

Julian Assange's extradition case plays out on a number of different legal grounds: most obviously the terms of the UK Extradition Act, but also European Convention rights (incorporated into English law under the Human Rights Act 1998). Also at issue are the bilateral Treaty that governs extradition arrangements between the UK and US and even international humanitarian law.

This document outlines the main issues from a European perspective.<sup>1</sup> If Julian Assange exhausts his domestic appeals in the UK, his case may well end up at the European Court of Human Rights in Strasbourg.<sup>2</sup> Both the Parliamentary Assembly of the Council of Europe and CoE Human Rights Commissioner Dunja Mijatovic have already expressed concerns about this extradition on Article 10 grounds.

The key overall line of the defence case is that this is a **politically motivated and abusive prosecution**. This is argued in terms of UK statute law but reflects customary principles that are widely accepted internationally.<sup>3</sup> The defence takes issue with UK case law that identifies the concept of a 'political offence' solely with individuals who are contesting political power *within* a state - such as members of political parties - as "obviously outdated":

"An individual who exposes wholesale abuse and war crimes by a state and thereby attracts prosecution for the very act of such exposure, is entitled to ... protection" (DCS 8.7)

Assange's defence team argue that WikiLeaks, as an endeavour in favour of official transparency and accountability for war crimes, necessarily found itself in opposition to a Trump Administration viscerally opposed to both of these things. The attitude of the Trump Administration has been borne out in actions such as the pardoning of war criminals and initiating sanctions against the International Criminal Court.<sup>4</sup> The defence argues that Julian Assange is therefore being discriminated against for his political opinions.

Another dimension of the defence's arguments about political motivation turn on the difference in prosecution decisions between the Obama and Trump administrations. They argue that a legally-sound Obama era decision not to prosecute Julian Assange for his journalistic work was reversed under the Trump Administration for political reasons. The overall conduct of the Trump administration towards journalists, and Assange in particular, are offered as additional evidence of the political nature of the prosecution.

The invasion of legal privilege through surveillance and the seizure of papers after Julian Assange was expelled from the Ecuadorian embassy are offered as examples of the abusive nature of this prosecution.<sup>5</sup> The defence says these "were the actions of a lawless state bent on adopting any means necessary to 'bring him down.'" (DCS 8.1.vi)

Furthermore, the defence say that statements by the prosecution that Julian Assange is not entitled to First Amendment protection as a foreign national mean that he is also at risk of discrimination on the grounds of nationality. (Extradition Act, section 81(b)) This is likely also to make a difference to

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<sup>1</sup>All references are taken from the Defence Closing Submissions (DCS) in the UK extradition case *Government of the United States of America v Julian Assange*, which was served on 6 November 2020 and the Defence Reply (DR) served on 1 December 2020.

<sup>2</sup>Should the first instance court (Westminster Magistrates' Court) rule in favour of extradition, JA has possible domestic appeals to the High Court of England and Wales and then the UK Supreme Court. The case will certainly end up in the High Court on appeal from the United States even if Westminster decides not to extradite Assange.

<sup>3</sup>The defence argues that JA is being prosecuted for his political opinions rather than "a proper and legitimate concern to punish... ordinary criminal conduct." (UK Extradition Act Section 81(a))

<sup>4</sup>See, for example <https://www.theguardian.com/us-news/2019/dec/27/eddie-gallagher-trump-navy-seal-iraq> and <https://www.bbc.co.uk/news/world-us-canada-54003527>

<sup>5</sup>The surveillance undertaken at the Ecuadorian Embassy in London is not being argued as an Article 6 (fair trial) issue.

the conditions Julian Assange would experience in prison, for instance the application of restrictive “Special Administrative Measures” (SAMs), which are determined by the US Department of Justice centrally. The prosecution have said that the imposition of SAMs is a possibility in Assange’s case.

### **The unprecedented nature of the prosecution is an Article 7 issue**

Article 7 ECHR provides protection against arbitrary treatment. Mr Assange’s defence argue that the absence of any legal precedent for this prosecution – something that is not seriously contested by the prosecution - means that:

“In 2010-11, the relevant time under consideration, it was wholly unforeseeable that such an indictment could or would be issued against a member of the press for obtaining, receiving or publishing leaked classified information.” (DCS 10.52)

Statements from the prosecution that Julian Assange would not be entitled for First Amendment protections as a non-citizen should be considered an Article 7 issue as well as a discrimination issue, say the defence, as Mr Assange would be denied human rights-like protections in the United States. (DR 7.9)

The defence also raises the breadth of the legislation Mr Assange has been charged under, the US Espionage Act and Computer Fraud and Abuse Act, and the enormous discretion their terms allow to prosecutors. (DCS 10.28)

Article 7 is essentially untested as a defence to extradition in the UK. It is likely the standard that would have to be met for a UK court to find on these grounds is for there to be a real risk of a “flagrant violation” of Article 7. (DCS 10.5-10.7)

### **Freedom of the press, Article 10 and the right to the truth**

Mr Assange’s defence team say that “this legally unprecedented prosecution seeks to criminalise the application of ordinary journalistic methods to obtain and publish true (and classified) information of the most obvious and important public interest.” (DCS 11.5)

A number of witnesses testified to how the prosecution’s theory would criminalise normal journalist-source communications. Investigative journalists typically do not passively receive information but solicit, communicate with and encourage their sources to provide the information necessary to back up their claims.

The defence argues that the equivalent legislation in the UK – the 1989 Official Secrets Act (OSA) – could not be used to prosecute journalists for normal work, because public authorities in the UK are bound by Article 10. (DCS 11.6-11.7) The House of Lords ruling in *R v Shayler*<sup>6</sup> included comments to this effect. (DCS 11.37-18)

Furthermore, the defence contends that the real position in 2020 has moved beyond the Shayler decision, noting that a recent report from the UK Law Commission suggests the OSA is no longer compliant with Article 10.<sup>7</sup> In the context of Mr Assange’s case, if the alleged conduct is not a crime in the UK, then the dual criminality requirement means that extradition cannot go ahead. This will, however, be an issue to be adjudicated by a higher court (possibly the ECtHR itself). (DR 12.5-6)

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<sup>6</sup>David Shayler was a whistleblower from MI5, the UK’s domestic intelligence service.

<sup>7</sup>The report suggests that the UK needs to provide a proper public interest defence for security service whistleblowers.  
<https://www.lawcom.gov.uk/project/protection-of-official-data/>

A number of cases from the European Court of Human Rights in Strasbourg are cited in support of the Article 10 implications of the case, notably that the ECtHR has supported newsgathering and obtaining information as a key element of the reporting process.<sup>8</sup> The defence and prosecution differ on the implications of the Strasbourg court's case law on "responsible journalism" for this case. The defence offers in support ECtHR decisions that uphold journalists assisting whistleblowers and protecting their sources.<sup>9</sup> (DR 8.9, 8.15)

In addition to the Article 10 arguments, the defence links the public interest of WikiLeaks' publications to the principle of the "right to the truth" regarding major human rights abuses which has been developed in international human rights law.<sup>10</sup>

### **"Flagrant denial of justice" – Article 6**

The defence outlines a number of factors about Julian Assange's likely treatment both pre-trial and post-conviction in the United States, that would amount to a denial of his Article 6 right to a fair trial.

These include the coercive nature of the criminal justice system in the US which combines plea bargaining with pre-trial solitary confinement, the composition of the local jury pool in Alexandria, Virginia which is likely to contain a disproportionate number of US government employees and their close relatives, the cruel and inhuman treatment Chelsea Manning has suffered over several periods of incarceration, public denunciations of Julian Assange from senior US officials and the ability of US prosecutors to bring unproven allegations into consideration during sentencing. (DCS 17.2-7)

The defence also raises the likelihood of Julian Assange receiving a sentence that amounts to effective life imprisonment. (DR 15.2)

### **US prison conditions and Article 3**

Conditions in the US prison system, particularly for those with pre-existing medical conditions, are regularly brought up in UK-US extradition proceedings. There is the ability to make these arguments on the basis of Article 3 rights being violated and on the UK statute protection against an "unjust or oppressive" extradition (UK Extradition Act, Section 91).

The attempt to extradite British computer scientist Lauri Love to the United States was rejected on Section 91 grounds in 2018 and, the defence argue, provides a clear precedent for Julian Assange's extradition to be blocked on welfare grounds. The argument on the Section 91 point includes the consideration of detailed medical evidence on Mr Assange's mental health, his diagnosis with Autism Spectrum Disorder and the real possibility he might take his own life if extradited to the US.

Turning to Article 3, the prosecution argue that a previous Strasbourg case endorsed the Special Administrative Measures (SAMs) Mr Assange might experience in the United States as Article 3-compliant.<sup>11</sup> The defence contends that this is not necessarily the case when detention is long-lasting

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<sup>8</sup>These include *Tarsasag v Hungary* (2011) 53 EHRR 3, *Szurovecz v Hungary* (2020) 70 EHRR 21, *Girleanu v Romania* (2019) 68 EHRR 19 and *Stoll v Switzerland* (2008) 47 EHRR 59

<sup>9</sup>Including *Goodwin v United Kingdom* (1996) 22 EHRR

<sup>10</sup>The "right to the truth" regarding evidence of war crimes was affirmed by the UN Human Rights Council in Resolution 21/7 (27/09/12) and the UN General Assembly in Resolution 68/165 (21 January 2014). The principle has been adopted by ECtHR in the rulings *El Masri v Macedonia* (2013) 57 EHRR 23 paras 191-193 and *Al Nashiri v Romania* (2019) 68 EHRR 3 para 641.

<sup>11</sup>*Babar Ahmad v United Kingdom* (2013) 56 EHRR 1

or indefinite and not subject to regular review. (DR 14.2) The defence argues it is a “virtual certainty” that Mr Assange will be subjected to SAMs if he is convicted, which mean that – among other things – Mr Assange would only be able to make one phone call to family a month, unlike the 90 minutes per day allowance he currently has at HMP Belmarsh (DR 14.6).

In practice, mental ill health is no barrier to being placed in ADX Florence, the most restrictive facility in the US prison system, where Mr Assange would experience conditions of solitary confinement on a possibly indefinite basis. (DR 14.11-12)

### **Additional issues: abuse of process**

This does not represent a complete accounting of the defence arguments put forward on Julian Assange’s behalf. Various additional issues are raised on domestic UK grounds, including the delay in the US bringing this case, the timing and content of the second superseding indictment and misrepresentation of the facts as presented by the United States. The defence alleges that the US prosecution has shown bad faith in bringing these charges.<sup>12</sup>

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<sup>12</sup>For discussion of these see DCS 23 (passage of time), DR 17 (second superseding indictment), DCS 12 and DR 9 (misrepresentation of the facts - Zakrzewski abuse) and DCS 7 (abuse of power).