Sterling*, 860 F.3d 233 (4th Cir. 2017).

(3) The U.S. Department of Justice's Office of Legal Counsel, which issues authoritative opinions on constitutional questions, has twice determined that proposed legislation (ultimately signed into law as the Intelligence Identities Protection Act, Title 50, United States Code, Section 3121) criminalizing, in certain circumstances, the intentional public disclosure of the names of intelligence agents and sources was consistent with the First Amendment.

(4) Although the Appellant is not charged under the Intelligence Identities Protection Act, the Office of Legal Counsel opinions on this Act are relevant here because they show that the U.S. Department of Justice (along with Congress and the President) has long viewed the intentional outing of intelligence sources as generally outside the protection of the First Amendment.

85. The Appellant advanced various arguments at first instance about the Espionage Act including that it was overly broad or that an individual could be subject to prosecution simply on the basis that material published was classified. Mr Kromberg [3 September 2020 Declaration (not currently included in the Core Bundle) at §§83- 84] explained that neither contention was correct citing, inter alia, *United States v. Rosen*, 445 F. Supp. 2d 602, 620 (E.D. Va. 2006).

86. In *United States v Rosen,* the United States District Court, E.D. Virginia (the same district that will try the Appellant's case) considered the position of two lobbyists who passed information obtained from the Government to the media. It follows that they were not Government leakers but rather individuals to whom materials had been leaked. The case against was described as follows:

> "In general, the superseding indictment alleges that in furtherance of their lobbying activities, defendants (i) cultivated relationships with government officials with access to sensitive U.S. government information, including NDI, (ii) obtained the information from these officials, and (iii) transmitted the information to persons not otherwise entitled to receive it, including members of the media, foreign policy analysts, and officials of a foreign government."

87. *Rosen* (cited by the District Judge at §180) is therefore an example of a ruling that the recipients of government leaks who disclose information "related to the national defense" to those "not entitled to receive it" can be prosecuted under the Espionage Act.

88. The US District Court in *Rosen* considered that the Supreme Court's decision in *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam) was the most relevant case to the question of the ambit of the Espionage Act, despite that the New York Times case was a *prior restraint* case. In the New York Times case, the Supreme Court concluded that there should not be a prior restraint of publication of materials derived from the Pentagon Papers. In *Rosen*, the District Court analysed why the Judgment suggested that a prosecution of the publisher thereafter may have been lawful (emphasis added):

> "There, the Supreme Court, in a brief *per curiam* decision, denied the United States' request for an injunction preventing the New York Times and Washington Post from publishing the contents of a classified historical study of United States policy towards

> Vietnam, known colloquially as the Pentagon Papers, on the ground that the government failed to overcome the heavy presumption against the constitutionality of a prior restraint on speech. *See id.* at 714. The *per curiam* decision was accompanied by six concurring opinions and three dissents, and although the issue was not directly before the Court, a close reading of these opinions indicates that the result may have been different had the government sought to prosecute the newspapers under § 793(e) subsequent to the publication of the Pentagon Papers. Of the six Justices concurring in the result three — Justices Stewart, White and Marshall — explicitly acknowledged the possibility of a prosecution of the newspapers under § 793(e). And, with the exception of Justice Black, whose First Amendment absolutism has never commanded a majority of the Supreme Court, the opinions of the other concurring justices arguably support, or at least do not contradict, the view that the application of § 793(e) to the instant facts would be constitutional. Justice Douglas's rejection of the potential applicability of § 793(e) to that case rested on his view that Congress specifically excluded "publication" from its prohibited acts. *See id.* at 720-22 (Douglas J., concurring). The obvious implication of Justice Douglas' opinion is that the communication — as opposed to publication —of information relating to the national defense could be prosecuted under § 793(e). Likewise, while Justice Brennan did not specifically address the espionage statutes, his concurrence was based on the heavy presumption against the constitutionality of prior restraints. *See id.* at 725-27 (Brennan, J., concurring). Thus, among the concurring justices, only Justice Black seemed to favor a categorical rule preventing the government from enjoining the publication of information to the detriment of the nation's security, and even he relied on the absence of congressional authority as a basis for denying the requested injunction. *See id.* at 718 (Black, J., concurring). Furthermore, while the dissenting justices chiefly objected to the feverish manner of the Supreme Court's review of the case, a survey of their opinions indicates the likelihood that they would have upheld a criminal prosecution of the newspapers as well. *See id.* at 752, 91 S.Ct. 2140 (Burger, C.J., dissenting 757 (Harlan, J., dissenting); *id.* at 761, 91 S.Ct. 2140 (Blackmun, J., dissenting). Thus, the Supreme Court's discussion of § 793(e) in the Pentagon Papers case supports the conclusion that § 793(e) does not offend the constitution."

89. Importantly, the District Court in *Rosen* also indicated that this part of the Supreme Court's judgment was binding upon it:

> "While the Supreme Court's discussion of the application of § 793(e) to the newspapers is clearly *dicta,* lower courts "are bound by the Supreme Court's considered *dicta* almost as firmly as by the Court's outright holdings, particularly when, as here, a *dictum* is of recent vintage and not enfeebled by any subsequent statement." *McCoy v. Massachusetts Institute of Technology,* 950 F.2d 13, 19 (1st Cir. 1991); *see also Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996); *Reich v. Continental Gas Co.,* 33 F.3d 754, 757 (7th Cir. 1994); *United States v. Bell,* 524 F.2d 202, 206 (2d Cir. 1975); *Fouts v. Maryland Casualty Co.,* 30 F.2d 357, 359 (4th Cir. 1929). 94 In sum, Congress's attempt to provide for the nation's security by extending punishment for the disclosure of national security secrets beyond the first category of persons within its trust to the general populace is a reasonable, and therefore constitutional exercise of its power.."

90. Mr Jaffer in his report on behalf of the Appellant conceded that there was nothing in the Espionage Act which precluded its application to publishers [§8]. At §23 [AB/417] his opinion was limited to the view that the US courts had not fully resolved the scope of the protection that the First Amendment provides to those who publish classified information without government authorisation. He accepted that whilst it was held in *Bartnicki v Vopper* (cited above) that "A stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" that it was important to the Court's reasoning that the broadcaster had not been "involved in the initial illegality". [§24]

91. This caselaw is set out simply to demonstrate that behind the District Judge's ruling, witnesses were examined and evidence was given, to demonstrate that the mantra, that *the Appellant's prosecution is unprecedented* did not reflect (asides the points made by Mr Kromberg about the well- established principles which apply in relation to the commission of criminal offences and the publication of source's names) the sort of mature jurisprudential consideration which has been given to the principles which underpin this prosecution.

92. None of this was apparent from the evidence which the Appellant sought to call from non-lawyers about the Espionage Act. Nor did they, for example, reflect that the Espionage Act had additionally been subject to refinement by a process of judicial interpretation. This is considered below.

5. ***Constitutional protections prevent risk of a breach of Article 7***

93. Separately, and a complete answer to whether there is any risk that the Appellant's extradition might be incompatible with Article 7, is the United States Constitution. The District Judge was correct to conclude that the Appellant is not at risk of being prosecuted on the basis of an arbitrarily uncertain criminal law because he is protected by the "void for vagueness" protections under the Fifth Amendment to the US Constitution.

94. Mr Kromberg affirmed this [Kromberg Declaration 17 January 2020 at CB/T12/P946, §69]. The nature of this protection is to the same effect as Article 7: "*A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement*". He also affirmed the ways in which the Appellant could rely upon the Fifth Amendment [§70].

95. Mr Kromberg provided evidence as to the nature of the protection and how the Appellant could rely upon it. The caselaw he referred to and which was before the District Judge demonstrated how the constitutional protection against vagueness had been expressly considered in the context of prosecutions brought under the Espionage Act, 18 U.S.C. Sec. 793(d) and (e). The District Judge referred to and relied upon *United States v Morison*, 844 F.2d 1057 in this regard [see her Judgment at CB/T2/P89 §254 and §256]. *Morison* [§§35- 36] provides:

> "While admittedly vagueness and overbreadth are related constitutional concepts, they are separate and distinct doctrines, subject in application to different standards and intended to achieve different purposes. The vagueness doctrine is rooted in due process principles and is basically directed at lack of sufficient clarity and precision in the statute; overbreadth, on the other hand, would invalidate a statute when it "infringe[s] on expression to a degree greater than justified by the legitimate governmental need" which is the valid purpose of the statute. Because of the differences in the two concepts, we discuss them separately in disposing of the defendant's argument, beginning with the defendant's claim of vagueness in sections 793(d) and (e) as applied to him.
>
> It has been repeatedly stated that a statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Construction Co., supra, 269 U.S. at 391, 46 S.Ct. at 127; Smith v. Goquen, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1246-47, 39 L.Ed.2d 605 (1974); Parker v. Levy, 417 U.S. 733, 752, 94 S.Ct. 2547, 2559, 41 L.Ed.2d 439 (1974). It is sufficient, though, to satisfy requirements of "reasonable certainty," that while "the prohibitions [of a statute] may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest ... [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." Arnett v. Kennedy, 416 U.S. 134, 159, 94 S.Ct. 1633, 1647, 40 L.Ed.2d 15 (1974). And, in any event, it is settled beyond controversy that if one is not of the rare "entrapped" innocents but one to whom the statute clearly applies, irrespective of any claims of vagueness, he has no standing to challenge successfully the statute under which he is charged for vagueness. Parker v. Levy, supra, 417 U.S. at 756, 94 S.Ct. at 2561. Finally, the statute must be read in its entirety and all vagueness may be corrected by judicial construction which narrows the sweep of the statute within the range of reasonable certainty."

96. Thus, as confirmed by Gordon Kromberg [3 September 2020 Declaration at §§83- 84 , not currently in the core bundle] by a process of judicial refinement, the United States must prove a number of elements related to what constitutes national defense information (the fact that it is classified is not sufficient):

> "83. Clarification of the law in the United States regarding the definition of information relating to "the national defense", under Section 793 of Title 18 of the United States Code, may assist the Court. Case law in the United States establishes that, to be national

defense information, the documents at issue must satisfy three criteria. First, the documents must generally relate to military matters or related activities of national preparedness. See Gorin v. United States, 312 U.S. 19, 28 (1941); United States v. Rosen, 445 F. Supp. 2d 602, 620 (E.D. Va. 2006) ("[T]he phrase 'information relating to the national defense' has consistently been construed broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities."). Second, the information must be "closely held" by the U.S. government. See United States v. Squillacote, 221 F.3d 542, 579 (4th Cir. 2000)("[I]nformation made public by the government as well as information never protected by the government is not national defense information."); United States v. Morison, 844 F.2d 1057, 1071-72 (4th Cir. 1988). Third, disclosure of the documents must be potentially damaging to the United States or potentially useful to an enemy of the United States. See Morison, 844 F.2d at 1071-72 (approving jury instruction that the prosecution must prove that the information "would be potentially damaging to the United States or might be useful to an enemy of the United States.").

97. Mr Kromberg also cited the approval given by the Court of Appeals in *Morison* to the *limiting* jury directions given in that case as authority for the third requirement that the prosecution must prove not, that the material is classified, but that its disclosure is potentially damaging. The Court in *Morison* explained the importance of this condition as follows (emphasis added):

> "The notice requirement insures that speakers will not be stifled by the fear they might commit a violation of which they could not have known. The district court's limiting instructions properly confine prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government. Without undertaking the detailed examination of the government's interest in secrecy that would be required for a traditional balancing analysis, the strictures of these limiting instructions confine prosecution to cases of serious consequence to our national security."

98. The fact that the United States Constitution affords the Appellant the right to protection against a prosecution which amounts to the unforeseeable application of law to him; that it has been confirmed that the Appellant could seek to rely upon those rights in a variety of ways to challenge the basis of his prosecution and that caselaw demonstrates how those rights can be relied upon in prosecutions under the Espionage Act, 18 U.S.C. Sec (including, for example, by the provision of limiting directions to the jury), the District Judge was wholly entitled to find that there was not a real risk that the Appellant's extradition would be incompatible with Article 7.

99. Moreover, the thrust of the Appellant's evidence was to attack the bringing of the prosecution. No evidence was adduced to suggest that the United States court would unfairly deprive the Appellant of his Fifth Amendment rights.

100. The High Court has taken the same approach in other cases where a Convention right has an analogue in a constitutional protection:

(1) *R (Bermingham and others) v Director of the Serious Fraud Office; Bermingham and others v Government of the United States of America* [2006] EWHC 200 (Admin), [2007] QB 727: §110. No less important is the US's constitutional guarantee of fair trial. The Sixth Amendment provides:[…..]. The content is strikingly similar to that of article 6 of the ECHR. It would be frankly grotesque for this court to hold, on the strength of testimony which the district judge concluded was parti pris, that this fundamental constitutional right would be more honoured in the breach than the observance at any trial of the defendants in Houston. There is a right to legal representation, to apply for bail, and to seek a change of venue. The defendants have already had much time to prepare their defences, having been aware of their predicament since November 2001. Jurors are vetted for bias in a voire dire process. There is no suggestion that the judge would be other than impartial……"

(2) *Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America* [2007] HRLR 8 95. "… As is well known the United States Constitution vouchsafes a guarantee of fair trial whose terms, as I observed in Bermingham (paragraph 110), are strikingly similar to those of ECHR Article 6. The Sixth Amendment provides […..]This does not expressly protect lawyer/client privilege, but it must be inherent in the measure. In any event recent authority of the Supreme Court … affirms its importance …".

(3) *Babar Ahmad v United Kingdom* (Partial Admissibility Decision, 6 July 2010) App. Nos. 24027/07, 11949/08 and 36742/08 [§129]): "But, as the High Court observed, <u>art.6</u> and the Eighth Amendment to the Constitution of the United States are strikingly similar. There is every reason to believe that the trial judges in the applicants' trials would ensure proper respect for their rights under the Eighth Amendment…."

101. Cutting through this and returning to the District Judge's ruling, she was entitled to conclude that the Appellant's extradition would not be incompatible with his Article 7 rights. Ground of Appeal 2 is unarguable.

V. GROUND 3: ARTICLE 10

102. The Appellant's submissions on Article 10 are also founded upon repetition of the same point that the prosecution is unprecedented and encompasses "ordinary journalism" [§10.16 of the Perfected Grounds of Appeal ("…*this legally unprecedented prosecution seeks to criminalise the application of ordinary journalistic practices of obtaining and publishing true (and classified) information of the most obvious and important public interest*)]. For all of the reasons set out above, this is a false premise.

103. Moreover, the PGOA are a re-litigation of the points that the District Judge rejected: that what the Appellant is accused of represents routine newsgathering [crystallising at PGOA §10.18]; that routine journalism would be criminal under the Government's "*novel theory*" of liability [PGOA §10.27] and that the Appellant's conduct is merely that of "assisting a whistle- blower" [see in particular the perfected grounds at § 10.27]. The Appellant also submits [PGOA §§10.21- 10.22] that defence witnesses rejected the United States "*theories*" behind the way that the charges against the Appellant have been drafted.

104. In terms of the grounds of appeal, the principal arguments on behalf of the Appellant may be summarised as follows:

    (1) That the District Judge concluded that mere encouragement of a "whistle-blower" ought to be criminal (and not protected by the freedom of expression) and that this conclusion was a plain legal error [PGOA §10.40]

    (2) Nothing in *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247 supports the conclusion that the "mere" encouragement of "whistle-blower" is capable of being criminalised consistently with Article 10 [PGOA §10.45]

    (3) That it is 'conspicuous and striking' that the requesting state had not been able to offer a single United States or United Kingdom or European authority which purported to criminalise the act of "whistle- blowing". According to the Appellant this is because "such conduct" is protected by the first Amendment / Article 10 [PGOA §10.47].

(4) In relation to the allegation that the Appellant, in agreement with Ms Manning, attempted to crack a password hash, the Appellant submits that the District Judge was in error in describing this as an attempted 'hacking' so to 'obtain protected material' because this was no more than an attempt to protect a whistle blower [PGOA §§10.51- 10.53].

(5) That protecting a whistle blower is protected by Article 10.

(6) Insofar as the Appellant is alleged to have published the classified material in an unredacted form (thus putting individuals at risk), this is protected by Article 10 / the First Amendment [PGOA §10.61]

(7) That the District Judge erred in her assessment that it would not be incompatible with Article 10 to extradite the accused because:

(8) She relied upon the White Paper which preceded the Official Secrets Act 1989 so as to conclude that a publisher could be prosecuted under the Act [PGOA §10.70].

(9) She was wrong to rely upon the cases of *Stoll v Switzerland* (2008) 47 EHRR 59 and *Gîrleanu v Romania* 2019) 68 E.H.R.R. 19.

(10) The District Judge erred in concluding that *Shayler* is determinative of whether Article 10 is available as a defence to an Official Secrets Act 1989 prosecution.

(11) That the Law Commission observed in its 2020 report that there was a real possibility that the Shayler case would be decided differently today [PGOA §10.75].

(12) That the District Judge erred insofar as she distinguished between the Appellant and the "traditional press" in her analysis of Article 10 [PGOA §10.76].

105. A new argument is also advanced on behalf of the Appellant, that his extradition would be incompatible with Article 10 because he might, if convicted, be sentenced to a lengthy period of imprisonment. This submissions rests upon the same submissions advanced later in the Grounds of Appeal, by the Appellant, that any sentence he receives will be grossly disproportionate (a contention which is not accepted on behalf of the United States) [PGOA §§10.78 and 10.83].

106. Finally [at PGOA §10.84], the Appellant elides the submissions which (impermissibly) seek to challenge the case which the Appellant faces in the United States with submissions on Article 10, to submit that the District Judge "misunderstood and mischaracterised"

what is protected journalistic activity and failed to undertake the correct balancing exercise required by Article 10.

107. This Ground of Appeal is unarguable for reasons which may be summarised as follows:

(1) The only issue at stake is whether it would be incompatible with the Appellant's rights to freedom of expression to extradite him so that he might face trial for the offences of which he is accused.

(2) To the extent that the Appellant argues that the act of extradition would expose him to a breach of his Article 10 rights because he was merely assisting a whistle blower or acting as any journalist might (again) rests upon a mischaracterisation of the basis upon which the Appellant is being prosecuted.

(3) The Judgment at first instance was an emphatic rejection of the contention that the Appellant's actions could be characterised as merely protecting a whistle blower or as routine journalism.

(4) That is sufficient to dispose of this appeal but given the District Judge's findings that the Appellant is being prosecuted for his complicity in the theft of the sensitive material from the United States and for the unredacted publication of that material, there is a real issue as to whether his extradition engages Article 10 <u>at all</u>.

(5) But, if his Article 10 rights are engaged (and the District Judge proceeded on the basis that they were), the issue is whether his extradition would constitute a flagrant breach (or amount to the nullification) of his Article 10 rights.

(6) The answer to this is straightforwardly no having regard to the nature of the allegations and given that the Appellant would not be able to rely upon Article 10 (or on a public interest defence) in proceedings under the Official Secrets Act 1989, in analogous circumstances. *R v Shayler* is binding authority that it is not open to an individual prosecuted under sections 1(1)(a); 4(1) and (3)(a) of the Official Secrets Act to defend the disclosure, in a given case, on grounds of public or national interest. Sections 1 and 4 and of the 1989 Act come within the qualification in article 10(2) as a justified interference with the right to freedom of expression guaranteed by Article 10 and are not incompatible with Article 10.

108. <u>In any event</u>, on facts of this case, it is fanciful to suggest that any prosecution of the Appellant, in this jurisdiction, would be incompatible with Article 10 absent a public interest defence (*a fortiori* that his extradition would be incompatible with those rights).

109. It is therefore unarguable that the District Judge was wrong to conclude that the Appellant's extradition was not barred by reason of his Convention rights.

A. Article 10 in the context of extradition

110. The successful invocation of Article 10 rights in the extradition context does require the satisfaction of the stringent test. Where qualified rights, are concerned, it is necessary to show that there would be a *flagrant* denial or gross violation of the right, so that it would be completely denied or nullified in the destination country; see *Ullah* [2004] 2 AC 323 at 24; paragraph 37 of Norris by Lord Phillips.

111. To the extent that §§10.17-10.18 of the PGOA demonstrate that Ground 3 is premised upon the same submissions that all journalists cultivate sources and may solicit national security information from them and that what the Appellant is alleged to have done is no more than "ordinary journalistic practice", this simply does not answer the point (set out in detail above) that, as a matter of United States law, confirmed at the highest level, it is "frivolous" to assert-and "no one does in these cases" that journalists have immunity from the operation of criminal law or are otherwise licenced to commit crime; the Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), citing *Branzburg v. Hayes* [supra]. As set out below, the basic point, that journalists do not have immunity from the operation of criminal law, is also the position as a matter of Convention law.

112. Moreover, the submission that the Appellant is in an analogous position to any journalist engaged in news gathering is wholly unrealistic (as the indictment against him attests to). But that indictment must also be considered as a whole because it demonstrates not only that the Appellant was not operating like any journalist, Wikileaks did not operate like a newspaper or analogous publisher. The indictment sets out that part of the allegations that the Appellant faces is that Wikileaks was operated, and that the Appellant personally encouraged, not the mere provision of national security information but *hacking* in order to *inter alia* provide stolen information, including classified national defence information [See additionally Kromberg §14 in the Affidavit in support of the second superseding indictment CB/T12/P793]:

> "ASSANGE, however, did not just conspire with Manning to steal and disclose classified information. The evidence shows that, from the time ASSANGE started WikiLeaks, he and others at WikiLeaks sought to recruit individuals with access to classified information to unlawfully disclose such information to WikiLeaks, and sought to recruit - - and worked with -hackers to conduct malicious computer attacks for purposes of benefiting WikiLeaks."

113. In summary:

(1) **First**: as regards, the Appellant's role in obtaining classified materials, the request explains that this went far beyond the mere setting up of a dropbox or other means of depositing classified materials. The indictment makes plain, Wikileaks and Assange sought to encourage *theft* and *hacking* that would benefit Wikileaks by recruiting and working with individuals with access to classified information or the ability to conduct malicious computer attacks. Thus, in *general* terms: The Appellant encouraged sources to:

   a. circumvent legal safeguards on information;
   b. provide that information to Wikileaks for public dissemination and;
   c. continue the pattern of illegally procuring and providing protected information to Wikileaks for distribution to the public [Dwyer in the original affidavit in support of extradition at §11].

(2) **Second**: as regards the Appellant's complicity in criminality, in specific terms (related to Manning):

   i. Manning responded to the Appellant's solicitation of classified materials [Dwyer at CB/T12/P833, §19].
   ii. Throughout the period of time that Manning was providing information to Wikileaks, Manning was in direct contact with the Appellant who encouraged Manning to steal classified documents and to provide them to Wikileaks [Dwyer CB/T12/PP835 and 837, §§24 and 31].
   iii. In furtherance of this the Appellant agreed to assist Manning in cracking an encrypted password hash stored on US Department of Defense computers. [Dwyer CB/T12/PP835-6, §§25 and 28].
   iv. Following direction and encouragement from the Appellant, Manning continued to steal documents from the US [Dwyer at CB/T12/PP835-6, §§25 and 28].

(3) **Third**: as regards the disclosure of the names of sources, in specific terms:

   i. The only instances in which the Appellant is charged with the distribution of classified material to the public is "explicitly limited" to his publication of documents classified up to the secret level containing the names of individuals in Afghanistan, Iraq and elsewhere around the world, who risked their safety and freedom by providing information to the United States and its allies [Dwyer at CB/T12/P833, §20].

(4) **Fourth**: as regards Assange's complicity in criminality, in specific terms (related to computer hacking by individuals other than Manning):

i. the Appellant sought to recruit and worked with other hackers to conduct malicious computer attacks for the purpose of benefiting Wikileaks. [Kromberg declaration in support of the second superseding indictment CB/T12/P793, §14,]. The Appellant sought out and worked with other hackers to unlawfully obtain information [for example CB/T12/PP797/805/806 §§24/ 55/ 56].

114. The District Judge accepted that this was the basis upon which the Appellant was being prosecuted including that:

(1) "However, in my judgment, Mr. Assange's alleged activities went beyond the mere encouragement of a whistle-blower". [Judgment at CB/T2/P41, §96].

(2) "If the allegations are proved, then his agreement with Ms. Manning and his agreements with these groups of computer hackers took him outside any role of investigative journalism. He was acting to further the overall objective of WikiLeaks to obtain protected information, by hacking if necessary". [Judgment at CB/T2/P43, §102].

(3) "However, this effort to decipher code did not protect Ms. Manning from exposure as the source of information already provided to WikiLeaks. It sought to enable her to avoid detection for unauthorised access to an account she had not yet achieved". [Judgment at CB/T2/P44, §103].

(4) "If Mr. Assange had successfully cracked the password hash to the FTP account, it is alleged, Ms. Manning could have used the account for her on-going theft of information, and investigators might not have been able to attribute the theft to her". [Judgment at CB/T2/P44, §104].

(5) "In this case, Mr. Assange chose to disclose documents which contained the unredacted names of informants. This falls squarely within the sort of information that Lord Bingham identified as needing to remain secret and confidential, namely the identity of those upon whom the service relies as sources of information, who need to feel able to rely on their identity remaining secret." [Judgment at CB/T2/P52, §130].

(6) "The defence submits that, by disclosing Ms. Manning's materials, Mr. Assange was acting within the parameters of responsible journalism. The difficulty with

this argument is that it vests in Mr. Assange the right to make the decision to sacrifice the safety of these few individuals, knowing nothing of their circumstances or the dangers they faced, in the name of free speech. …. In the modern era, where "dumps" of vast amounts of data onto the internet can be carried out by almost anyone, it is difficult to see how a concept of "responsible journalism" can sensibly be applied." [Judgment at CB/T2/P53, §131].

(7) "Free speech does not comprise a 'trump card' even where matters of serious public concern are disclosed (see Stoll above), and it does not provide an unfettered right for some, like Mr. Assange, to decide the fate of others, on the basis of their partially informed assessment of the risks" [Judgment at CB/T2/P54, §135].

B. Article 10 does not confer immunity from criminal law

115. Setting to one side the height of hurdle which the *flagrant* breach test imports to the extradition context, even as a matter of Convention law, Article 10 is a qualified right and the only Convention right to specify that it carries with it duties and responsibilities (per Article 10 (2)):

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

116. The position as a matter of Convention law is thus akin to United Stated law. Journalists do not have immunity from the operation of criminal law. Under Article 10, two of the issues that are relevant when it comes to determining, ex post facto, whether it was reasonably proportionate to prosecute a journalist for the sharing or publication of confidential material is (i) whether the journalist was engaged in responsible journalism and (ii) whether the journalist was a party to illegality; see *Gîrleanu v Romania* 2019) 68 E.H.R.R. 19 at [§84] and [§91]:

> "[84] However, the protection afforded by art.10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of art.10

of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.

[91]. The Court further notes that the applicant did not obtain the information in question by unlawful means and the investigation failed to prove that he had actively sought to obtain such information. It must also be noted that the information in question had already been seen by other people before the applicant."

117. Journalists are also bound to abide by criminal law: *Stoll v Switzerland* (2008) 47 EHRR 59 [102]:

> "The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49 *in fine*, Series A no. 24). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III, and *Monnat v. Switzerland*, no. 73604/01, § 66,ECHR 2006-X).

118. In other words, a journalist cannot claim exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression the offence in question was committed during the performance of his or her journalistic functions: *Doryforiki Tileorasi Anonymi Etairia v. Greece* [2018] ECHR 187 [§61].

119. The District Judge correctly applied these authorities [see Judgment at CB/T2/P47 and 51, §§127 and 115].

120. The District Judge rejected the contention that the Appellant's prosecution amounted to the criminalisation of newsgathering [see §116 of her Judgment, CB/T2/P47] having regard to *Brambilla and others v. Italy* (application 33567/09, 23rd June 2016). She was correct to do so. The journalists in that case had intercepted carabinieri radio communications in order to obtain information on crime scenes for the purposes of reporting. The European Court relied upon *Stoll* [supra] and observed that "the concept of responsible journalism is not confined to the contents of the information which is

collected, and/or disseminated by journalistic means. It also embraces, *inter alia,* the lawfulness of the journalists' conduct…" [§53],

121. Put shortly, neither United States law nor Article 10 confer licence upon a journalist or a publisher to break the law. To the contrary, Article 10 protects *responsible* and *lawful* journalism or publication. The allegations against the accused (as the District Judge found) are brought on the clear and explicit basis that the Appellant's conduct (and the role of Wikileaks) does not fall within the ambit of the journalism which Article 10 protects. See too the Judge's findings in this regard including:

(1) First, Wikileaks' very design and purpose was to encourage illegality, not just by the theft of information (including classified, national defence information) but also by hacking into protected systems in order to obtain such information or engaging in malicious computer attacks intended to benefit Wikileaks. [District Judge Judgment at CB/T2/P42, §97]

(2) The Appellant personally sought to encourage the provision of material by hacking (even going so far as to exhort individuals to join the CIA so as to provide material). [District Judge Judgment at CB/T2/P43, §101]

(3) In the case of Manning, the Appellant solicited the mass and indiscriminate theft of material. [see for example the District Judge Judgment at §132, CB/T2/P53, referring to the Appellant's final, indiscriminate disclosure of all of the data]

(4) In the case of Manning, the Appellant sought to assist her to crack the encrypted password hash so as to be able to break into Government computers under a different identity. [District Judge Judgment at CB/T2/PP43-4, §§102- 104].

(5) The Appellant, unlike the media outlets like the New York Times to whom he entrusted classified material, published it wholesale with the names of individuals who had given information to the United States unredacted (thus putting them at risk of harm). [District Judge Judgment at CB/T2/P53, §132]

(6) The Appellant knew that by his actions (in publishing the materials unredacted) he was putting people at risk of harm [see for example CB/T2/P18 and 54,§§22 and 136]

122. It suffices to note that none of the examples cited by the Appellant as demonstrating routine journalism involve the encouragement by media outlets of individuals to actively undermine the operation of Government agencies by hacking or by joining them in order to be able to provide classified / national defence information.

123. To the extent that the Appellant continues to rely heavily upon the evidence of commentators or free speech activists like Mr Timm to support the contention, that the District Judge erred in not accepting that journalists routinely engage in illegal activity,

two points noted above, in relation to Article 7, are repeated. First, Mr Timm does not decide the law (nor is he capable of giving expert evidence as to the content of law). Second, Mr Timm (as set out above) is the head of the Free the Press Foundation which contributed $100,000 to the Appellant's costs in these extradition proceedings.

124. Put shortly, it is plain and obvious, as the District Judge found, that news outlets like the New York Times are not instituted for the purposes of encouraging illegality and do not involve themselves in the sorts of criminal conduct alleged against the Appellant (like attempting to crack an encrypted password hash or conspiring with hackers to engage in computer intrusions). Unsurprisingly the Appellant's witness Professor Feldstein agreed this:

(1) It is 'well settled' that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information; see transcript of 8 September 2020 ([line 26: *You are a professor of journalism; do you agree with those words "it , is well settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information"? A. Yes, I agree*. And (at line 33): Q. *…..Is a journalist entitled to hack into computers to get newsworthy material for political purposes? A. No.* [AEB/T39/PP1213-1214].

(2) The materials should not have been published by the Appellant unredacted [8 September transcript AEB/T39/PP1215 to 1216 (lines 34 and 1), and AEB/T39/P1217 line 1].

(3) A responsible journalist would not publish the unredacted name of an informant, knowing that might put him in deadly danger and when it was unnecessary to do so for the purposes of the story [AEB/T39/P1217, line 11].

125. The US Department of Justice also made clear that the prosecution of the Appellant was brought on the express basis that the Appellant's conduct was not journalistic:

> "…The department takes seriously the role of journalists in our democracy …and it is not and has never been the Department's policy to target them for their reporting. Julian Assange is no journalist…. Indeed no responsible actor- journalist or otherwise – would purposely publish the names of publish the names of individuals he or she knew to be confidential human sources in war zones, exposing them to the gravest of danger."
>
> [cited by the District Judge at CB/T2/P68, §175(d)]:

126. Put shortly – the allegations against the Appellant are put squarely on the basis that he is "no journalist". The contention that the Appellant's alleged agreement to assist Manning to crack an encrypted password hash is not criminal because it was to protect Manning's identity is (i) not how the allegation is put in the United States and (ii) not sustainable (and the District Judge agreed that it could not possibly be characterised as such [Judgment at CB/T2/PP43-4, §§102- 104]). Put simply, there is an obvious difference

between a journalist who seeks to protect a source's identity (for example after they have provided information) and an attempt to gain unauthorised access to a computer to facilitate the insider acquiring and conveying (because their true identity is unknown) sensitive information. It is unarguable that the District Judge erred in her treatment of the allegations against the accused or in her finding that this was not journalism which fell within the ambit of protected speech for the purposes of Article 10.

1. ***No breach of Article 10 rights if prosecuted in the UK***

127. The District Judge's wholesale rejection of the Appellant's case that his conduct was routine journalism or protecting a whistle blower, raises the question as to whether, on those findings, the Appellant's rights to freedom of expression are even engaged in these proceedings. But assuming that they are (and the District Judge appears to have approached the Appellant's case on the basis that his Article 10 rights were engaged), a further, insuperable hurdle the Appellant faces is that he could not rely upon Article 10 as a defence in an analogous prosecution under the Official Secrets Act 1989 (given that there is no defence of justification nor any defence of acting in the public interest available under that Act).

2. ***Proportionality***

128. Where the English courts have considered how Article 10 intersects with offences which are directed at free speech, the consistent approach has been to look at the offence created by the criminal provision in question and to ask whether that *offence* is proportionate to the aim of the legislation. The issue is not whether prosecution or conviction in a given case is incompatible with Article 10.

129. In short, Article 10 cannot, in domestic proceedings be relied upon, (i) in an ad hoc way, as a defence, dependent upon the facts of a given case; (ii) in order to halt a prosecution properly brought and in respect of which there is sufficient evidence to put to a jury or (iii) to found a submission that a conviction based upon such a provision is incompatible with Article 10:

(1) The general approach, in domestic law, where it is recognised that an offence may interfere with Article 10, is thus directed at an overview of the provision itself; *Attorney General's Reference* (No 4 of 2002) [2005] 1 AC 264, Lord Bingham of Cornhill, with whom Lord Steyn and Lord Phillips of Worth Matravers MR at 54.

(2) In *R. v Choudary* [2018] 1 W.L.R. 695, (an appeal of a preliminary ruling whereby the defendants sought to challenge whether the trial judge's interpretation of the offence of inviting support for a proscribed organisation, contrary to section 12(1) of the Terrorism Act 2000 accorded with Article 10), the Court of Appeal ruled that the question was not whether the prosecution was compatible with Article 10 but the narrower question of whether the *provision* (under which the prosecution was brought) comported with Article 10. The Court of Appeal accepted that the prosecution engaged article 10 of the Convention, to the extent that it limited the right of an individual to express himself in a way that amounted to an invitation of support for a proscribed organisation. It also accepted that article 10 was engaged on the facts of the case. The Court's approach was to determine whether the provision met the requirements of proportionality [Sharp LJ at §66].

(3) The same approach was taken in *Pwr and Others v Director of Public Prosecutions* [2020] 2 Cr. App. R. 11 whereby the High Court rejected an argument (on a case stated) that the Crown Court was required by s.3 of the Human Rights Act 1998 to construe section 13 of the Terrorism Act 2000 in a manner consistent with Article 10. The Court also rejected the argument that because the offence was one of strict liability, it was incompatible with art.10 (because it permitted conviction of a serious offence without knowing illegality). The issue was whether the *offence* created by the provision was justified. The Court of Appeal was satisfied that the s.13 offence was compatible with Article 10.

(4) Upon appeal to the Supreme Court (*PWR v Director of Public Prosecutions Akdogan and another v Director of Public Prosecutions* [2022] UKSC 2), the Supreme Court (Lady Arden, Lord Hamblen and Lord Burrows: (with whom Lord Lloyd-Jones and Lady Rose agreed) agreed with this approach and endorsed the approach taken in *Choudary* (supra). The Supreme Court concluded [§79] on the question of whether the section 13 offence was compatible with Article 10: "*We therefore agree with the conclusion of the Divisional Court in this case on Issue 2 essentially for the reasons given by Holroyde LJ. As he said in summary, at para 73: "the* section 13 *offence is compatible with* article 10 . *It imposes a restriction on freedom of expression which is required by law; is necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights of others; and is proportionate to the public interest in combating terrorist organisations."*

(5) Nor has the Court of Appeal accepted that there is any ability to make a submission that a prosecution is incompatible with Article 10 once evidence has been called or post conviction. Both points were rejected in *R. v Choudary* (Anjem)(No.2) [2017] 4 W.L.R 204 (the applications for permission to appeal post- conviction) [§27] "*….We would emphasise that consistent with the Court of Appeal's ruling, there is no room, or jurisdiction, to be more precise, for a judge to decide that although there is sufficient evidence on which a jury, properly directed, could convict of an offence contrary to section 12(1)(a), the*

prosecution should be halted, because on the judge's assessment of the facts, a conviction would be a disproportionate interference with a defendant's right to freedom of expression. This would be to go behind the decision of the Court of Appeal."

(6) The Court of Appeal also rejected an argument that post- conviction, a defendant could still argue that his prosecution none the less violated articles 9 and 10 of the Convention (and sections 3 and 6 of the Human Rights Act 1998):

> "*The Court of Appeal did not simply decide that section 12 may consistently with article 10 of the Convention, criminalise invitations of support for proscribed organisations, even if they do not incite or are not liable to incite violence. The Court of Appeal decided by reference to the judge's broader interpretation of inviting support, that section 12 was compatible with articles 9 and 10 of the Convention: see further, R v Choudary and Rahman at paras 61–90. The jury in this case were properly directed on the law. If the jury concluded that as a matter of fact the defendant whose case they were considering, had knowingly invited support for ISIS, then he was guilty of an offence contrary to section 12(1)(a) of the 2000 Act. There was no room in those circumstances for a freestanding argument that such a conviction was none the less incompatible with articles 9 or 10 of the Convention.*"

130. In summary, as a matter of English law, the Appellant would not be able to argue that, on the facts of his case, his prosecution was incompatible with Article 10. Nor would he able to raise Article 10 or public interest as a defence, on the facts of his case. The focus of the Court would be on the proportionality of the legal provisions at stake.

3. ***This approach has been applied to the Official Secrets Act 1989***

131. This approach has been applied in the context of the Official Secrets Act in terms which are directly relevant to this case. In *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247, it had been ruled as a preliminary matter that that no public interest defence was open to a defendant in a prosecution pursuant to sections 1 and 4 of the Official Secrets Act 1989 and that the absence of such a defence was not incompatible with Article 10.

132. The House of Lords went on to hold that the absence of a public interest defence was not incompatible with Article 10, Lord Bingham at [§23]:

> "In the present case there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression. There can equally be no doubt but that the restriction was directed to objectives specified in article 10(2) as quoted above. …"

133. As regards the aims pursued, Lord Bingham pointed to the overarching requirements of national security (emphasis added):

> "There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 , 118C, 213H– 214B, 259A, 265F; Attorney General v Blake [2001] 1 AC 268 , 287D–F. In the Guardian Newspapers Ltd (No. 2) case, at p 269E–G, Lord Griffiths expressed the accepted rule very pithily:
>
> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

134. Lord Bingham also pointed [at §27] to there being no absolute ban on disclosure insofar as a former Crown servant could also, make disclosure to a Crown servant for the purposes of his functions as such or make a disclosure to the staff counsellor (thus seeking authority to make a wider disclosure). The House of Lords also pointed to the obvious fact that authorisation was unlikely to be given where it would be liable to disclose the identity of agents or compromise the security of informers [§30]:

> "If the information or document in question were liable to disclose the identity of agents or compromise the security of informers, one would not expect authorisation to be given. If, on the other hand, the document or information revealed matters which, however, scandalous or embarrassing, would not damage any security or intelligence interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate."

135. The House of Lords was thus satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the convention.

136. In these extradition proceedings, the requesting state identified that the Appellant's conduct would amount to offences including aiding and abetting an offence under Section 1 of the 1989 Act or conspiracy to commit it. It has also been identified as constituting an offence pursuant to section 5 of the Official Secrets Act.

137. Section 5 of the Official Secrets Act (*Information resulting from unauthorised disclosures or entrusted in confidence*) expressly applies to individuals who are not the original leaker of the information. In other words, it applies to individuals who disclose materials which are protected from disclosure under section 1-3 of the Official Secrets Act 1989. It applies to those who are provided with materials by those to whom sections 1-3 apply, per section 5(3):

> (3) In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—
>
> (a) the disclosure by him is damaging; and
>
> (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging; and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

138. As noted above, the request sets out in detail not just the damaging nature of the disclosures but also that the Appellant knew that the dissemination of the names of individuals endangered them [see Dywer at CB/T12/PP844-5, §44].

139. The rationale for the section 5 offence is set out in the White Paper which underpinned the 1989 Act (Reform of Section 2 of the Official Secrets Act 1911 (1988) Cm 408, para 55). It was premised upon the view that an unauthorised disclosure committed by a newspaper could be just as harmful as the disclosure of the same information by a Crown servant [§54]:

> "The objective of official secrets legislation is not to enforce Crown service discipline – that is not a matter for the criminal law – but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the 51nauthorized disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence". [Emphasis added]

140. The White Paper concluded, in cases involving someone who is not a Crown servant, that there ought to be a burden on the prosecution to prove not only that the disclosure would be likely to result in harm, but also that the person who made the disclosure knew, or could reasonably have been expected to know, that harm would be likely to result.

141. Section 5 gives effect to this intention. The District Judge referred to the White Paper in her Judgment [CB/T2/PP50 and P133, §§125 and 394]. She did so to make the point that

the Official Secrets 1989 expressly contemplated and was drafted so as to permit the prosecution of a publisher (*and* that the offence under section 5 is harder to prove).

142. There is no public interest defence to this section and nor could Article 10 be pleaded as a defence to it. Rather, the offence is predicated upon the disclosure being damaging and that the defendant made it knowing, or having reasonable cause to believe, that it would be damaging. It complies with Article 10 because it is intended to criminalise the disclosure of *knowingly* harmful material.

143. The Appellant's point [PGOA at §10.38] that the Official Secrets Act has never been deployed to prosecute the act of publishing (as opposed to leaking) classified information is nothing to the point; domestic legislation specifically foresees and protects against the disclosure of damaging material in precisely the sort of circumstances of this case.

144. In any event, the suggestion that a prosecution of the Appellant under the Official Secrets Act in this jurisdiction would be incompatible with Article 10, is fanciful for all of the reasons set above, but principally because what is protected is that which falls with the tenets of responsible journalism; see *Gîrleanu v Romania supra* (Judgment at §84 and §91). The case law demonstrates the outer limits of the protection Article 10 confers. It is unarguable that the right to freedom of speech trumps the right to life or the right to be safe on the part of sources of information *a fortiori* when the decision to reveal them was not part of any editorial balancing exercise or necessary for the purposes of any story.

145. In summary, to the extent that Article 10 confers any protection upon a journalist it protects those acting in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible and lawful journalism. The prosecution of the Appellant (limited as it is to the publication of the names of sources and to his being party to criminality in the obtaining of the material) is plainly well within the boundaries of a justified interference with his rights to freedom of expression.

146. *Shayler* makes plain that the absence of a 'public interest' defence to Official Secrets Act offences in the United Kingdom is not incompatible with Article 10. The Appellant cannot rely upon an absence of such a defence in the analogue provisions in United States law to contend that his extradition would be incompatible with Article 10.

147. Nor does the Law Commission report on the operation of the Official Secrets Act (referred to at PGOA §§10.75) change the position that *Shayler* remains binding law. Moreover, there is a risk in reading sections of the Law Commission report where it refers to the

Shayler judgment in isolation. Its observations on it are nuanced. For example, the report also states that Shayler might be decided in the same way [§9.65]:

> "There is a good argument, of course, that Shayler might be decided the same way on its very specific facts (albeit that the reasoning would be different): it is noteworthy, for example, that Shayler was in contact with journalists without making use of official channels. The fact that Shayler did not attempt to use any reporting mechanism meant that no meaningful judgment could be reached as to the effectiveness of those mechanisms that did exist. Although their Lordships expressed appropriate caution in considering whether these mechanisms would be sufficient in every conceivable case, the fact remains that Shayler could not convincingly state that there was no effective mechanism available to him. This was a failing emphasised by their Lordships in Shayler. Further, the failure to use the mechanisms available may import questions of bad faith. As with Catalan, a defendant's deliberate failure to use the reporting channels available to him or her without good reason may lead to the conclusion that direct disclosure to the press was not simply a search for redress."

148. This passage reflects the relationship between the adequacy of existing reporting mechanisms and whether domestic law comports with Article 10. <u>But those sorts of considerations are completely unrealistic here</u> (as the features of the *Shayler* case mentioned in the Law Commission report (*supra*) attest to). There is no issue in the United States prosecution that Ms Manning had specific information which she considered ought to be disclosed and in respect of which there was no official channel by which she could report it or raise concerns about it. What is at issue is a conspiracy between Ms Manning and the Appellant to steal what the United States describes as a *vast* amount of classified material and the Appellant's *indiscriminate* publication to the world at large of the material unredacted.

149. The Appellant selectively cites from the Law Commission Report [see PGOA at §10.75]. Where the report considers whether a public interest defence might be made available to journalists, the report distinguishes information which relates <u>"to security, intelligence, defence or the prevention of serious crime"</u> [Report at § § 9.90 and 9.98]. Far from suggesting that a public interest defence might be made available in an analogous prosecution to that which the Appellant faces, the Law Commission Report *reinforces* that there is a clear distinction to be drawn between publication of material on security, intelligence, defence or the prevention of serious crime (to which no such public interest defence might apply) and other types of sensitive material.

150. It is respectfully submitted, for all the above reasons, that the Appellant's case does not raise an arguable point that extradition would constitute a flagrant denial or gross violation

of the Appellant's Article 10 rights, so that they would be completely denied or nullified. Returning to the grounds of appeal summarised above:

(1) The District Judge rejected that conduct alleged could be characterised as the mere encouragement of a "whistle blower". The Appellant's reliance upon Article 10 must be viewed through the lens of the conclusions which the District Judge reached about the allegations he faced.

(2) The proposition that *Shayler* does not criminalise the "mere" encouragement of a "whistle-blower" does not arise on the facts.

(3) The suggestion that the allegation that the Appellant sought to assist Ms Manning in cracking a password hash was no more than an attempt to protect a whistle blower was roundly rejected by the District Judge.

(4) The European Convention cases relied upon by the Judge including *Stoll v Switzerland* and *Gîrleanu v Romania* all make the point that whether the Appellant broke the law is a relevant and vitally important consideration as to whether he could claim the protection of Article 10. Moreover, that what was protected by Article 10 was responsible journalism. She did not err in her application of these cases.

(5) There was nothing erroneous about the District Judge's reliance upon the White Paper. She was making the fundamental point that the 1989 Act was drafted on the express basis that journalists and publishers could be prosecuted under it <u>and</u> that prosecution under section 5 was harder to prove.

(6) The District Judge was not wrong in her treatment of *Shayler*. *Shayler* demonstrates that the lack of a public interest defence does not render the Official Secrets Act 1989 incompatible with Article 10. It remains binding.

(7) Far from helping the Appellant, the Law Commission Report draws a clear distinction, in considering a possible public interest defence, between disclosures which relate to national security, intelligence, defence or the prevention of serious crime and those which do not.

(8) That the District Judge was more than justified in comparing the Appellant to conventional media outlets in order to demonstrate that he fell outwith the ambit of responsible journalism (which attracts the protections of Article 10).

4. ***Sentence***

151. As noted above, a further argument is also advanced on behalf of the Appellant, that his extradition would be incompatible with Article 10 because he might, if convicted, be sentenced to a lengthy period of imprisonment [PGOA §§10.78 and 10.83].

152. As set out below the question of what sentence the Appellant might get is a contested one. This submission adds nothing to the separate argument advanced by the Appellant (and

dealt with a separate head of appeal) that any sentence he might receive will be grossly disproportionate.

5. ***Trial issues***

153. At PGOA §10.84, the Appellant impermissibly, and by a series of assertions, sets out a number of propositions said to further support his claim that his extradition would be incompatible with Article 10. None of these assertions are accepted or were found by the District Judge to be correct.

6. ***Fresh evidence – Alan Rusbridger***

154. The purpose of the Appellant's reliance upon Mr Rusbridger is unclear. The witness statement of Ms Peirce refers to it in relation to the *Zakrewski* abuse point [see §17 of the witness statement filed in support of the admission of the fresh evidence] whereas the PGOA refers to it in relation to Article 10 [at page 148 §18.1]. The crux of Mr Rusbridger's evidence is that he addresses a statement issued by The Guardian newspaper in September 2011 which was critical of the Appellant for the unredacted publication of the material stolen from the United States. This statement was referred to at §132 of the District Judge's decision (and is set out, in part, here for ease):

> "WikiLeaks has published its full archive of 251,000 secret US diplomatic cables without redactions, potentially exposing thousands of individuals named in the documents to detention, harm or putting their lives in danger. The move has been strongly condemned by the five previous media partners, the Guardian, the New York Times, El Pais, Der Spiegel and Le Monde who have worked with WikiLeaks publishing carefully selected and redacted documents." …. "We deplore the decision of WikiLeaks to publish the unredacted State Department cables which may put sources at risk, the organisations said in a joint statement. Our previous dealings with WikiLeaks were with a clear basis that we would only publish cables which had been subjected to a thorough joint edited and clearance process. We will continue to defend our previous collaborative publishing endeavour. We cannot defend the needless publication of the complete data. Indeed, we are united in condemning it."

155. Mr Rusbridger now appears to distance himself from that statement on what *he* considers the facts to be [see his statement at AEB/T4/P18, §9]. For example, he states that it (emphasis added)"..*seems* apparent that Julian Assange was not intent on publishing the

unredacted cache of papers in the way we and others perceived at the time" and he states his understanding that the Appellant sought to mitigate the position at the time.

156. This evidence does not meet the test for admission under *Szombathely City Court v Fenyvesi* [2009] 4 All E.R. 324 (above). **First**: it is clear that this was evidence which could have been given at time (the application to admit expressly recognises this). **Second**: the statement does not address why it could not with reasonable diligence have obtained. Ms Pierce simply refers obliquely to having had some limited contact was between lawyers acting for Mr Assange and Guardian journalists before the September 2020 hearing [§18]. This does not explain why Mr Rusbridger was not willing to give a statement then- his statement reflects what has always been the Appellant's case.

157. But, **third** and far more fundamental an objection, is that Mr Rusbridger's statement, that he would have said something different in 2011, is a belief based on his views of contested facts (insofar as *he* thinks those facts to be). As set out by the Judge, those facts are a matter not for witnesses called by Mr Assange but for a trial court.

158. Mr Rusbridger's statement in 2011, that WikiLeaks had published 251,000 secret US diplomatic cables without redaction, potentially exposing thousands of individuals named in the documents to detention, harm or putting their lives in danger reflects accurately the allegations which the Appellant faces in the United States. Moreover, as the District Judge noted at §391, the Appellant did not dispute that Wikileaks published a full unredacted version of approximately 250,000 diplomatic cables in the early hours of 2 September 2011, which included the names of human sources. The Appellant did not dispute that Wikileaks published the significant activity reports for Iraq and Afghanistan in unredacted form on 25 July 2010 and in October 2010.

159. Mr Rusbridger's *opinion* about the facts of what the accused intended or what steps he took to mitigate the position or what effect any publication by Cryptome were matters considered (extensively) by the District Judge and rejected as affording any basis for the Appellant's discharge. At:

   (i) CB/T2/P131, §387: the District Judge referred to prosecution case that the reason why it was relevant that publication was via Wikileaks, was precisely because it was a high-profile website with a wide global reach.
   (ii) CB/T2/P131,§388: the District Judge set out the chronology of the disclosures by Wikileaks incorporating dates which had been relied upon by the defence.
   (iii) CB/T2/P132, §389: the District Judge referred to the United States point, that even on the evidence provided by the defence, the Appellant's purpose in

publishing the unredacted cables in the early hours of 2 September 2011 was to prevent Wikileaks from being "scooped" by others who had already published, by using the wider reach and greater presence of Wikileaks, and by actively promoting the material to as wide an audience as possible.

(iv) CB/T2/P132, §389: the District Judge referred to the United States point that the Appellant was aware that when Wikileaks published the cables that their release would put the sources at risk, citing the Appellant's telephone call to the US government, in the days before he published saying that he feared for the safety of informants. As the Judge referred to, it is the United States case that nevertheless the Appellant went on to release the entire cache on the Wikileaks website.

160. The District Judge, having considered the Appellant's evidence, concluded that what the Appellant was seeking to do was to raise trial issues [CB/T2/P133, §390]. In relation to harm, the District Judge referred to the opposing cases on this but (correctly) noted [CB/T2/P133, §393] that the issue of whether publication on the Wikileaks website was potentially damaging to the United States would be a matter for the prosecution to prove at trial [See Kromberg affidavit of 3 September 2020 at §§83-84 confirming that the United States would have to prove this beyond reasonable doubt (not currently in the core bundle)].

161. The Judge also considered at some length [CB/T2/P134, §397] the issue relied upon by the Appellant that the Cryptome website had published prior to Wikileaks. She pointed out that the prosecution allegation (additional to the global reach of Wikileaks and the steps taken by Wikileaks to publicise the material) was that long before Cryptome published the unredacted cables, Wikileaks published around 134,000 classified cables marked confidential or secret which also contained names marked "Strictly Protect". She noted that the Appellant did not dispute that this early release of cables was made, but rather sought to dispute that this was harmful. Again, she concluded (correctly) that would be for any trial court to determine.

Conclusions

162. These matters are set out in some detail to demonstrate why Mr Rusbridger's belief that he would have said something different in 2011 (although quite what he would have said is open to obvious question) is immaterial to the conclusions which the District Judge reached (fundamentally because the facts upon which he bases his belief are contested and will be tested at a trial).

163. <u>But they also highlight a fundamental point about the limitations of the Appellant's arguments on Article 10</u>. To the extent that they rest on his challenges to underlying facts – these will be a matter for the trial court. If the trial court was to conclude that the Appellant's disclosures were incapable of causing harm (despite, for example, the global reach of Wikipedia), the Appellant would not be convicted. Even on his case, there would be no breach of Article 10. This is simply a further and additional basis upon which to dismiss his arguments on Article 7 and 10.

VI. GROUND 4: ARTICLES 5 AND 6

164. This ground of appeal is set out in the introduction to the PGOA at §1.12(iii), and thereafter §§11.1 to 11.19 of the PGOA.

165. In the introduction to the Appellant's PGOA [§1.12(iii)], this ground is categorised as "a prosecution designed to secure a guilty verdict", and is said to be advanced under article 6 of the convention only. By the time that the ground is advanced more fully [§§11.1 to 11.19], it is particularised under both articles 5 and 6.

166. The ground is a hybrid of complaints in the following directions:

(1) That the indictment has been drafted in a manner that exposes the Appellant to a severe sentence [PGOA §11.1];

(2) That the Appellant would feel pressure to enter guilty pleas because of the size of his cell and having limited human contact [PGOA §11.2];

(3) That the Appellant's trial will 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" [PGOA §11.3];

(4) That jurors would be "prejudiced irretrievably by public denunciations of him made by a series of administration officials from the President downwards of the sort that have characterised this matter to date" [PGOA §11.4]

(5) That the Appellant would be liable to be tried on evidence obtained from Chelsea Manning by inhuman treatment [PGOA §11.5];

(6) That (somewhat contradictorily) the Appellant would be deprived of the supporting evidence of Chelsea Manning because of the contempt proceedings [PGOA §11.6];

(7) The "coercive practice of plea-bargaining in the United States" [PGOA §11.8].

A. Article 6 - The legal framework

167. A requested person must risk a 'flagrant' denial of the right to a fair trial before extradition can be resisted on article 6 grounds [see *R (Ramda) v. Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) at §10 and *Soering v. UK* (1989) 11 E.H.R.R 439 at §113]. In *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512 Lord Phillips of Maltravers confirmed that:

> 'A different approach will, however, be appropriate in an extradition case. There it is the prospective trial that is relied on to justify the deportation. If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the likely consequences of the unfair trial.'
>
> *RB* [supra] per Lord Phillips of Maltravers at §139

168. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, *Ahorugeze v Sweden* (2012) 55 EHRR 2, at §§114-115). It constitutes a breach that is so fundamental it amounts to a nullification or destruction of the very essence of the right guaranteed by Article 6 (*Othman v United Kingdom* (2012) 55 EHRR 1 at §§258-260).

169. Public declarations and press reporting are rarely if ever incapable of being accommodated within the trial process. In *R v Abu Hamza* [2007] 2 W.L.R 266, the Court of Appeal noted:

> "89. In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. The position was summarised by Lord Taylor of Gosforth CJ in R v West [1996] 2 Cr App R 374, 385–386 as follows:
>
> "But, however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the

nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In Kray (1969) 53 Cr App R 412 , 414, 415, Lawton J said: 'The drama … of a trial almost always has the effect of excluding from recollection that which went before.' That was reiterated in Young and Coughlan (1976) 63 Cr App R 33 , 37. In Ex p The Telegraph plc [1993] 1 WLR 980 , 987, I said: 'a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'"

…

92. …The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial."

170. This approach was echoed in the ECtHR in *Ali v UK* (2016) 62 E.H.R.R. 7, at §§89-91:

"89. Even in cases involving jury trials, an appropriate lapse of time between the appearance of any prejudicial commentary in the media and the subsequent criminal proceedings, together with any suitable directions to the jury, will generally suffice to remove any concerns regarding the appearance of bias. In particular, where the impugned newspaper reports appeared at a time when the future members of the jury did not know that they would be involved in the trial process, the likelihood of any appearance of bias is all the more remote, since it is highly unlikely that the jury members would have paid any particular attention to the detail of the reports at the time of their publication. In such cases, a direction to the jury to disregard extraneous material will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial press campaign. It is essential to underline in this respect that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary.

90. In some cases concerning adverse press publicity, the Court has looked at whether the impugned publications were attributable to, or informed by, the authorities. However, it is important to emphasise that the fact that the authorities were the source of the prejudicial information is relevant to the question of the impartiality of the tribunal only in so far as the material might be viewed by readers as more authoritative in light of its source. The question whether public officials have prejudged a defendant's guilt in a manner incompatible with the presumption of innocence is a separate issue to be considered under art.6(2) , with the focal point being the conduct of those public officials and not the impartiality of the tribunal itself. Thus, while the authoritative nature of the published material may require, for example, a greater lapse of time or most robust jury directions, it is unlikely in itself to lead to the conclusion that a fair trial by an impartial tribunal is no longer possible. In particular, allegations that any disclosure of prejudicial material by the authorities was deliberate and was intended to undermine the fairness of the trial are irrelevant to the assessment of the impact of the disclosure on the impartiality of the trial court.

91. It can be concluded from the foregoing that it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible. Indeed, the applicant has

not pointed to a single case where this Court has found a violation of art.6 on account of adverse publicity affecting the fairness of the trial itself. As noted above, the trial judge, when invited to consider the effect that an adverse media campaign might have on a "tribunal", has at his disposal various possibilities to neutralise any possible risk of prejudice to the defence and ensure an impartial tribunal. In cases involving trial by jury, what is an appropriate lapse of time and what are suitable directions will vary depending on the specific facts of the case. It is for the national courts to address these matters—which, as the Law Commission observed in its 2012 consultation paper, 26 are essentially value judgments—having regard to the extent and content of the published material and the nature of the commentary, subject to review by this Court of the relevance and sufficiency of the steps taken and the reasons given."

171. As to plea bargaining, this does not give rise to any breach of article 6 per se: see the ECtHR in *Babar Ahmad v United Kingdom* (2010) 51 E.H.R.R, but rather would only raise an issue under article 6 if "the plea bargain was so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear to be the only possible way of avoiding a sentence of such severity as to breach art.3" [Ahmad §168]. Even if entered into before the extradition proceedings, plea bargaining is not abusive: *McKinnon v USA* [2008] UKHL 59 [§33].

B. The District Judge's decision

172. The District Judge's ruling on this issue is found in her judgment at CB/T2/P82, §226 onwards. Her ruling is beyond criticism. In her ruling, the Judge:

(1) Found that the Appellant's case on public denunciations was not made out on the facts, but that in any event there were sufficient checks and balances within the US trial process such that any trial would not be unfair [District Judge ruling, CB/T2/P82, §225];

(2) Found that, as a matter of fact, the Appellant's case on the likely constitution of the jury pool "is untenable" [District Judge ruling, §226], was inconsistent with the evidence elicited by both the Appellant and the Respondent, that, in any event, there were procedural safeguards in place, and that the Appellant had not produced evidence "*that challenged the use or effectiveness of these procedural safeguards or argue that the court will not exercise proper oversight of the selection process*" [District Judge ruling, CB/T2/P83, §228].

(3) Noted that any guilty plea entered by the Appellant will be scrutinised to ensure that it is voluntary, and factually sustained. She also noted that there was no

evidence of any plea agreement or negotiations having taken place [District Judge ruling, CB/T2/P84, §232].

(4) Found, as a matter of fact, that the charges brought against the Appellant were brought in good faith [ruling, CB/T2/P84, §234]. She found that there was "no credible evidence" to sustain the Appellant's case that the indictment had been overloaded in order to enhance the sentencing on counts of which the Appellant might be convicted, even if he were acquitted on others.

173. As to the unjust sentencing procedure, the Judge:

(1) Noted that the practice of "upward enhancement" had been considered within the context of specialty in *Welsh and another v. SSHD* [2006] EWHC 156 (Admin) and found to be unobjectionable [District Judge ruling, CB/T2/P85, §236, citing *Welsh* at §113].

(2) Considered that, against this background, the availability of a sentencing enhancement is "legitimate". The contrary submission would have the effect of preventing all extradition to the United States in which a sentencing enhancement might be available.

(3) Noted that the Appellant had not identified any conduct outside the request which would be used for the purpose of "upwardly enhancing" the Appellant's sentence.

174. As to Chelsea Manning [District Judge ruling, CB/T2/P86, §§240 – 241], the District Judge noted that Ms. Manning had been detained between 27th January 2011 until her release on 17th May 2017, and had been returned to prison in civil contempt proceedings on 8th March 2019. There was "*no foundation for the defence submission that evidence given by Ms. Manning was given as a result of her having been subjected to torture, and there is no evidence that this request is based on evidence connected with Ms. Manning's detention*". There was, equally, no evidence that Ms. Manning would refuse to testify at the request of the Appellant, nor that she is not a compellable witness.

175. Accordingly, and in light of her findings, the District Judge ruled that none of the issues raised would, either individually or cumulatively, result in a contravention of article 6 [District Judge ruling, CB/T2/P86, §242].

C. Why this ground has no merit

176. Each of the individual complaints made by the Appellant will be addressed in turn.

1. *The indictment and potential sentence*

177. This issue is addressed elsewhere [under Ground 6 "grossly disproportionate sentence"]. For the reasons set out there, there is no proper complaint that the potential sentence faced by the Appellant is so grossly disproportionate as to offend his Convention rights.

178. The Judge, having heard a considerable body of evidence put forward by the Appellant, found as a matter of fact that the indictment had not been drafted in bad faith. This Court should respect that finding.

179. That being the case, the fact that the Appellant is accused of serious criminality, and as a consequence may face a significant sentence of imprisonment, is neither surprising nor offensive. It does not render his trial unfair, let alone approach the threshold of a flagrantly unfair trial.

2. *Pressure to enter guilty pleas because of the conditions of his detention*

180. This strand of the argument was not advanced in the Court below [see final submissions of the Appellant, §§17.1 to 17.8, CB/T4/PP413 to 415]. There can be no criticism of the District Judge for not addressing an argument which was not advanced.

181. This argument is of dubious logic. It is unclear why the Appellant contends that he would be pressured into entering guilty pleas which would have the effect of exposing him to conditions which he so decries. Rather, one would have thought, such conditions would act as an incentive to contest the case (and, in the event of an acquittal, secure release).

182. In any event, the conditions in which the Appellant will be detained will not violate article 3 of the Convention – the Appellant has already lost this argument. The Appellant will not be held in inhuman or degrading conditions. This is an attempt to resurrect an article 3 argument, which has already failed, under the guise of article 6. Such an attempt is impermissible.

3. *The jury pool*

183. This argument was advanced in the Court below [final submissions of the Appellant §17.3, CB/T4/P414] as follows: "The system will be skewed even further against Julian Assange, because this prosecution will be located in Alexandria, Virginia; from which a

jury pool comprised almost entirely of government employees and/or government contractors is guaranteed".

184. The Appellant appears to accept that his original submission that a "jury pool comprised almost entirely of government contractors is guaranteed" was misleading. Rather, the PGOA contend that the jury pool has "a high concentration of defence and intelligence employees, contractors, and their relatives", and that the courthouse is "just fifteen miles away from the CIA headquarters".

185. There can be no tenable suggestion, from the evidence concerning jury pools, that the Appellant would suffer a flagrantly unfair trial.

186. The evidence does not suggest that the Appellant's jury pool will be skewed in favour of defence contractors. The Eastern District of Virginia (from which the pool will be drawn) employs an enormous population of people who work across a range of business types, from across all parts of the socio-economic spectrum. Mr. Kromberg cites, by way of example, that more than 1,100,000 people live in Fairfax County alone. Fairfax County is only one division of the Eastern District of Virginia. The jury could also be drawn from Arlington County, Fauquier County, Loudoun County, Prince William County, and Stafford County [Prince, AEB/T8/P346, §7]. At its height, the Appellant's evidence [presented by Ms. Prince] establishes that four defence related government agencies are among the top fifty employers in the area [AEB/T8/P346, Prince §9 and exhibit 2 (not provided in the Core Bundle)]. On the basis of Ms. Princes's own researches, others include the public school system, the area transit authority, local government, the department of agriculture, the Coca Cola Bottling Company, the postal services, and food and catering companies.

187. Indeed, the evidence indicates that the Appellant is able to avail himself of a greater level of protection against unfairness than would be afforded in England:

188. The Appellant will benefit, at his trial, from a wide range of procedural guarantees to ensure the impartiality of the jury. This right is guaranteed by the sixth amendment to the constitution [Kromberg 17 January 2020, CB/T12/P948 to 952 §§72 to 81]. The trial Judge will conduct a voire dire to ensure that each juror can lay aside any impression or opinion and return a verdict based on the evidence in court [Kromberg 17 January 2020, CB/T12/P949, §§74-5, 78]. Only those jurors found to be capable of "fair and impartial jury service" after a "careful voire dire" will be able to serve. A similar process will be undertaken to ensure no bias on the basis of a juror's employment by the US government

or a government contractor [Kromberg 17 January 2020, CB/T12/P951, §§79-80]. The Appellant will be able to challenge any juror for good cause, and ten jurors with *no cause at all* [Kromberg 17 January 2020, CB/T12/P949, §75]. The guarantees set out above, and in particular the ability to challenge jurors without cause affords the defendant more by way of procedural rights than would be available in this country.

189. As to the proximity of the Court to CIA headquarters, this is an irrelevance. On the logic of the Appellant, trials involving sensitive intelligence could not take place at the Central Criminal Court [3.3 miles from the MI6 building in Vauxhall Cross] or matters of political sensitivity [3.1 miles to Westminster].

190. There is nothing in this complaint. It is hardly surprising that the District Judge was able to reject it in robust terms. So should this court.

4. ***Public denunciations***

191. The Appellant is a high profile figure accused of high profile criminality. It is no surprise that his conduct has been the subject of comment in the media. This plainly does not render his trial flagrantly unfair.

192. As noted above, the jury will be challenged by the Judge to ensure that they are capable of fair and impartial jury service. The Appellant will benefit from a significant degree of challenge, including ten challenges for no cause. The conduct alleged against the Appellant is no longer at the front of the public consciousness. In any event, much of the public commentary made on the Appellant has come from the Appellant himself, or his supporters, or those sympathetic to him.

193. In short, the trial process is well capable of accommodating a high profile defendant such as the Appellant, who has been the subject of (mostly historic) commentary both in favour of his actions and against them. By reference to the caselaw on the subject of public statements (summarised above) there is no conceivable argument as to the fairness of the Appellant's trial.

194. This argument was misconceived at first instance and remains so. It should be rejected by this court.

5. *Evidence obtained from Ms. Manning*

195. This argument was advanced for the first time in the Court below in the second skeleton argument of the Appellant, drafted after evidence had been called. It has never been particularised exactly which "evidence obtained by torture" the Appellant fears will be deployed at his trial.

196. The PGOA baldly state "Any trial of [the Appellant] would likely involve evidence from Ms. Manning" [§11.11]. This evidence is not identified. Nor is it explained why a witness who was willing to be detained for contempt rather than co-operate with the US government, would give evidence against the Appellant.

197. The evidence of publications, of the operation of Wikileaks, and of communication between Assange and Manning plainly has no connection at all to Manning's detention after her arrest (even if this could properly be described as "torture"). The evidence that Manning gave at her plea hearing was given of her own volition, and in order to ensure that her pleas were voluntary. Manning was thereafter the subject of civil contempt proceedings because she **refused** to co-operate or give evidence.

198. The District Judge made findings of fact in this regard against the Appellant. She found that there was "no foundation" for the submission that Ms. Manning had given evidence as a result of being tortured, and "no evidence that this request is based on evidence connected with Ms. Manning's detention" [District Judge ruling, CB/T2/P86, §241]. These findings of fact are fatal to the Appellant's argument. The Appellant has not addressed them.

199. In the same way that the Appellant dedicated a single paragraph to this argument in the Court below, the PGOA on this issue run to one paragraph [§11.11]. He does not, and has never, addressed the evidence that would be advanced, how it was obtained by torture, and why, within the context of a trial before the world's media, in a civilised Western state, and with a phalanx of well-funded lawyers, he would be unable to challenge the admissibility of any such evidence which is in a manner which renders his trial flagrantly unfair.

200. This argument was also misconceived at first instance and remains so now.

6. *Lack of evidence from Ms. Manning*

201. In an apparently contradictory submission, the Appellant complains (above) of evidence from Ms. Manning being used at his trial and, at the same time, that he would not be able to rely on evidence from Ms. Manning, at the same trial. The irony of such a submission will not be lost on the court.

202. In any event, this submission fails on its facts. Simply because Ms. Manning does not wish to co-operate with the US authorities, does not mean that she will not wish to assist the Appellant. In any event – and even if she were to refuse – this is no different to the common situation in which one conspirator who has already been tried declines to give evidence at a later trial for fear of self-incrimination. The English trial process is well familiar with such a position. It cannot tenably be said that the position destroys the essence of the trial process such as to render any future trial flagrantly unfair.

7. *Plea bargaining*

203. As noted above, the plea bargaining system in the USA does not *per se* violate article 6. This Appellant is attempting to relitigate an argument which has already been determined. The key test is whether there is evidence of a plea bargain "so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear the only way to avoid a sentence of such severity as to breach article 3".

204. For the reasons set out elsewhere, this Appellant does not face a sentencing regime of such severity as to breach article 3. Therefore, the only basis on which the plea bargaining system might amount to a flagrant breach of the Appellant''s article 6 rights is if it were so coercive as to vitiate entirely his right not to incriminate himself.

205. The District Judge was right, in this context, to note that she had found no evidence of bad faith in the prosecutorial team, and that there was no evidence of any plea negotiation. Indeed, the Appellant will (and currently does) benefit from a well-funded team of lawyers with significant resources.

206. Furthermore, the evidence before the District Judge established that, were a plea to be entered, there were systemic guarantees against an unfair trial. A plea will only be accepted by the US Courts if it is made voluntarily, knowingly, and intelligently, with awareness of the likely consequences [Kromberg 17 January 2020, CB/T12/P991, §179]. Any plea entered will be scrutinized by the Court to ensure that it is made voluntarily and

not as the result of force, threats or promises [Kromberg 17 January 2020, CB/T12/P991, §§180-1]. The Appellant will "not be allowed to plead guilty unless he agrees he is guilty, and a district judge finds a trustworthy basis for his guilty plea" [Kromberg 17 January 2020, CB/T12/P991, §181]. The District Judge did not "wrongly" focus on such procedures [as is maintained by the Appellant - PGOA §1.7]. Rather, they are directly relevant to, and dispositive of the Appellant's case on, whether plea bargaining would vitiate entirely his right not to incriminate himself. This was the test which the District Judge, rightly, bore in mind [District Judge ruling CB/T2/P82, §224].

207. As in the Court below, this argument has no force and should be rejected.

8. *Article 5 and specialty*

208. The Appellant attempts [PGOA §113] to plead a specialty argument – which is relevant only to the consideration of the Secretary of State – in the alternative as an article 5 Convention argument in this appeal.

209. Perhaps unsurprisingly, this argument was never pleaded by reference to article 5 of the Convention in the Court below, although it did feature as one aspect of the article 6 argument. There is therefore no "decision" of the District Judge to appeal, in relation to article 5.

210. Specialty is a matter for the Secretary of State. The issue will be considered in the parallel appeal proceedings under s.108 of the 2003 Act. It is unclear why, for the first time, the Appellant seeks to raise an article 5 issue in these proceedings.

211. In any event, the Court's decision in the s.108 appeal will determine the Appellant's article 5 argument in these proceedings. Either the US system operates in a manner consistent with the specialty provisions of the 2003 Act – in which case it is impossible that it would flagrantly breach the Appellant's article 5 (or article 6) Convention rights – or it does not, in which case the article 5 argument is an irrelevance.

VII. GROUND 5: NO ECHR RIGHTS

A. First Amendment Rights

212. The Appellant seeks to argue that he may not be afforded any constitutional rights at his trial [PGOA §12.1]. This is not an accurate reflection of the evidence at first instance and indeed the District Judge rejected it.

213. In his declaration in support of extradition, Mr Kromberg fairly indicated that the prosecution, in the United States, might seek to *argue* that the Appellant as a foreign national is not permitted to rely on the First Amendment, at least as it concerns defence information, or is not entitled to rely on the First Amendment as a defence to his complicity in Manning's criminality or as a defence to publishing the names of sources [See Kromberg 17 January 2020 at CB/T12/P947, §71]. The District Judge recorded this [District Judge ruling, CB/T2/P92, §264] making the point that what Mr Kromberg envisaged *might* be argued was narrow:

> "Without binding the United States to any position here, however, we could advance a number of arguments in response to those challenges. For example, concerning selective prosecution, the United States could argue that because of Assange's unprecedented conduct, there are no other similarly situated individuals, and even if there were, there was no invidious decision to prosecute. Concerning any First Amendment challenge, the United States could argue that foreign nationals are not entitled to protections under the First Amendment, at least as it concerns national defense information, and even were they so entitled, that Assange's conduct is unprotected because of his complicity in illegal acts and in publishing the names of innocent sources to their grave and imminent risk of harm".

214. As is clear from Mr Kromberg's evidence, he was referring to possible arguments of law that may be utilised at a trial in the US to define the outer limits of the Appellant's right to rely on the First Amendment in any prosecution. They are arguments which may or may not be taken and which may or may not be accepted by the Court. There is an obvious difference, in this regard, between a legal process that will judge the availability of certain rights to defendants and those rights being removed for oppressive or prejudicial reasons.

215. Mr Kromberg did not suggest that the argument which the prosecution might take as regards the Appellant's rights under the First Amendment applied to any other constitutional rights (and indeed he appeared to limit this potential argument even within the rubric of the First Amendment). As noted above Mr Kromberg had also indicated how the Appellant could theoretically rely upon the void for vagueness provisions as part of the trial process.

216. The reason why this point is unarguable may be put shortly. In this jurisdiction, the Prosecution's inexorable starting position would be that the Appellant could not rely upon Article 10 to challenge his being prosecuted or as a defence, because of *Shayler*. A further

objection would be that he is outside the protection of Article 10 (or that his Article 10 rights are not engaged) because his conduct is so far removed from the type of journalistic conduct that Article 10 protects. In other words, in equivalent circumstances in this jurisdiction a prosecutor would highly likely challenge any claim to reliance upon Article 10 rights.

217. The case of *USAID v Alliance for Open Society* (2020) 140 SC 2082 (cited by the Appellant [PGOA at §12.16]) does not assist the Appellant. To be clear, this case concerned foreign affiliate organisations which received funds from the United States Government in order to fight the spread of HIV/ AIDS abroad. It was a Policy Requirement by the United States that such organisations should have a policy explicitly opposing prostitution and sex trafficking. The Plaintiffs sought to invoke the First Amendment to bar the Government from enforcing the Policy Requirement against the plaintiffs' legally distinct foreign affiliates. 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. This appears to reflect the position, as a matter of English law, that the protection of the Human Rights 1998 is restricted to those within the physical territory of the UK (subject to very limited exceptions).

218. The District Judge was thus entitled to find, as a matter of fact, that this was not evidence that the Appellant would be deprived of all constitutional rights in the United States and did not demonstrate that he would be at a real risk of a flagrant breach of Convention rights in the event of extradition.

VIII. GROUND 6: IF CONVICTED - A GROSSLY DISPROPORTIONATE SENTENCE

A. The legal framework

219. The general principles relating to the application of Article 3 ECHR in the extradition context are well known and are summarised below for reasons of brevity:

(1) A decision by a Contracting State to extradite a fugitive may give rise to an issue under Art. 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or

to inhuman or degrading treatment or punishment in the requesting country: *Soering v. UK* 11 EHRR 439.

(2) Where the direct responsibility for the infliction of harm does not lie with the Contracting State, "a very strong case" (*R(Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at §24) is required to make good a violation of Art 3. The test is a "stringent test which is not easy to satisfy": *AS and DD (Libya) v. SSHD* [2008] EWCA Civ 289 at §65, and requires strong or substantial grounds, or serious reasons to believe in the risk of ill-treatment: §67.

(3) The legal burden is on the requested person is to establish by evidence "substantial grounds for believing that he or she would, if extradited, face a 'real risk' of being subjected to treatment contrary to Article 3 in the receiving country" (*Saadi v. Italy* (2009) 49 EHRR 30, GC, at §140).

220. As to so-called "grossly disproportionate sentences", the High Court has accepted that such a sentence might raise an article 3 issue, where the sentence to be imposed was so disproportionate such as to *shock the conscience* of the court. As Gross LJ noted in *Harkins and others v. USA* [2011] EWHC 920 (Admin), at §17:

> "…the test of whether a potential sentence in the receiving state is such as to justify a refusal to extradite, is set necessarily high. For my part, I would respectfully adopt either of Lord Hoffmann's formulations, namely, that to justify a refusal to extradite to a non- *ECHR* state, the potential sentence must be one which "shocked the conscience" or was likely, on the facts of the case to be "clearly disproportionate": Wellington , at [32] and [35]. Any lesser test would fail to give proper effect to the public interest in effective extradition arrangements and could only serve to bring the law in this area into disrepute."

221. Similarly, Aikens LJ ruled in *Shaw v. USA* [2014] EWHC 4654 (Admin), at §27:

> "27. In my judgment, it is important to recall three principles that the ECtHR has emphasised now more than once. The first is that the ECtHR does not impose Convention Standards on non-contracting states. The second is that sentencing policies of different states are bound to differ and that such differences will, for the most part, be entirely legitimate. The third principal is that it is only on "rare and unique" occasions that the Strasbourg Court would hold that a sentence to be imposed by a requesting state on an extradited person is to be regarded as "grossly disproportionate", such that to extradite that person to face such a sentence would amount to a breach of the person's Article 3 rights by the extraditing state."

222. Considered by reference to article 3, the question, therefore, is whether there is a real risk of this Appellant being made the subject of a grossly disproportionate sentence, such as to shock the conscience of the court.

B. Submissions

223. This ground is unarguable. The Appellant has consistently misrepresented the sentence he is likely to be given if convicted.

224. The Appellant's contention is, variously, that the ""US then set about ensuring the resulting would bury Mr. Assange in concrete for the rest of his natural life" [PGOA §13.1], that the "prospective sentence" is one of 175 years' imprisonment [PGOA §13.2], and that the "likely sentence" is 30 to 40 years' imprisonment [PGOA §13.3].

225. The figure of 175 years was arrived at, for sound bite purposes, by simply multiplying the maximum sentence for each count. The approach to sentencing in the United States of America is on the same principles as in the United Kingdom.

226. The 17 January 2020 declaration of Mr Kromberg[CB/T12/P992, §§182-184], dispels the Appellant's approach:

> 182. Eric Lewis alleges in his affidavit that Assange is "highly likely to be sentenced to imprisonment that will constitute the rest of his likely natural lifespan." Lewis Aff. ¶ 47. Mr. Lewis's affidavit suffers from critical flaws. For one, Lewis heavily relies on the statutory maximum of 175 years, without acknowledging that only a tiny fraction of all federal defendants receive statutory maximum sentences.
>
> 183. The law that controls sentencing in federal courts in the United States sentence is 18 U.S.C. 3553. Pursuant to that statute, the court shall impose a sentence sufficient, but not greater than necessary, to comply with the need for the sentence imposed to (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (b) afford adequate deterrence to criminal conduct; (c) protect the public from further crimes of the defendant; and (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
>
> 184. In determining the particular sentence to be imposed, the district court shall consider the following factors:
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed to --
>
> (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;
>
> (b) afford adequate deterrence to criminal conduct;
>
> (c) protect the public from further crimes of the defendant; and
>
> (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the U.S. Sentencing Commission and any pertinent policy statement issued by the U.S. Sentencing Commission;

(5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(6) the need to provide restitution to any victims of the offense.

After weighing each of these factors, the sentencing court will arrive at an appropriate sentence. This determination is within the sentencing court's broad discretion and is subject to appellate review under a reasonableness standard or for any procedural defects.

227. Other cases involving unauthorized disclosures of classified information to the media have led to significantly lower sentences than those identified by the Appellant's witnesses – in *Sterling* a sentence of 42 month (maximum exposure 130 years), in *Allbury* 48 months (maximum exposure 20 years), and the lengthiest sentence served by a federal defendant for unauthorised disclosure to the media is in the case of *Winner,* and was 63 months [see cross examination of Eric Lewis, Tr. 15.9.20 at AEB/T44/PP405-409, , and Kromberg 17 January 2020, CB/T12/P993-4, §185].

The ultimate decision on sentence will be determined by a Federal Judge of 35 years' standing, who is independent of the parties and of the Government [cross examination of Eric Lewis, Tr. 15.9.20 pp19-20]. Eric Lewis described the judge as strict but fair and would not question his integrity [Tr. 15.9.20 p20(9-15)]:

Q. Well, let me help you a little bit. He was appointed a federal judge in 1985 and has been sitting on the bench for 35 years. Would you agree that he is a highly experienced district judge?

A. Yes.

Q. Do you have any reason to think he would not make a fair sentencing decision in this case?

A. His reputation is as a strict sentence, but I do not know whether that would say that he is unfair. Lawyers talk a lot about the tendencies of judges and who you would want to sentence your client. He is not one of them.

Q. But you agree ---

A. But he is fair, I do not ---

Q. You ---

A. --- I do not question his integrity in any way

228. Indeed, there was no dispute when it was put that the longest sentence ever imposed in the United States of America for the same charges under the Espionage Act that Assange is facing was 63 months.[13]

> Q. Answer me this, Mr Lewis. What is the longest sentence, and this is a simple question that does not require a speech, what is the longest sentence served by a federal defendant for unauthorised disclosure to the media? What is the longest sentence ever imposed? Do you know?
>
> A. I do not have – I mean,…
>
> Q. I am going to ask you to agree that it is 63 months' imprisonment.
>
> A. Well, I believe there have been eight cases that have been tried under the Espionage Act until this one… then I accept that those days, 63 months, is the longest.
>
> Q. Do you agree that Mr Assange does not face a mandatory minimum sentence in this case?
>
> A. I do agree with that.
>
> Q. Do you agree that the federal judge assigned to this case will himself decide on the appropriate sentence?
>
> A. The federal judge has a discretion upon the sentence… [Emphasis added]

229. As to article 3, the Appellant is accused of serious criminality on an unprecedented scale. There should be no dispute that the Appellant is accused of criminal conduct of the utmost severity. Whilst the approach of the UK courts may be of limited relevance, the Court of Appeal has recently emphasised the seriousness of similar (but on its facts far less serious) offending in *R v. Finch* [2021] 4 W.L.R 64 (§§57-61), noting a series of cases dating back as far as the 1960s, in which contraventions of the Official Secrets Acts were described as follows:

> "It is of the utmost importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held in utter abhorrence by all ordinary men and women, but should receive, when brought to justice, the severest possible punishment. This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country."
>
> Hilbery J in *R v Blake* [1962] 2 QB 377 at p 383

> "Contraventions of the Official Secrets Act which prejudice the defence of this country and which may thus tend to endanger the lives of members of the community are to a considerable degree in a category of their own. The perils they create and thus the sentences that are appropriate in the interests of the community will, of course, vary according to the circumstances of the particular case. But one factor stands out. In

[13] Transcript 15th September, page 18, lines 8 - 28

recent decades the dangers of mass destruction of life and property at the hands of an opposing power have increased to an outstanding degree, and it follows that as the dangers increase so does the need in protection of society for sentences of deterrent length."

R v Britten (1969) 53 Cr App R 111, Davies LJ at pp 117–118

"What this applicant had done was to take the Queen's shilling, both as a member of the Royal Air Force and of the Government intelligence service, and then to have sold her, her subjects and allies to a potential enemy. In time of war such conduct would have merited the death penalty. In peacetime the law does not provide for a death penalty. The nearest it provides for is a very long sentence indeed. In our judgment, right-minded members of the public would consider that a very long sentence was appropriate, and that is what the applicant received.

"There is also in this class of case the element of deterrence. Anyone, particularly those in the armed services and Government service, who is tempted, whether by money, threats of blackmail or ideology, to communicate sensitive information to a potential enemy, should have in mind what happened to this applicant. This is particularly so nowadays when, because of developments in the gathering and storing of information by electronic means, those in comparatively lowly positions often have access to material which could endanger the security of the state if it got into the wrong hands."

R v Prime (1983) 5 Cr App R (S) 127 Lawton LJ, at p 133

"…in sentencing for espionage the court needs to place an important emphasis upon the deterrent factor of the sentence as well as the punitive factor. Anyone who is prepared to betray his country must expect that he will receive a long sentence. It makes no difference that there may be variations in the political situation worldwide, or in the existence or non-existence of the Cold War, or any other possible source of war or threat to the United Kingdom in the future. Treachery is treachery. It must be deterred and it must be punished."

R v Smith [1996] 1 Cr App R (S) 202 , Lord Taylor of Gosforth CJ

"18. We repeat and endorse the observations of Lord Taylor CJ in relation to any case where a member of the Armed Forces, however junior, serving abroad in a theatre of military operations, chooses to disclose information to anyone which may be of use, directly or indirectly, to an enemy of this country or prejudicial to the interest and safety of his colleagues and companions serving in a war zone and at daily risk of death or serious injury. The element of intended betrayal of serving colleagues makes this a very serious offence indeed. Fortunately, cases like these are very rare. When they do occur, there must be no doubt that even if the information disclosed is not proved to have caused any actual damage, and was brought to a halt before any such damage may have occurred, the deterrent element in the sentence is absolutely fundamental. In fact although no individual serving soldier was directly affected by the appellant's activities, they did have a direct impact on the military relationships between NATO forces and the Afghan Government, and this alone might well have made the task of serving soldiers lengthier and more hazardous.

"19. The Court has a duty to those members of the Armed Forces risking life and health and safety through loyal service to the interests of this country to provide such protection as can be provided in the fortunately very rare cases indeed of possible

> treachery from those working alongside them and who are treated as trusted colleagues…"
>
> *R v James* [2009] EWCA Crim 1261; [2010] 1 Cr App R (S) 57, Lord Judge CJ at paragraphs 18-19

230. The Appellant is accused of encouraging the theft of sensitive of information by Ms. Manning, and of publishing information which put the lives of co-operating individuals at risk. This conduct is serious, and is seen as such in this country. In such circumstances, the evidence available as to potential sentence was not such as to "shock the conscience of the court".

231. The District Judge is criticised for not responding to this submission. However, analysis of the Appellant's submissions in the Court below shows that the argument was developed in one paragraph (CB/T4/P416, §18.1) amongst a 252 page submissions document. It is hardly surprising that the Judge concentrated on the other aspects of the Appellant's article 3 submissions, when the issue of a grossly disproportionate sentence was barely developed. In any event (for the reasons outlined above) the submission is hopeless. Permission should be refused.

IX. GROUND 7: THE TREATY PROHIBITS EXTRADITION FOR POLITICAL OFFENCES

232. The Appellant submits that the prosecution is legally indefensible as he argues Article 4(1) of the Treaty prohibits his extradition.

233. This ground is hopeless for two reasons:

    (1) The Treaty is not part of English law and the District Judge correctly found she had no jurisdiction to consider it;

    (2) Even if consideration of the Treaty was permissible, which it is not, the Appellant's offences are not pure political offences but relative political offences which would not violate the Treaty provision.

234. The District Judge dealt with this at §§34 to 63 of her judgment [CB/T2/PP22 to 30]. The discussion at §§41 to 60 are comprehensive and obviously right.

A. Jurisdiction

235. The Appellant's argument is wrong as a matter of fundamental, constitutional law for reasons which may be summarised as follows:

(1) First: the Appellant can derive no rights under the Treaty. As a matter of English law his extradition is governed only by the Extradition Act 2003;

(2) Second: The EA2003 makes no provision for extradition to be barred because the individual sought is accused or convicted of a political offence. The omission of such a provision marked a deliberate legislative choice to remove the political offence exception in domestic law;

(3) Third: an individual cannot, by the back door (of abuse of process), rely on a right which Parliament has elected not to provide by the front door (here by the Extradition Act 2003); and

(4) Fourth: The Appellant's ground, rejected by the District Judge, is ultimately an invitation to the Court to provide the accused with a bar to extradition in circumstances where Parliament has expressly precluded reliance upon it.

236. The courts have consistently rejected the approach that an unincorporated in English law treaty creates any rights upon which a person can rely. See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, Lord Templeman* at 476, per Lord Oliver at 500; *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696 (rejecting the existence of a right to rely upon the European Convention on Human Rights prior to it being given domestic effect by the Human Rights Act 1998); *R v Lyons [2003] 1 AC 976* Lord Hoffman at §27:

> "In other words, the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418* (the *International Tin Council* case). Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law."

237. It follows the District Judge was unquestionably right not to take any account of any provision in the United Kingdom extradition Treaty with the United States of America. As a simply matter of law it is not allowed to do so (and no court has ever done so under the 2003 Act).

238. The Appellant seeks to argue that notwithstanding the Treaty is not part of English law it is somehow an abuse of process or breach of Article 5 of the ECHR not to give effect to the Treaty provision if applicable.

239. It cannot be an abuse of process not to give effect to an unincorporated Treaty provision that Parliament has *specifically* abrogated in domestic law. It was accepted below by the Appellant that the EA2003 Act marked the abolition of the political offence exception and indeed that this development kept pace with modern extradition treaties which do not provide any such protection. Self-evidently this trend negates any suggestion that the political offence bar can be regarded as a fundamental human right.

240. The political offence exception was provided for in section 3 of the 1870 Act[14] and section 6(1)(a) and paragraph 1(1) of Schedule 1 of the Extradition Act 1989 [15]. The protection against extradition requests which were politically *motivated* (selective prosecution) was provided for separately (see, for example, section 6(1)(c) of the 1989 Act). No issue thus arises in this case as to the interpretation of the EA2003 Act. It is agreed that it marked the abolition of the political offence exception as a matter of domestic law.

241. Moreover, the point has been determined in the extradition context in relation to the 1972 UK- US Extradition Treaty. In *Norris v The Secretary of State for the Home Department* [2006] EWHC 280 (Admin), reliance was placed upon Article IX of the 1972 Treaty. This provided that extradition should be granted only if the evidence was sufficient according to the law of the requested Party … to justify the committal for trial of the person sought if the offence of which he is accused had been committed in the territory of the requested Party. …"

242. Under the Extradition Act 2003, the US was designated as a category 2 territory within paragraph 3 of the Extradition Act 2003 (Designation of Part 2 Territories) Order SI 2003/3334 (the 2003 Order) so as to abrogate the evidential sufficiency requirement in respect of the US. It was argued in Norris that there was a contradiction between this designation and the express terms of the 1972 Treaty, which was then still in force,

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[14] (1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character:

[15] 6.— General restrictions on return.

(1) A person shall not be returned under Part III of this Act, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority—

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

embodying an agreement that extradition between the two states should not proceed without sufficient evidence to show a case to answer. As recited by the Court [PQBD at §35] the argument ran:

> "If the 2003 Treaty is ratified by the United States, the inconsistency between the designation and the express terms of the extant Treaty would disappear and citizens of the United Kingdom would cease to have any enforceable right based on it. Until then, however, the right of United Kingdom citizens to rely on the terms of the existing Treaty applies in the same way as it does to citizens of the United States…... The Secretary of State has failed sufficiently to appreciate that the 1972 Treaty continues in force, and that it provides protections enforceable by United Kingdom citizens faced with proceedings to extradite them to the United States."

243. The Court proceeded [PQBD at §37] on the basis that the *Designation Order* had altered the arrangements for extradition between the United Kingdom and the United States, and removed the protective condition found in Article IX of the 1972 Treaty. That was irrelevant as regards the operation of the Extradition Act 2003 [§144] which alone governed the extradition and remained the source of any rights for the individual:

> "Mr Jones was unable to show any previous authority in the United Kingdom which suggested that the 1972 Treaty, standing alone, created personal rights enforceable by its individual citizens. The Treaty specified the circumstances in which the governments of the United Kingdom and United States agreed that extradition would, or would not, take place and they bound themselves to a series of pre-conditions which would govern the extradition process. Thereafter, the rights of citizens of the United Kingdom were governed by domestic legislative arrangements which ensured that the extradition process should be subject to judicial oversight, in an appropriate case, extending as far as the House of Lords in its capacity as the final appellate court. The Treaty reflected the relationship agreed between the United Kingdom and the United States for the purposes of extradition, rather than the municipal rights of United Kingdom citizens, enforceable against their own government. In brief, therefore their rights were provided and guaranteed, not by treaty, but by domestic legislation."

244. *Norris* is determinative of this ground. Self-evidently there are no examples of extradition treaties conferring personal rights, because (as set out above) such treaties are not a source of rights and the Courts are not permitted to enforce such rights (or create laws to do so) absent domestic legislation intended to give effect to such rights.

245. Article 5 can add nothing to the point. The detention is lawful in domestic law and is not an abuse of process. In such circumstances it is impossible for Article 5 to be engaged.

B. The Conduct Alleged

246. While the legal position is determinative as to this ground the PGOA is for the most part concerned with the argument that the conduct described would amount to a political

offence if that bar were available. Whilst this argument is sterile, for the avoidance of doubt, it is not accepted that the political offence exception would have had any application here even if it had been provided for in domestic law. These reasons can be stated shortly.

247. There was never any statutory definition of a political offence and the concept gave rise to considerable difficulty as it became outmoded; see *T v Immigration Officer* [1996] A.C. 742, Lord Mustill at page 753, foreshadowing its demise:

> "These laws were conceived at a time when political struggles could be painted in clear primary colours largely inappropriate today; and the so-called "political exception" which forms part of these laws, and which is the subject of this appeal, was a product of Western European and North American liberal democratic ideals which no longer give a full account of political struggles in the modern world. What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date."

248. *T* explained the jurisprudential basis upon which a political offence might be demonstrated. It could arise where a political struggle was either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence was an incident of this struggle; *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556 ; *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931 where Lord Diplock said, at p. 945:

> "even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."

249. A crime was a political crime if it was committed for a political purpose, i.e. with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; <u>and</u> (2) there was a sufficiently close and direct link between the crime and the alleged political purpose [Lord Lloyd at pp.786- 787].

250. That an offence could be described as inherently political was not definitive; see Simon Brown LJ (as then) in *R v Secretary of State for the Home Department and Others ex parte Fininvest* [1997] 1 W.L.R. 743, 761 referring to the example of the murder of the Sovereign, carried out for purely personal reasons, albeit by definition treason, which might not be regarded as political. Equally, he did not accept that any offence committed

with a view to inducing a change in government policy was ipso facto to be regarded as a political offence: *The difficulty comes in defining just when it will be and when it will not* [pp 761-762].

251. The gravamen of the allegations against the Appellant are not his leaking of materials to the press but rather his actions in publishing the 250,000 cables; 75,000 Afghanistan significant activity reports and 400,000 Iraq significant activity reports, absent redaction, thus putting named individuals at risk. Per *Schtraks* above, the US Government is not "after" the accused for reasons other than the enforcement of the criminal law following its usual course.

252. For these reasons this ground is unarguable, and the District Judge was clearly correct in rejecting it.

X. GROUND 8: *ZAKRZEWKSI* ABUSE

253. In *Zakrzewksi v. Regional Court in Lodz, Poland* [2013] 1 W.L.R 324 the Supreme Court (per Lord Sumption at §13) set out the conditions in which the Court's abuse jurisdiction may be invoked in relation to the description of the conduct:

(1) The jurisdiction "is exceptional". The statements in the [warrant] Request must comprise "statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally)".

(2) The true facts required to correct the error or omission "must be clear and beyond legitimate dispute". The abuse of process jurisdiction "is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court".

(3) The error or omission must be material to the operation of the statutory scheme.

254. *Zakrzewski* was determined under part 1 of the 2003 Act, but the principles identified apply equally to part 2 case [see *Lazo v. United States of America* [2022] EWHC 1438 (Admin), citing *United States of America v. Shlesinger* [2013] EWHC 2671 (Admin), and *Scott v. United States of America* 2018] EWHC 2021 (Admin)].

255. The Appellant's reliance on *Castillo v. Spain* [2005] 1 WLR 1043 [PGOA, §§15.87 and 15.90 for example] is unhelpful – *Castillo* was decided under different legislation and did

not even consider abuse of process, but rather the obligation to particularise the offending alleged. The touchstone for this Court's consideration of abuse of process is *Zakrzewski.*

256. It is necessary, therefore, that the Appellant show the request is not merely inaccurate – but that it is misleading in a material sense, beyond mere factual dispute, or even matters of fact which may crystallise during the course of litigation. The inaccuracy needs to be clear beyond legitimate dispute. This is an important hurdle – it would be quite improper, for example, for a defendant in extradition proceedings to use the *Zakrzewski* abuse doctrine as a back-door means to litigate his guilt or innocence, or even to mount a challenge to the evidence of the prosecuting authorities in America – this must be done in the requesting state. Nor would it be permissible to mount a *Zakrzewski* argument in order to highlight inaccuracies which had no materiality to the issue of extradition.

257. The Appellant, in making this submission, boldly asserts that the request is not just materially inaccurate but deliberately so [PGOA §15.1]. This allegation is of a piece with submissions in the court below, which accused prosecutors of giving particulars of the offending which were "knowingly false", "utter rubbish", and "lies, lies and more lies". The Appellant's case is therefore an outright allegation of dishonesty made against a significant number of high ranking American prosecutors, in violation of their own disciplinary code and criminal law. The Court would ordinarily expect strong evidence to substantiate such a claim.

258. Not only is there no such evidence, but the allegation is plainly denied – [see Kromberg 24 March 2020, CB/T12/P1011, at §§3 to 5]:

> "(3) At the hearing on February 25, 2020, Assange's counsel made a series of highly charged accusations that the United States knowingly made false allegations in its extradition request. Assange's counsel, for example, described various allegations as "a knowingly false account", "utter rubbish" and "lies, lies and more lies". Transcript of Extradition Hearing, at 7-8 (Feb.25, 2020) (hereafter "Extradition Hr'g Tr."). I categorically reject such accusations. As a federal prosecutor on the case, I affirm that, to my knowledge and belief, the United States has not made any knowingly false allegations to support its extradition request.
>
> (4) The accusation that a lawyer, and a federal prosecutor in particular, knowingly made a false allegation is a serious one in the American legal system. The Virginia Rules of Professional Conduct – the ethical rules that govern the practice of law in the Commonwealth of Virginia – expressly prohibit lawyers from knowingly making false statements or introducing false evidence. These ethical rules, moreover, impose additional responsibilities on prosecutors. Id r3.8. A prosecutor, for example, "shall…not file or maintain a charge that the prosecutor knows is not supported by probable cause." ID r3.8(a). Federal prosecutors are subject to sanction by the courts,

governing bar authorities and the Department of Justice if they violate these Rules of Professional Conduct.

(5) Federal prosecutors have abided by these ethical guidelines when preparing its extradition request. The United States' extradition request faithfully and accurately reflects its case against Assange…"

259. Against the background of a strident, unsupported, allegation of prosecutorial dishonesty, which is outright denied, this court should also bear in mind the status of the United States of America as a trusted extradition partner, and the presumption of honesty in the making of extradition requests:

> "We start by reminding ourselves that the United States of America, and its constituent states including California, is a mature democracy governed by the rule of law. The assurance given by the District Attorney has been transmitted by the Department of Justice as a solemn promise between friendly states who have long enjoyed mutual trust and recognition. Assurances have been accepted routinely from the Government and the promises made have been honoured."
>
> Giese v. United States of America [2018] 4 WLR 103
>
> Per Lord Burnet of Maldon LCJ and Dingemans J at paragraph 47
>
> "[47]…as a general rule, the court of the executing state is bound to take the statements and information in the warrant at face value…In extradition cases, as a result of mutual respect between nations, the starting point should be that the Requesting State has behaved properly…."
>
> Lazo v. United States [supra]
>
> Per Cavanagh J at paragraph 47

1. ***Impermissible introduction of trial issues into extradition***

260. The *Zakrzewski* abuse doctrine does not permit the litigation of factual or legal disputes which should be determined in the requesting state. It is, of course inevitable that there will be factual disputes between the parties, and it may be that some of those disputes will in due course be resolved in the Appellant's favour. This is not what the *Zakrzewski* abuse doctrine is concerned with. Indeed, were the Courts to allow defendants to call evidence on areas of factual dispute, the result would not only be the impermissible litigation of guilt or innocence, or other trial matters, but delay which is inimical to the statutory extradition scheme.

261. Rather, the *Zakrzewski* abuse procedure is a protection against extradition in circumstances where the request is so fundamentally inaccurate – and it is agreed or beyond dispute that it is so - that extradition cannot stand.

262. The Appellant's argument has always been an impermissible attempt to introduce trial disputes into the extradition process. The District Judge, correctly, found this to be the case:

(1) As to the "most wanted list", at ruling §372 [CB/T2/P127]: "In my judgment, the defence merely seeks to offer an alternative narrative to the allegations in the request and their contentions are matters to be determined at any trial."

(2) As to the "password hash", at ruling [CB/T2/P129-130] §§380 and 383; "Again, in my judgment, the defence merely seeks to offer an alternative narrative to the allegations in the request. The issues they raise are matters to be determined at trial…this is a clear example of the defence impermissibly mounting a contentious challenge to the US's evidence".

(3) As to the risk to human sources, at ruling §390 [CB/T2/P133]: "Once again, the defence raises issues which would have to be evaluated and determined at trial rather than at an extradition hearing."

(4) As the US prosecuting authorities have noted "At trial in the United States, [Mr.] Assange will have a constitutional right to present evidence, call witnesses on his behalf, confront and cross-examine the government's witnesses, and assert his defenses." [Kromberg 24 March 2020, CB/T12/P1012, §7]. The appropriate place for disputes such as those put forward by the Appellant is during the trial process in the US.

2. *The Appellant's submission broken down*

263. The Appellant relies on three areas which are said to be "central allegations", that have been deliberately mis-stated. These are:

(1) The allegation that Manning's disclosures were "causally solicited by the draft most wanted list"; and

(2) The "passcode hash" allegation, which is said to have been made inaccurately, and then concealed from the District Judge; and

(3) The allegation that Wikileaks (and this Appellant in particular) deliberately put lives at risk by purposely disclosing unredacted materials.

264. The starting point for the analysis of this ground of appeal is the District Judge's consistent finding that the request is not motivated by bad faith, nor that there was any evidence of dishonesty amongst the prosecutors bringing the case. This, in fact, is the end of the matter. The Judge has made a finding that the request has been brought in good faith. On the evidence, this was inevitable.

265. Whilst it is not always necessary to show bad faith when mounting a *Zakrzewski* abuse argument, on the facts of this case, it must be. This is because, in responding to the Appellant's submissions, the US authorities have confirmed that they stand by their case. Therefore, the underlying basis of the *Zakrzewski* abuse cannot be "clear and beyond legitimate dispute" unless the US authorities are deliberately mis-stating the position.

266. Accordingly, the Appellant persists in pursuing his *Zakrzewski* argument on the basis of prosecutorial dishonesty. He has come nowhere near showing that the Judge was <u>wrong</u> in her finding of good faith. This Court should respect that finding. If it does, the *Zakrzewski* argument – which is premised squarely on allegations of dishonesty and impropriety – fails.

267. In any event, each of the complaints does not relate to material error, clear beyond legitimate dispute. Rather, and as noted above, the Appellant simply seeks to litigate trial issues in these proceedings under the guise of the abuse of process jurisdiction. This is impermissible. Each complaint will be addressed in turn.

3. *The "most wanted list"*

268. The prosecution case was set out in the final written arguments. It is:

(1) On its website "Wikileaks expressly solicited classified information for public release" [Dwyer, CB/T12/P828 §5 second superseding indictment CB/T12/P45, §2];

(2) Evidence gathered shows that the "most wanted list" was intended by the Appellant to "encourage and cause individuals to illegally obtain and disclose protected information, including classified information to WikiLeaks contrary to law" [Dwyer CB/T12/P831-2, §§14-16, Kromberg 24 March 2020, PP1018 and 1019, §19, and §22]. It was intended to recruit individuals to hack into computers and/or illegally obtain and disclose classified information [second superseding indictment CB/T12/P1045, §3, Kromberg 24 March 2020 CB/T12/PP1018-1019,

§§18 to 20]. This was accompanied by public declarations given by the Appellant himself at, for example, conferences [Dwyer CB/T12/P832, §16, second superseding indictment CB/T12/PP45-6, §§3-6].

(3) Manning responded to the list. She performed searches which are directly related to material requested on the most wanted list [Kromberg 19 February 2020, CB/T12/P1002, §12, Dwyer CB/T12/P833-4, §19-21], and the material provided by Manning was consistent with the list [Kromberg 19 February 2020, CB/T12/P1003, §13].

(4) The Appellant relies [PGOA §15.11] on five matters which it is said the request "conceals":

i. The list was not linked to from the Wikileaks "submission page" nor could it be navigated from the Wikileaks site.

ii. Examination of Manning's computer showed "no access to the list";

iii. Manning and Assange never discussed the list;

iv. Manning's online "confession" in 2010 "made clear" her decision was based on revealing things that belonged in the public domain.

v. With "one exception" the list requested none of what Manning sent to Wikileaks.

269. As to (i), the list's availability from the Wikileaks submission page is irrelevant. The request makes no claim that the list *was* available on the Wikileaks "submission page". The request is not misleading. Nor is this issue significant or material to the operation of the statutory scheme. It is, at best, a minor factual dispute of the sort commonly seen in criminal trials. At worst, it is not even a dispute. This is an attempt by the Appellant to confect a factual challenge as the foundation for an abuse argument. It is misconceived.

270. As to (ii), this submission has evolved throughout the case. The Appellant initially suggested that there was "<u>no evidence</u> that Manning searched for or accessed the list" [first defence skeleton argument, part 2, paragraph 91]. By the time of the final submissions the argument was that "there is <u>no suggestion</u> that Manning ever searched for or accessed the list". On appeal, the suggestion has changed to "examination of Manning's computer … showed no access to the 'list', and no suggestion was made at her Court Martial that she had accessed the list". The Appellant's position has moved,

therefore, from an absence of evidence, to an absence of suggestion, to the analysis of Manning's computer running contrary to the prosecution case. None of these formulations could sustain a *Zakrzewski* abuse.

271. Even assuming (the Appellant has not identified the evidence relied on) that an examination of a computer used by Manning showed no evidence that she had accessed the list from that computer, this does not prevent the prosecution case from holding water. The prosecution case, as set out in the request, is that Manning performed searches related to material requested on the list [Kromberg 19 February 2020, CB/T12/P1002, §12, Dwyer CB/T12/PP833 to 834, §19- 21], and that the material provided by Manning was consistent with the list [Kromberg 19 February 2020, CB/T12/P1003, §13]. The Appellant may wish to dispute this. He is entitled to. This is a classic example of a trial issue.

272. As to (iii), this argument has again changed. In final submissions in the Court below, the Appellant phrased his argument as follows (CB/T4/P333, §12.13(iii)): "*There is no suggestion that Manning and Assange ever discussed the "list"*. The PGOA [§15.11 (iii)] suggests that the request "conceals" that Manning and Assange "never discussed the 'list'". The Appellant's initial formulation is more accurate. It has never been suggested that Manning and Assange discussed the list. It is difficult to see how the request could be misleading in a material sense, when the disputed fact complained of does not even appear in the request. This argument is flawed and should be dismissed.

273. As to (iv) the prosecution are no more bound by Manning's online confession, than they are by her evidence given in her own interest (to which see below). That Manning posted an online, untested "confession" in which she indicated a particular motivation for the leaks cannot sensibly mean that the prosecuting agencies in the US are bound by this confession in formulating their case. Taking this argument to its logical extent, prosecuting authorities would be bound by answers given by co-conspirators in interview, assuming those answers to be exculpatory, and it would be abusive to prosecute any defendant in circumstances where a co-accused had given an alternative explanation for their conduct. The Appellant's position is untenable. In addition to this, Manning's statement in her online confession and the prosecution allegation are not mutually exclusive. Manning could have been motivated to help WikiLeaks based on the reason given in her online confession and then identified *how* to help WikiLeaks (i.e., what kinds of documents to steal and provide) by reading the Most Wanted Leaks

274. Contention (v) is simply an irrelevance. It has never been asserted that the Iraq and Afghan War Diaries [PGOA §15.12(i)], or the Guantanamo detainee assessment briefs [PGOA §15.12(ii)], or the State Department cables [PGOA §15.12(iii)] were ever on the list [Dwyer CB/T12/P831-2, §§15-6, Kromberg 24,March 2020, CB/T12/P1019-1020, §§21 to 22]. As the Judge noted [District Judge ruling CB/T2/P127, §374] "*Some of information which the defence relies on is not relevant to the allegations. For example, it is not alleged that the significant activity reports, the detainee assessment briefs or the diplomatic cables were on the list and their absence from the list has no great significance …"*. This finding succinctly summarises the fundamental flaw in the Appellant's reliance on (v). Again, the Appellant seeks to raise an issue which he would wish to put in his defence, and which is not even referred to in the request, as sustaining an abuse of process application. Such an argument is untenable.

275. As to the reliance on the contention that the list was "offline" between January to May 2010 [PGOA §15.10], this is a classic trial issue. Not even the Appellant suggests that this would prevent the Appellant from having used the list to solicit sensitive material, nor prevented Ms. Manning from having responded to it. Additionally, the allegation is [§§11 and 12 of the Second Superseding Indictment, CB/T12/P1048] that Manning began searching for items on the Most Wanted Leaks in November 2009, before the Appellant says it went "offline."

276. It is assumed that the Appellant no longer pursues the argument that Manning's evidence at her court martial sustains a *Zakrzewski* abuse [previously argued in final defence submissions §12.10, responded to by the prosecution in skeleton argument paragraphs 466-8 and considered by the Judge at §375], as this does not appear in the perfected grounds of appeal. For the avoidance of doubt, the Judge was correct to note [District Judge ruling §375] that the US are not bound by evidence given by Manning in her own defence, or mitigation.

277. Similarly, it is assumed that the contention that the list was a public collaboration is no longer relied on, as it was in the court below, in furtherance of the abuse of process of argument. Again, and for the avoidance of doubt, this was an utter irrelevance to whether the Appellant relied on the list to solicit classified information.

278. Ultimately, as the Judge found, the Appellant has sought to mischaracterise the prosecution case, in order to dispute it. The Judge was right to find that the prosecution "relies on the Most Wanted Leaks list in a much more general way than has been

characterised by the defence" [District Judge ruling CB/T2/P127, §373]. None of the issues raised above come close to engaging the exceptional *Zakrzewski* abuse jurisdiction. This argument must fail.

4. *The password hash*

279. Again, this argument is a mere attempt to litigate trial issues in the extradition arena. It is a fundamentally flawed and impermissible argument.

280. Count 2 of the second superseding indictment encompasses an allegation that the Appellant conspired with a number of hackers to commit computer offences to benefit Wikileaks. The password hash allegation is only one aspect of this conspiracy

281. The prosecution case on the password hash is set out in the amended opening note at §21:

> "As part of this conduct, it is alleged that Mr Assange agreed with, and to assist, Ms Manning in cracking an encrypted password hash stored on United States Department of Defense computers connected to the Secret Internet Protocol Network [Affidavit of Kellen Dwyer at §28]. The request describes the steps which were taken in an attempt to achieve this. Had Ms Manning and Mr Assange succeeded in cracking the encrypted password hash, Ms Manning might have been able to log on to computers connected to a classified network called the Secret Internet Protocol Network under a username that did not belong to her. The United States specifically alleges that Mr Assange entered into the agreement to crack the password hash for the purpose of Ms Manning's ongoing efforts to steal classified material [Affidavit of Kellen Dwyer at §32]."

282. Mr. Kromberg further clarified the relevance of the password hash agreement [Kromberg 24 March 2020, CB/T12/PP1014 to 1018, §§10 to 17]. In particular, at §11:

> Contrary to the defense's assertion, the United States has not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to the Net Centric Diplomacy database or, for that matter, any particular database. Instead, Count 18 of the Superseding Indictment generally alleged that the "primary purpose was to facilitate Manning's acquisition and transmission of classified information related to the national defense of the United States so that Wikileaks could publicly disseminate the information on its website". The Superseding Indictment further asserted that "had ASSANGE and Manning successfully cracked [the password hash], Manning may have been able to log onto computers under a username that did not belong to her" and "[s]uch a measure would have made it more difficult for investigators to identify Manning as the source of disclosures of classified information". Superseding indictment ¶18. As this language plainly reflects, the United States alleged that the purpose of the hash-cracking agreement was to facilitate the acquisition and transmission of classified, national defense information generally, not to access a particular database or set of documents."

283. Mr. Kromberg continued, at §12:

> 12.Cracking the password hash could have furthered the alleged goals of the conspiracy in many ways that have nothing to do with how the Net Centric Diplomacy database (or any other of the particular databases) tracks access. Stealing hundreds of thousands of documents from classified databases, as Manning did, was a multistep process. It required much more than simply gaining access to the databases on which the information was stored. For example, Manning had to extract large amounts of data from the database, move the stolen data onto a government computer (here, Manning's SIPRNet computer), exfiltrate the stolen documents from the government computer to a non-government computer (here, Manning's personal computer), and ultimately transmit the stolen documents to the ultimate recipient (here, Assange and WikiLeaks). Each step in this process can leave behind forensic artifacts on the computers or computer accounts used to accomplish the crime. Therefore, the ability to use a computer or a computer account not easily attributable to Manning could be a valuable form of anti-forensics. Put another way, Manning needed anonymity not only on the database from which the documents were stolen (e.g., the Net Centric Diplomacy database), but also on the computer with which the documents were stolen (e.g., the SIPRNet computer). The hash-cracking agreement, at a minimum, could have furthered the latter goal."

284. As Mr. Kromberg noted, evidence used against Ms. Manning at her army trial included the storage of incriminating material under her user profile [Kromberg 24 March 2020, CB/T12/PP1015 to 1056, §§13 to 14]. Had she had access to another profile, it would have been harder for those investigating to connect the material to Ms. Manning [Kromberg 24 March 2020, CB/T12/P1016 to 1017 §14].

285. Furthermore, there is no allegation that the cracking of the password hash was necessary to gain access to any particular set of documents, including the Guantanamo Bay detainee assessment briefs, Iraq Rules of Engagement, and the Afghanistan and Iraq significant activity reports. Rather, the "purpose of the agreement was to gain access to the FTP account, which could have been used for Manning's ongoing theft of classified information generally" [Kromberg 24 March 2020, CB/T12/P1017 to 1018, §17].

286. This is not a "morphing" of the allegation, as Appellant maintains [PGOA §12.32]. As is made clear in Mr. Kromberg's affidavit, the US prosecution consider Mr. Assange's evidence to be "misleading". Mr. Kromberg's affidavit sets out the US case against the Appellant, by reference to the indictment. There has been no change of position.

5. *The Appellant's complaint*

287. The Appellant complained in the Court below that it would have been impossible to break the password hash from the information provided, and that in any event the breaking of

the password hash would serve no useful purpose. The first of these submissions no longer appears to be advanced.

288. Rather, the Appellant's essential complaint is that accessing the 'FTP user' account would not have provided "anonymous" access to the relevant databases [perfected grounds header to paragraph 15.28], or that it would have been "impossible for Manning to have downloaded any data "*anonymously'*"" [PGOA §15.28].

289. It should be noted at the outset that this has never been the position set out in the request. As set out above, the allegation is that, had Ms. Manning and Mr. Assange succeeded in cracking the password hash, Ms. Manning might have been able to log on to computers connected to a classified network under a username that did not belong to her. This would have made it *more difficult* to trace her, and would have provided her with a forensic advantage in the continuing theft and dissemination of classified material.

290. Thereafter, the Appellant, in his grounds of appeal, simply recites the evidence which he has called from Mr. Eller as if it were unchallenged or accepted in whole. It was not. Mr. Eller was cross examined and made significant concessions. These do not appear in the perfected grounds of appeal. They are, however, important. As was noted in argument below, Mr. Eller conceded in cross examination that "*the ability interrogate Ms Manning's user profile, namely bradley.manning, was of considerable forensic use in proving what she had done*", and that accessing the same computer or terminal using an FTP user account could have hidden her activity in the sense that it was not traceable to her own domain user profile account[16]. He also accepted that "*there is a clear and tangible benefit for Ms Manning to access the databases through an anonymous FTP user account*"[17].

291. Put bluntly, the purpose of cracking the password hash is said to have been [per Kromberg 24 March 2020, CB/T12/P1017 to 1018, §17] "to gain access to the FTP account, which could have been used for Manning's ongoing theft of classified information generally". The Appellant's own witness agreed that this was feasible.

292. Set against this, the Appellant's contention is that the "obvious, true purpose" of Ms. Manning and Mr. Assange going to significant lengths to attempt to crack a military password hash "**could actually have been**…installing programs to play movies and music" [PGOA §15.33, bold emphasis added]. This is obviously speculative – even the

[16] 25th September 2020 transcript at p46 (8-11)
[17] 25th September 2020 transcript at p47 (6-8)

Appellant's own document states that this “could have” been the purpose of the arrangement, and even more plainly a trial issue.

293. The Appellant's complaints concerning lack of access to the Guantanamo detainee assessment briefs, cables, rules of engagement and war diaries [PGOA §§15.31(i) to (iv)] are, yet again, irrelevant. As Mr. Kromberg has made clear [Kromberg 24 March 2020, CB/T12/P1014 to 1015, §11] “*the United States alleged that the purpose of the hash-cracking agreement was to facilitate the acquisition and transmission of classified, national defense information generally, not to access a particular database or set of documents”.* There is therefore no allegation that the password hash crack was specifically linked to any or all of these documents.

294. There is therefore no *Zakrzewksi* abuse.

6. *The District Judge's Decision – the password hash*

295. The District Judge was therefore correct to conclude [District Judge CB/T2/P129, §380] that this is yet another area in which the Appellant has sought to offer his own alternative narrative, and seeks to present that as the foundation of an abuse argument.

296. The Appellant's criticisms are ill conceived. The District Judge understood the nature of the dispute – District Judge ruling CB/T2/P128, §§377 and 379:

> “The defence submits that accessing an FTP user account would not have provided Ms. Manning with more access then she already possessed and it would have been impossible for her to have downloaded any data anonymously from a government database using the account…The US makes it clear that it does not allege that the purpose of the agreement was to gain anonymous access to the Net Centric Diplomacy database or any particular database. The purpose of the agreement was to facilitate the acquisition and transmission of classified information generally, not to access a particular database or particular cache of documents.”

297. As to the four criticisms levelled by the Appellant at the Judge's decision:

a. **Criticism 1.** The Appellant criticises a finding that the decrypting the passcode hash could “somehow have concealed ‘forensic evidence’ of the exfiltration of the war diaries etc” [PGOA §§15.36 to 15.42]. This is not what the District Judge found. Rather, the Judge noted that “*The defence has not disputed that Ms. Manning sought anonymous access to an FTP account on her SIPRNet computer or that important forensic evidence was found by army investigators on the FTP user account in her name.*” It is correct that the last line of this finding is more accurately expressed as “*or in the user profile in her name”*. However, the sense of the ruling is clear – the defence, and defence witnesses

did not dispute that there is evidence that Manning, firstly, sought access to an FTP account, and secondly that the use of the user account in her name was of forensic use in detecting her criminality. Had she been able to use an FTP account, the US alleges, this would have been made more difficult. This is the purpose of the agreement. The Appellant's selection of evidence from a defence witness is *at best* an attempt to shoehorn a jury speech in extradition proceedings. This is not the foundation for an abuse of process argument.

b. **Criticism 2.** It is said that the alternative explanation – that the password hash was being cracked to allow music to be played – was established through the evidence of Mr. Eller and "the government's own evidence" [PGOA §15.43]. This is incorrect. Plainly, the government's case, as set out repeatedly and at length, and as particularised in the indictment is <u>fundamentally not</u> that the purpose of the agreement was for the playing of music. Rather, this evidence comes from transcripts of Ms. Manning's Court Martial which at its height established that unauthorised use of computers for listening to music or watching films was commonplace amongst Ms. Manning and her colleagues and that administrator passwords were cracked in order to install programmes in this regard. This is absolutely *not* evidence that the agreement between Ms. Manning and Mr. Assange was for this purpose. Indeed, it would be curious if Ms. Manning and her colleagues were so frequently able to crack administrator passwords for the purposes of installing music programmes, that Ms. Manning would feel the need to discuss breaking a password hash for an FTP account with this Appellant – who had absolutely no interest in such matters, but did have a particular interest in assisting in Ms. Manning's theft of sensitive data. This criticism does not stand up.

c. **Criticism 3.** The Appellant complains [PGOA §§15.44 to 15.46] that the indictment contains no allegation in count 2 of the indictment that the Appellant conspired with Manning to steal protected information more generally, or over and above the war diaries, Guantanamo briefs, rules of engagement or cables. This, it is said, sustains a *Zakrzewski* abuse submission, as that the password hash allegation is "irrelevant" to the allegation in the indictment. This is incorrect. Count 2 alleges a conspiracy to commit computer intrusion to obtain, amongst other matters "*information that has been determined by the United States Government pursuant to an Executive order and statute to require protection against unauthorized disclosure for reasons of national defense and foreign relations, namely, documents relating to the national defense classified up to the SECRET level, with reason to believe that such information so obtained could be used to the injury of the United States and the advantage of any foreign nation, and to willfully communicate, deliver, transmit, and cause to be communicated, delivered, or transmitted the same, to persons not entitled to receive it, and willfully retain the same and fail to deliver it to the officer or employee entitled to receive it*" [superseding indictment and Kromberg 14 July

2020 at §89, CB/T12/PP816 to 817]. The count is not limited to the categories of material which the Appellant claims. The password hash allegation is plainly encompassed in, and relevant to, count 2. The District Judge [at CB/T2/P128, §379 of her judgment] recited the evidence in the case. This included the indictment, which incorporated this conduct as part of count 2. It also included the affidavits of Mr. Kromberg which explained the prosecution case in relation to the password hash agreement. The US case (rehearsed above) was set out accurately by the District Judge. That the Appellant does not accept that a piece of evidence relied on by the US prosecutors goes to this issue is neither here nor there. It is a classic trial issue.

d. **Criticism 4.** This is a repetition that the FTP user account would not, on Mr. Eller's evidence, have allowed Manning to access data anonymously. As noted above, this is a classic trial issue. It is not within the proper conduct of extradition proceedings for a defendant to call expert evidence on matters of trial evidence and – relying on such trial evidence – attempt to taint the proceedings wholesale with an abuse argument. This is not a *Zakrzewski* point. In any event Mr. Eller did accept, in cross examination, that access to an FTP user account would have been of forensic advantage to Ms. Manning (see above, with transcript references).

298. The casual allegation (PGOA §§15.49) that "the US has been caught lying" would be a surprising one in any document. This Appellant continues to make the allegation in the teeth of an independent judicial finding to the contrary, and without proper evidence to sustain it. This Court should reject the suggestion robustly.

299. Nor is there any validity in the suggestion that the request "concealed" the "US evidence" [PGOA §15.33]. The US case is plainly set out in the request, and maintained in further correspondence. The transcripts of Ms. Manning's court martial are not "US evidence" against this Appellant, nor were they concealed, nor do their contents give rise to a tenable argument that the request is misleading beyond legitimate dispute.

300. The true position is that the Appellant disputes the US case on this issue. The US maintain their case. There is no material inaccuracy beyond legitimate dispute. This argument is another attempt to introduce trial evidence through the back door. It must fail.

7. *Placing sources at risk*

301. This argument is a classic trial issue masquerading as an abuse argument. The US case is that the Appellant knowingly put the lives of sources at risk through the following publications:

(1) The Afghanistan Significant Activity reports, published in 2010;

(2) The Iraq Significant Activity Reports, published after the Afghan SARs, but also in 2010;

(3) The Diplomatic Cables published in August and September 2011.

302. The Appellant asserts that, to the contrary, he made efforts to redact the names sources and that, in relation to the cables, the fact that there is evidence that another website had published in the hours prior to his publication should mean that he escapes criminal liability.

303. This complaint is misconceived. As was noted in submissions below [prosecution final skeleton argument paragraph 484] "Ultimately, this is yet another trial issue. The Indictment specifically avers [the Appellant] caused a grave and imminent risk of harm to sources. Damage, or potential damage, is a necessary ingredient in both jurisdictions. The affidavit in support of the Request shows a risk of harm was caused and that accords with common sense." The Respondent maintains this position, which the Judge was correct to endorse.

(a) *The background*

304. The indictment seeks to prosecute the Appellant for publishing only three sets of documents (counts 15 – 17) – those are the Afghanistan significant activity reports, the Iraq significant activity reports and the Diplomatic cables.

305. It is only the above three tranches of material which form the basis of the publication counts, and even then only to the extent that they were documents "containing the names of individuals, who risked their safety and freedom by providing information to the United States and our allies" – again see counts 15-17. The Appellant's submissions as to other materials [see PGOA §§15.56(ii), and (iii)] are an irrelevance.

(b) *The Afghanistan and Iraq SARs*

306. The Afghanistan SARs were published in 2010. The Iraq SARs were published afterwards, also in 2010.

307. The US case on the SARs is that:

(1) The publication of the "Afghanistan war-related significant activity reports, Iraq war-related significant activity reports, and U.S. State Department cables

containing names of human sources who provided information to U.S. and coalition forces and to U.S. diplomats. ASSANGE communicated these documents to the public by publishing them on the internet via Wikileaks, thereby creating a grave and imminent risk that the human sources he named would suffer serious physical harm and/or arbitrary detention. ASSANGE knew the disclosure of these classified documents would be damaging to the work of the security and intelligence services of the United States of America. These disclosures damaged the capability of the armed forces of the United States of America to carry out their tasks; and endangered the interests of the United States of America abroad." [Dwyer, CB/T12/P829 §8].

(2) "The significant activity reports from the Afghanistan and Iraq wars that ASSANGE published included names of local Afghans and Iraqis who had provided information to U.S. and coalition forces. The State Department cables that WikiLeaks published included names of persons throughout the world who provided information to the U.S. government in circumstances in which they could reasonably expect that their identities would be kept confidential. These sources included journalists, religious leaders, human rights advocates, and political dissidents who were living in repressive regimes and reported to the United States the abuses of their own government, and the political conditions within their countries, at great risk to their own safety. According to information provided by people with expertise in military, intelligence, and diplomatic matters, as well as individuals with expert knowledge of the political conditions and governing regimes of the countries in which some of these sources were located, by publishing these documents without redacting the human sources' names or other identifying information, ASSANGE created a grave and imminent risk that the innocent people he named would suffer serious physical harm and/or arbitrary detention." [Dwyer CB/T12/P841, §39]. This is also reflected in Kromberg 17 January 2020, CB/T12/P930, §25.

(3) The request provides **examples** of documents which were published by Mr. Assange and which contained the unredacted names of co-operating individuals put at risk. These include C1 (revealing the identity of an Afghan source who gave details of a planned attack on coalition forces) C2 (identifying an Afghan source who identified a weapons supplier), D1 (identifying Iraqi sources who provided information on an IED attack), D2 (identifying an Iraqi source who had

turned in weapons to coalition forces and faced threats as a result), A1 (a Diplomatic Cable identifying an Iranian source who required protection) and others [Dwyer CB/T12/PP842 to 843, §§41-2, Kromberg 17 January 2020, CB/T12/PP935 to 936, §§39-42, and P937, §§44-5].

(4) The Taliban explicitly stated that it was reviewing Wikileaks publications in July 2010 – **which must relate to the Afghanistan SARs** – to identify spies whom they could "punish" [Kromberg 17 January 2020, CB/T12/P936, §42]. The publication of the cables also endangered Chinese nationals [Kromberg 17 January 2020, CB/T12/PP939 to 941, §§49 – 54], and Syrians [Kromberg 17 Janaury 2020, CB/T12/PP941 to 943, §§55 – 59].

(5) As a result of the Wikileaks publications, hundreds of at risk people were identified, and some were relocated. Some have "disappeared" (although the United States at this point cannot prove that their disappearance was the result of being outed by WikiLeaks), some were arrested and/or investigated [Dwyer CB/T12/P843, §43, and Kromberg 17 January 2020, CB/T12/PP931 to 933, §§28-34].

(6) As to any efforts at harm minimization "it does not matter if Assange took measures to protect sensitive information in some of the documents. As alleged in the extradition request, he still published the names of local Afghan and Iraqis who provided information to U.S and coalition forces, which created a grave and imminent risk that the individuals he named would suffer serious physical harm. If Assange wants to defend against these allegations by offering evidence of efforts he undertook to protect other sources, he is free to raise this issue in United States courts. But his evidence of those efforts does not suggest that the United States' allegations were false" [Kromberg 24 March 2020, CB/T12/P1024, §33,].

308. The essence of the Appellant's complaint is that he made significant efforts to redact the SARs before publication. It is said that this renders the request abusive. Of course, this argument can <u>only</u> relate to the publication of the SARs and is irrelevant to the publication of cables (addressed below).

309. The Appellant does not (and cannot) dispute that the names of co-operating individuals were published by Wikileaks in the SARs and that there is evidence that these individuals were put in danger and/or suffered significant harm or death as a result.

310. It is the Appellant's case that, after the publication of the Afghanistan SARs, he entrusted the redaction of the Iraq logs to Professor Sloboda (whom he called to give evidence) and his partner. Neither of them had any background in national security, redaction or source protection, and neither had undergone any sort of vetting procedure. Prof. Sloboda has a background as an expert in the psychology of music, but had also started an NGO known as "Iraq Body Count" which was intended to function as a database of civilian deaths in Iraq since 2003.

311. When giving evidence, Prof. Sloboda accepted that individuals had been named in the Afghanistan SARs[18], that the process of redaction of the Afghanistan SARs was "clearly…not as it should have been"[19]. He also accepted that any co-operating individual named in the Iraq SARs would have been put in danger[20], and was unable to explain how it was that individuals' names had been published in the Iraq SARs[21].

312. It is plain therefore that co-operating individuals' names were published and they were put in danger. Whether the Appellant did so deliberately is a matter in dispute. It is a classic trial issue. When the Appellant speaks [PGOA §15.53] of "the true picture concealed", he speaks of *his own case.* This is not a platform for an abuse argument.

313. In contending that any suggestion that Wikileaks did not take redaction seriously is "bluntly false" [PGOA §15.56], the Appellant relies on a witness (Ellsberger) who has <u>no personal knowledge of the issue at all</u>. This is telling. The *Zakrzewski* arguments advanced by this Appellant involve picking lines from transcripts in which witnesses have commented on the Appellant's case – even witnesses with no personal knowledge of the issue at hand – and framing this as an abuse of process. Such an approach, it need hardly be said, is impermissible.

314. The District Judge was therefore correct to conclude [judgment paragraph 402] that "The request is not based on facts which are clearly wrong. Rather, the defence suggests alternative explanations for the allegations, and raises substantive defences to the charges, often based on evidence which the US disputes. Mr. Assange will suffer no unfairness or prejudice from his extradition to the US where he would be able to argue his case at trial."

(c) *The Diplomatic Cables*

[18] Prof. Sloboda, transcript 17.9.20, p15(14), Appellant's evidence bundle p1537
[19] Prof. Sloboda, transcript 17.9.20, p15(29), Appellant's evidence bundle p1537
[20] Prof. Sloboda, transcript 17.9.20, p15(4), Appellant's evidence bundle p1537
[21] Prof. Sloboda, transcript 17.9.20, p21, Appellant's evidence bundle p1543

315. The US case is that:

(1) “Assange claimed that he intended “to gradually roll the cables” out in a safe way” by partnering with mainstream media outlets and “reading through every single cable and redacting identities accordingly”. Nonetheless while Assange and Wikileaks published some cables in redacted form beginning in November 2010, they published 250,000 cables in September 2011, in unredacted form, that is, without redacting the names of the human sources” [Dwyer, CB/T12/P844, §44]. The cables “contained the names of hundreds of innocent people who provided information to the United States government. These sources included journalists, religious leaders, human rights advocates, and political dissidents who were living in repressive regimes…at great risk to their own safety. By publishing the names of these vulnerable people, ASSANGE outed them to their own governments and potentially put them in grave and immediate risk of being unjustly jailed, physically assaulted, or worse. At the time he published the unredacted names of the State Department's sources, ASSANGE was aware that doing so would cause serious risk to innocent human life.” [Dwyer, CB/T12/P862, §83].

316. As to the contention that Mr. Assange was not the first person to publish the Diplomatic Cables unredacted, this does not show the request to have been false or misleading. The publication by Wikileaks did cause a risk of harm, as it posted the unredacted names of numerous sources on a high profile website [Kromberg 24 March 20202, CB/T12/P1026, §37]. As the US have noted – Mr. Assange may attempt to challenge whether his publication of unredacted cables created a risk to individuals in the US courts, but the merits of such a defence are for the US courts to resolve [Kromberg 23 March 2020 CB/T12/P1026, §37]. It is beyond doubt that what is alleged and legitimately so is that the publication of the cables by Assange put people at risk. It is not a *Zakrzewski* abuse for Mr. Assange to say in response simply that he disputes this, or even to call the evidence which he will rely on in attempting to make good his dispute.

317. Furthermore, Mr. Assange and Wikileaks had published diplomatic cables which contained names marked “strictly protect” before any other party published the unredacted cables. Indeed, of the Diplomatic Cables published by Assange by 30th August 2011, numerous cables contained names of individuals classified as “Strictly Protect”, numerous cables were classified as CONFIDENTIAL or SECRET, and most importantly specific

classified cables have been identified as containing the unredacted names of individuals who risked their safety by providing information to the US Government and who faced a grave risk to their safety by the disclosure of their names [Kromberg 24 March 2020 CB/T12/P1026, §38, and Kromberg 21 September 2020 §4 (not included in the Core Bundle)].

318. The Appellant's case as to abuse of process regarding the cables is, essentially, that other websites had also published the cables in the hours before he did, and the fact that this does not appear in the request renders it abusive. Of course, this argument could only relate to the publication of cables, and not the request more generally.

319. To this end, the Appellant called a Professor of Computer Science, Christian Grothoff, who was also cross-examined. It is worth noting that Prof. Grothoff, whilst called as an expert, was undoubtedly partial. In 2017, he had put his name as an "initial signature" to a letter calling on the President of the United States:

> "to immediately close the grand jury investigation to WikiLeaks and drop any charges against Julian Assange and other WikiLeaks staff members which the Department of Justice is planning…to close the grand jury investigation into WikiLeaks and drop any charges planned against any member of WikiLeaks. It was a free and robust press that provided you with a platform on which to run for president. Defending a free press requires freedom from fear and favour and the support of journalists and citizens everywhere. For the kind of threats now facing WikiLeaks and all publishers or journalists is a step into the darkness".

320. When cross examined about whether he should, pursuant to his duties under the Criminal Procedure Rules, have drawn the court and parties' attention to this, he stated that he could not remember the letter[22], or putting his name to it. This is so even after the Appellant's lawyers drew it to his attention shortly before he was due to give evidence. He denied that endorsing a letter to the President of the United States calling for the cessation of criminal proceedings against Wikileaks and the Appellant might even give the impression that he was partial[23].

321. In any event, the evidence Prof. Grothoff gave was in reality trial evidence put forward in the extradition proceedings. From the evidence, the District Judge distilled the following chronology [judgment paragraph 388]:

> a. In the Summer of 2010 David Leigh and the Guardian were given access to the unredacted diplomatic cables by Assange. The cables were in a file on the Wikileaks

[22] Transcript of evidence of Prof. Grothoff, defence appeal bundle p1623(25) to p1625(9)
[23] Transcript of evidence of Prof. Grothoff, defence appeal bundle p1626(23-32)

website. Access to (at least parts of) the unredacted cables was also given to 50 other organisations, according to Wikileaks [Grothoff XX Tr. 21.9.20 pp21-1]

b. On 28th November 2010 Wikileaks and other media partners released redacted versions of the cables. There is no count on the indictment reflecting this publication.

c. In November and December 2010 Wikileaks is the subject of online attacks and encourages the process of "mirroring" that is to say the copying of the website and its hosting on numerous servers, to ensure that the website remained available.

d. On 1st February 2011 David Leigh published his book. Mr. Assange and Wikileaks (in this case through Professor Grothoff) assert that this book published the title of the password to the diplomatic cables file, which could not be changed. David Leigh denies this (describing Mr. Assange's version of events as "a complete invention") and asserts that he had always been told it was a temporary password. This file existed on numerous mirrored Wikileaks websites held on different servers.

e. Between 23rd and 30th August 2011 Wikileaks publishes a series of the cables (around 134,000), advertising them via its twitter account including in fully searchable versions [Prof Grothoff XX Tr. 21.9.20 p28 et seq]. Mr. Assange claims that these cables were "unclassified" [defence skeleton §12.69]. The evidence from America is that 140,000 cables have been obtained which were downloaded to the Wikileaks website as of 30th August 2011. These cables are still being reviewed, but numerous cables have been identified which were classified to CONFIDENTIAL or SECRET levels and contained names marked "Strictly Protect". The US has also identified specific classified cables which "contained the unredacted names of individuals who had risked their safety and freedom by providing information to the United States, and who faced a grave risk to their safety and freedom from the disclosure of their names" [Kromberg 6, §4]. Wikileaks advertised the release of these cables and thereafter boasted of releasing them again in "searchable format" [Grothoff XX Tr. 21.9.20 pp29-30]. Professor Grothoff could not say whether the cables contained names marked strictly protect or not [Prof Grothoff XX Tr. 21.9.20 p33(28)].

f. On 25th August 2011 Der Freitag published an article stating that an encrypted copy of the cables was available on the internet. It did not reveal the location or the means by which the file might be accessed.

g. On 29th August 2011 Der Speigel published an article stating that the cables were on the internet and that the password had been accidentally revealed by an external contact.

h. At around 22:00 on 31st August 2011 Nigel Parry tweeted that David Leigh's book contained the password for the file containing the cables [eg Grothoff XX Tr 21.9.20 p39].

i. At 22:27 GMT on 31st August 2011 Wikileaks posted a tweet identifying that a Guardian journalist had revealed the password to a file containing the cables.

j. At 23:44 GMT on 31st August 2011 Wikileaks issued an editorial in which they identified Mr. Leigh's book as containing the password to the file and showed readers of the editorial on its twitter feed which chapter and whereabouts the password could be found. The Wikileaks twitter feed has a far greater reach than Nigel Parry [Professor Grothoff XX Tr. 21.9.20 p42-3]. Wikileaks also calls a "Global Vote" on whether or

not to release the entire cache of cables on its own site [Professor Grothoff XX Tr. 21.9.20 p43].

k. Mr. Parry claims in his blog that an internet user named NIM_99 uploaded the cables to the internet shortly before midnight on 31st August to 1st September 2011. However, Professor Grothoff could not find any evidence of this posting using the Wayback Machine [Professor Grothoff XX, p40-41, p55]. There is no evidence (other than Mr. Parry's blog, unsubstantiated by the expert called by the defence) of a posting at this time.

l. On 1st September 2011 at 11:23 GMT a user named "Yoshima" uploaded the cables to the Pirate Bay Website [Professor Grothoff XX Tr. 21.9.20 p41]. This is the earliest that Professor Grothoff can say the cables were "put up" [Professor Grothoff XX Tr. 21.9.20 p44(32-34) ad p45(1-10)]

m. On 1st September 2011 Crytome.org published the cables on the Cryptome website at an unknown time [Grothoff XX Tr. 21.9.20 p 41].

n. At 13:09 GMT on 1st September 2011 a user named "Draheem" posted the cables to the Pirate Bay Website [Professor Grothoff XX Tr. 21.9.20 p41].

o. On 1st September 2011 at either 7.58pm or 5.58pm [depending on time zone] "MRKVAK" tweeted that searchable cables were available at cables.MRKVA.EU [Grotfhoff XX Tr. 21.9.20 at pp35-8]

p. At 01:20 on 2nd September 2011 Wikileaks published the entire cache of cables, labelling it "Cable Bomb" or "Cable Gate 2". Wikileaks mirrored the site to make sure that the cables stayed online [Professor Grothoff XX Tr. 21.9.20 pp43-4]. Professor Grothoff accepted that the Wikileaks twitter account and website had "significant global reach" and that in the immediate aftermath of the publication the website was struggling to deal with the traffic accessing it - indicating that either a vast number of people were trying to access the material on the site, or that it was being made the subject of a DDoS attack in an attempt to render the site inoperable [Professor Grothoff XX Tr. 21.9.20 p44].

q. By the early hours of 2nd September 2011 Wikileaks had published searchable versions of the cables which were attracting significant global interest [Professor Grothoff XX Tr. 21.9.20 p44]. Professor Grothoff did not agree that the Wikileaks posting was in a more searchable format (as indicated in media reports at the time) but he did accept that it made the material "more visible" [Professor Grothoff XX Tr. 21.9.20 p46].

322. This is a chronology that the District Judge was entitled to rely on, and compiled from the Appellant's evidence. The commentary on it contained in the PGOA §15.80 is merely yet another attempt to repeat the Appellant's case (or his own contentions of fact) within a court pleading. It does not assist this Court.

323. The Appellant's contention that the Judge's chronology (which if correct would show publication by other websites hours before the Appellant) somehow renders the request abusive is plainly unarguable. The Respondent relies on the same arguments put forward in the court below, which were rightly accepted, namely:

324. Firstly, the request is not misleading. The allegation that Assange published the full and unredacted cache of Diplomatic Cables in September 2011 is accepted by the defence.

325. Secondly, the Appellant had been publishing unredacted cables, including cables with names marked "strictly protect" and cables that put named sources at risk, by **30th August 2011**, prior to any other website or individual publishing the cables [Kromberg 21 September 2020, §4 (not included in the Core Bundle)].

326. Thirdly, that other less visible parties might have also published contemporaneously (on the evidence, 14 hours previously) is immaterial. It is clear that the allegation against the Appellant, made consistently, is that his publication put others in danger. Professor Grothoff accepted the greater reach and presence of Wikileaks [see AB/p1651 (13) to (15), p1652 (17) to (19), p1653(31) to 1654 (6)[24]]. The District Judge noted this.

327. This is not a case of publishing material when the "damage had already been done". The evidence indicates Mr. Assange was refusing to be "scooped", and actively promoting the material to as wide an audience as possible.

(d) *Republication and reach*

328. As is clear from the above, the allegations made in the request as to publication are accurate. The Appellant, undeterred, describes the request not as inaccurate in its description of the conduct, but in failing to mention other evidence which he wishes to rely on. This plainly is not the position that *Zakrzewski* was considering.

329. Nonetheless, the Appellant persists. He maintains that the failure to provide the Court with material which he wishes to rely on in his defence is abusive because it goes (or would go, if it were in the request) to the issue of dual criminality [see PGOA §§15.82 to 15.86]. The Appellant's argument in this regard is that "prior publication" is a defence under UK criminal law, and that the conduct of the Appellant would therefore have been lawful. He is wrong:

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[24] Q. And would you accept that WikiLeaks' Twitter account has a very significant public reach?
A. I would think compared to Mr Parry, yes
…
Q. --- as I think you accept, the WikiLeaks' Twitter account and, indeed, the WikiLeaks' website have a significant global reach?
A. Yes, compared to (inaudible). It depends on what you compare it with
…
Q. Would you accept that the WikiLeaks' release was more comprehensive and publicly visible than previous releases?
A. More comprehensive in part of their searchable material, which I do not quite see in it…but more visible, I would accept.

330. Firstly, the high point on the Appellant's case in this regard is reliance on *Attorney-General v. Guardian Newspapers (No.2) [1990] 1 A.C 109,* the "Spycatcher" case. As the Appellant has to concede, this is <u>not</u> a case about the ambit of the criminal law, or even concerning criminal law. The case did not, and did not purport to, find that "republication of material already in the public domain is not a criminal offence" [as the Appellant argued in the Court below - defence final skeleton argument, CB/T4/P362, §12.59].

331. Rather, the case concerned a former member of MI5 who had published a book "Spycatcher". This had been published in the United States in July 1987, and in Australia in October 1987. Publication had also taken place in Ireland, Canada and other countries. The Observer and The Guardian sought to publish articles commenting on the contents of the book. By the time of the ruling the book and its contents had been disseminated on a world wide scale, and the information contained therein commented on by newspapers throughout the world [see for example the ruling of Scott J at first instance at 171D]. One of the issues to be decided was whether the material relating to the contents of the book was held in confidence.

332. The height of the findings of the in *Guardian Newspapers* was that – on the facts of that case – the material which was the subject of an injunction was already in the public domain and therefore no longer confidential, and that accordingly no further damage could be done by its publication. No injunction could therefore be granted against The Observer and The Guardian newspapers, both of whom wished to comment on the contents of the book. Lord Keith of Kinkel concluded so but stressed that "I do not base this upon any balancing of public interest…nor upon any possible **defences of prior publication…**but simply upon the view that all possible damage to the public interest has already been done" [at 260E]. There was no discussion of the criminal law or its ambit. There was no statement that "republication is not a criminal offence".

333. The passage from Lord Brightman cited by the Appellant [PGOA §15.83(i)] contains no statement of legal principle beyond a factual finding that – on the facts of that case – there was "no possible damage" to be done by publication in the Sunday Times. The allegation in this case is the converse – it is alleged that <u>damage was done</u>. Of course, in each case, whether a disclosure is damaging will be a matter of fact and degree.

334. Secondly, the Appellant's reliance on Lord Hope in §§81 – 83 of *R v Shayler* [2003] 1 A.C 247 is also misplaced. Lord Hope did not find that prior publication is a defence to the criminal charge. The quote relied on reads, in full [§82]:

> "It was suggested in the course of the argument that a contrast should be drawn between judicial review of a decision to withhold authorisation and the factors to be taken into account where an injunction is sought to prevent the publication of disclosed material. Reference was made to Lord Griffiths's speech in Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 273a-b where he said that, while the court cannot brush aside claims that publication will imperil national security, it must examine and weigh against the countervailing public interest of freedom of speech and the right of people in a democracy to be informed by a free press. The suggestion was that judicial review on traditional Wednesbury grounds would fall short of the degree of scrutiny which the court can bring to bear in injunction cases. But once the full scope and intensity of judicial review of individual decisions to withhold official authorisation on proportionality grounds is recognised, there is parity on this point between the two systems. The essential difference between the two systems is between the taking of decisions on public interest grounds before disclosure on the one hand and taking those decisions after disclosure on the other."

335. As can be seen from the above, there is no statement of principle that prior publication is a defence to a criminal charge. The District Judge was correct to note, in this regard, that the issue of prior publication will go to whether or not the publication was damaging [District Judge ruling, CB/T2/P130, §383] – that is a classic trial issue.

336. Thirdly, it is surprising that the Appellant feels it necessary or appropriate to rely on a quote from an article in the Daily Telegraph as demonstrative of the state of English criminal law [see PGOA §15.85]. It needs hardly be said that this court will not be bound by a twenty year old newspaper quote when determining the scope of the law.

337. Fourthly, as the District Judge noted [District Judge ruling, CB/T2/P133 §394]:

> "in relation to the OSA 1989 the government considered and rejected a defence of prior publication in the white paper which preceded the Act. It argued that, in certain circumstances, a second or subsequent disclosure might be more harmful, giving the example of the publication of a list of addresses of persons in public life which may capture the interest of terrorist groups more readily than the same information scattered in disparate previous publications. It argued that the offence would not be made out if no further harm is likely to arise from a second disclosure."

338. Lastly, and linked to the above, the Indictment specifically avers that the Appellant caused a grave and imminent risk of harm to sources. Damage, or potential damage, is a necessary ingredient in both jurisdictions. The affidavits in support of the Request allege a risk of harm was caused, and maintain that the risk was caused irrespective of whether another website(s) had published in the previous hours. Even the Appellant's own evidence had this effect. Prof. Grothoff could not say whether the cables released by Wikileaks between 23 and 30 August 2011 contained names marked "strictly protect", as alleged by the US[25].

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[25] Transcript of evidence of Prof. Grothoff, Appellant's bundle p1637(9) to (16) and p1641(25) to (31)

He accepted that one of the things Wikileaks boasted of was the release of cables in searchable format[26]. He also accepted the global reach and visibility of Wikileaks (as noted above).

339. It is unclear whether the Appellant relies on the "fresh" statement of Mr. Rusbridger for the purposes of furthering his *Zakrzewski* abuse argument. For the avoidance of doubt, the Respondent submits that the Rusbridger statement takes this matter no further. Mr. Rusbridger's opinion on a trial issue (whether sources were put at risk, and deliberately so) is nothing to the point. The US maintains its case, and properly so. The Appellant is entitled to litigate the point.

340. Neither the misconduct alleged nor the offences indicted have been mischaracterised. The essential allegation against this Appellant – that he published cables by August 30, 2011 with names marked "strictly protect" and then again in September 2011 unredacted, is accurate. The issue of whether, when doing so, he caused damage by putting named individuals at risk is disputed. It is a trial issue. The US maintains its case [see for example Kromberg 24 March 2020, CB/T12/P1206, §37]. The Appellant is free to litigate the issue. That is not abusive.

341. Against this background the District Judge's ruling is beyond criticism. She noted, correctly, that it is not disputed that Wikileaks published a full unredacted cache of diplomatic cables on 2nd September 2011 which included the names of human sources[27]. She also noted, correctly, that the issue of whether the publication was damaging to military security will be a matter to be considered by the jury[28]. This was not irrelevant [per PGOA §15.83(ii)]. That the issue was one to be determined by a jury, at trial in the US was plainly relevant to the District Judge's conclusion that the Appellant was attempting to *raise a trial issue*. As to the issue of extradition offences (to which US law is irrelevant), the US maintains its case – the fact that there is evidence which the Appellant would wish to rely in his defence is neither surprising nor abusive.

342. Ultimately the Judge found that "*The category of abuse with which Zakrzewski is concerned relates to a situation in which the court is presented with a request which is, on the face of it, regular and which cannot be challenged, but which would lead to extradition on facts which are known to be clearly wrong. That is not what has happened*

[26] Transcript of evidence of Prof. Grothoff, Appellant's bundle p1637(21) to (31)
[27] Paragraph 391
[28] Ruling, paragraphs 393 to 395

here." For the reasons set out above, this was the only proper conclusion. There is no prospect of the Appellant showing this part of the ruling to be wrong. Permission must be refused.

XI. CONCLUSIONS

343. For all the reasons set out above the grounds of appeal advanced by the Appellant are unarguable and permission to appeal should be refused.

James Lewis KC

Clair Dobbin KC

Joel Smith

31 October 2022