IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case No: CO/2334/2022

IN THE MATTER OF AN APPEAL UNDER S.108 OF THE EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Applicant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

GROUNDS OF RENEWAL

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1. Introduction

1.1. On 17 June 2022, the Secretary of State ('**SSHD**') ordered the Applicant's extradition to the USA. The Applicant sought to appeal that decision on four grounds.

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

1.3. Pursuant to Crim PR r.50.22, the Applicant renews his application for permission to appeal on two grounds, namely:

(i) Ground of Appeal 1: Extradition is barred by the treaty;

(ii) Ground of Appeal 2: Extradition is barred by inadequate specialty protection.

2. Ground of Appeal 1: Extradition is prohibited by the treaty

2.1. In accordance with long and well-established Anglo and US[1] practice, Article 4(1) of the 2003 US/UK treaty provides that '*extradition shall not be granted if the offence for which extradition is requested is a political offence'*.

2.2. The prohibition on extradition for political offences, reflected in Article 4, has venerable historic and juristic importance. It is one of the most fundamental protections recognised in international and extradition law. It features in Article 3a of the United Nations Model Treaty on Extradition. It features in Article 3 of the Interpol Convention.

[1]. The prohibition on extradition for political offences is contained within nearly all US extradition treaties. Some of the first treaties to contain the political offences exception were signed by the US, dating as far back as 1856.

It is enshrined in the substantive law of numerous Western democracies including Canada, Argentina, Belgium, Spain, Italy, and Germany. It is one of the most universally accepted rules of international law governing extradition. It is secured in the Trade & Cooperation Agreement with the EU. Part 1 of the 2003 Act is therefore[2] now modified so far as 12 EU Member States are concerned (Belgium, Croatia, Cyprus, Czech Republic, Denmark, France, Italy, Poland, Slovakia, Finland and Sweden) to incorporate the prohibition. The UK continues to enter into treaties which feature a political offence exception long after passing the Extradition Act 2003; see for example article 3(1)(a) of the UK/Morocco Treaty, which entered into force on 6 December 2022.

2.3. The offences with which Mr Assange is charged, and for which his extradition is sought, are, on the face of the extradition request, '*political offences'* as a matter of universally recognised law.

2.4. The offences alleged in the current (second superseding) US indictment that now forms the basis of the extradition request are a series of offences, cumulatively punishable with 170 years' imprisonment, under the Espionage Act 1917 (now codified in Title 18, USC chapter 37 '*espionage and censorship'*), namely:

(i) Conspiracy to obtain, receive and disclose national defence information (Count 1);

(ii) Unauthorised obtaining and receiving of national defence information (Counts 3 to 9);

(iii) Unauthorised disclosure of national defence information (Counts 10 to 18).

2.5. There is also an offence[3] (punishable with 5 years' imprisonment) of '*conspiracy to commit computer intrusion'* with intent to '*facilitate Manning's acquisition and transmission of classified information related to the national defence of the United States*' (Count 2; Second Superseding Indictment, CB/12/p1043 – 1091).

2.6. The gravamen (and defining legal characteristic) of each of the charges[4] is thus an alleged intention to obtain or disclose US state secrets in a manner that was damaging to the security of the US state. These are all *'political offences'* in law and extradition is prohibited and unlawful in respect of all such offences under the express terms of the 2003 Anglo-US Extradition Treaty.

2.7. What follows at paragraphs 2.10 to 2.41 is, for the assistance and assurance of the court, an explanation of the settled law which underpins the Applicant's assertion that the treaty prohibition is squarely engaged in this case. The reader should, however, know

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2. By reason of Article 602 TCA and s.29 of the EU (Future Relationship) Act 2020 as interpreted by ***Lipton v BA City Flyer*** [2021] 1 WLR 2545 at §78.
3. Originally the only offence charged.
4. Including charge 2: the Computer Fraud and Abuse Act is described in the evidence as '*an extension of the Espionage Act – with its serious flaws – to the digital age'* (Shenkman, EB/5, §35).

that neither the DJ, nor the SSHD, nor Swift J contend or hold that extradition is not barred by the treaty.

2.8. The actual decision of the SSHD subject to this appeal, and endorsed by Swift J, is the stark proposition (unsupported by authority) that the SSHD is *bound* by law to give effect to an extradition request which she knows to be prohibited by international law (and legal principles applied around the globe). For the reasons explored at §2.42ff below, it is entirely arguable that the Act did not compel such an abnormal conclusion.

2.9. **The reader may therefore proceed, if they wish, to §2.42 on page 12 of these renewal grounds.**

'Pure political offences'

2.10. The concept of a '*political offence'*, or an offence '*of a political character',* has featured in successive Extradition Acts and in numerous bilateral treaties over the last century and a half. It is a concept which carries a particular meaning under international law.

2.11. As a starting point, the authorities, both in England and abroad, first identify certain offences that are, by definition, paradigm or '*pure'* political offences because they are clearly offences against the state. In ***Schtraks v Government of Israel*** [1964] AC 556, Lord Reid identified certain offences as obviously of a political character, namely '*treason, sedition, or any other offence of that kind'* (Lord Reid at p581).

2.12. The distinction between '*purely political crimes*' and '*relative political crimes which are common crimes with a political overlay*' was reiterated in ***T v Immigration Officer*** [1996] AC 742 per Lord Mustill at p761D. Treason is, for example, per Lord Mustill, a '*purely political crime'* because it is a crime that, by definition, is '*directed at the sovereign and his apparatus of state'*. ***Oppenheim's International Law*** identifies as clearly within this definition '*certain offences against the state only, such as high treason, lese-majeste and the like'* (at p964). They are '*crimes such as treason or sedition'* (***Cheng v Governor of Pentonville Prison*** [1973] AC 931 per Lord Hodson at p941E). They are '*on the face of them political offences*' (per Lord Diplock at p943G, 944F). They are '*the type of political offence which is necessarily committed against the state seeking extradition'* (per Lord Simon at p949F-G).

Espionage is a 'pure political offence' in law

2.13. The offence of espionage is understood under UK law, common law and international law, to be a paradigm example of a '*pure political offence*', because it is, by definition, directed against the political order of the state itself. ***Bassiouni*** on International Extradition identifies '*treason, sedition and espionage'* as paradigm examples belonging to this category (p677-679). See also, to like effect, ***Shearer***, Extradition in International Law, 151 (1971)

2.14. The jurisprudence is likewise all one way. ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540 concerned potential allegations of '*spying, weakening of the armed forces; going over to the enemy'*. That '*is an offence of a political character'* per Cassels J at p547. Even the allegations of mutiny on a merchant ship, as Lord

Mustill observed in ***T v Immigration Officer*** (supra) at p766D, '*were in reality 'pure' political offences, such as sedition'*.

2.15. In ***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA 7, the High Court of Australia identified '*offences such as treason, sedition, and espionage*' as pure political offences (per Gleeson CJ at §15, 21). '*Crimes designated as 'purely political' would involve such offences as high treason, capital treason, activities contrary to the external security of the State and so on'* (ibid., per Kirby J at §103).

2.16. Likewise ***Dutton v O'Shane*** [2003] FCAFC 195 the Full Federal Court (Finn and Dowsett JJ) said at §185-186: *'...Illustrative of pure political offences are offences such as treason, espionage, sabotage, subversion and sedition. Such are offences 'directed solely against the political order': Shearer, Extradition in International Law, 151 (1971). Their purpose has been described, variously, as to protect the political institutions of the State: Aughterson, 91; the State itself; 34A Am Juris 2d §44; or the sovereign or public order: Bassiouni, International Extradition 512 (3rd ed)...'*

2.17. In short, espionage is a 'pure political offence' in the same category as treason, sabotage and sedition. See also, for example:

(i) The US Court of Appeals in ***McMullen v Immigration and Naturalization Service*** (1986) 788 F.2d 591, at p596 ('*...'pure' political crimes, such as sedition, treason, and espionage*');

(ii) Per Piersol CJ in the US District Court in ***Arambasic v Ashcroft*** (2005) 403 F Supp 2d 951 at p956 ('*A purely political offense involves conduct directed against the sovereign or its political subdivisions but does not have any of the elements of a common crime. Treason, sedition and espionage are examples of purely political offenses*'); and

(iii) Per North J in the Australian Federal Court in ***Santhirarajah v Attorney-General for the Commonwealth of Australia*** [2012] FCA 940 at §103, 107, 111, 123, 145 (recording *inter alia* the Government's assertion that '*pure political offences [encompass] treason, sedition, and espionage'*).

2.18. The principle that espionage is a '*pure political offence'* for which extradition is forbidden, is so entrenched in international law and practice that Interpol's General Assembly Resolution AGN/53/RES/7 (1984) provides that '*offences...by their very nature political...e.g. espionage...come within the scope of Article 3'* of Interpol's Constitutional prohibition on extradition for political offences (at §II.i). Interpol's Repository of Practice concerning Article 3 further states that (at §3.4): *'...Offences committed against the internal or external security of the State, such as the offences of ... espionage, have traditionally been viewed as pure political offences under extradition law.*[5] *INTERPOL has therefore consistently considered that such crimes fall within the scope of Article 3 of the Constitution.*[6]

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5. See M. Cherif Bassiouni, International Extradition: United States Law and Practice (fifth edition), p. 660.

6. Resolution AGN/53/RES/7 (1984); Resolution AGN/63/RES/9 (1994).

2.19. In sum, espionage is, without more, an offence directed against the state itself and therefore well established as a '*pure political offence'*, for which extradition is prohibited under the terms of the Treaty.

The *conduct* underlying all charges is that of 'pure political offences' in any event

2.20. This is not an argument about mere labels. Even if one ignores (which one cannot) the juridical label of the Espionage Act, the alleged conduct which underlies all charges is unquestionably one of a '*pure political offence'*. That is because the alleged conduct satisfies the established test of conduct directed against '*the apparatus of the state'* (***Schtraks v Government of Israel*** [1964] AC 556 at p588, and ***T v Immigration Officer*** [1996] AC 742 at p716D). Mr Assange is alleged to have sought, obtained and published official state secrets. That is an allegation of an activity '*contrary to the external security of the state or, the state itself'* and the rationale of the prosecution is that it is supposedly '*designed to protect the political order of the USA'*.

2.21. As the extradition request states, the case levelled against Mr Assange by the US government itself is of alleged involvement in a:

> *'...scheme to steal classified documents from the United States and publish them...knowing that the documents were unlawfully obtained classified documents relating to security, intelligence, defense and international relations of the United States of America...The disclosure of these 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...'* (Dwyer affidavit, CB/12/p827-828, §4).

2.22. Thus:

(i) Under Count 1: '*...the objective of the conspiracy charged in Count 1 of the Superseding Indictment was to obtain, receive, and disclose national defense information...*' (Dwyer, CB/12/p851 – 852, §61-62) '*...which were classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/p1043 – 1091, p28);

(ii) Counts 3-9: require proof of the purposeful obtaining / receiving of information '*...connected with the U.S. national defense...*' (Dwyer, CB/12/p853 – 855, §66-68) '*...classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/p1043 – 1091, p32-38);

(iii) Counts 10-18: require proof of the wilful obtaining / receiving of information '*...relating to the national defense...*' (Dwyer, CB/12/p853 – 855, §66-68) '*...classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/p1043 – 1091, p39-47);

(iv) That is equally true of Count 2 (conspiracy to commit computer intrusion). Count 2 is not an allegation of common computer hacking; it is (and is predicated upon) a legally necessary allegation that Mr Assange planned *'...to obtain information*

that has been determined by the United States Government...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...' (Dwyer, CB/12/p864, §85) (Second Superseding Indictment, CB/12/p1043 – 1091, p30). In sum, s.1030 USC as alleged here requires that (and is only engaged where) the '*conspiracy'* is directed at state secrets as defined by Executive Order.

2.23. The conduct alleged against Mr Assange is therefore, by analysis as well as by label, also that of '*espionage'*. That is, on the authorities, a '*violation of laws designed to protect the political institutions*' or '*protecting the political order'* of the USA (***Dutton***). It is activity '*contrary to the external security of the [USA]'* (***Singh***). It is '*conduct directed against the sovereign or its political subdivisions'* (***Arambasic)*** and '*against the state itself'* (***Bassiouni***). It is conduct *'on [its] face political' (**Schtraks**), 'necessarily committed against the state' (**Cheng**)*, or *'directed at the sovereign and his apparatus of state' (**T**).*

2.24. It is no different to the extradition request concerning MI5 agent David Shayler, prosecuted under the Official Secrets Act 1989 for passing top secret documents to The Mail on Sunday in 1997 (including disclosing the names of agents).[7] That extradition request was rejected by the French Cour d'Appel on 18 November 1998 as being a '*political offence'* (under Article 3(1) of the European Convention on Extradition 1957).[8]

2.25. In addition to alleging the commission of political conduct, the motivation and purpose attributed to Mr Assange (which constitutes a core aspect of the criminal allegation against him) is to damage '*the work of the security and intelligence of the US'* and to '*damage the capability of the armed forces of the USA to carry out their tasks; and endanger the interests of the United States of America abroad'* (Dwyer affidavit, CB/12/p827 – 828, §4). For example:

(i) *'...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...'* (Dwyer, CB/12/p829 – 830, §8);

(ii) *'...ASSANGE was the public face of 'WikiLeaks,' a website he founded with others as an 'intelligence agency of the people.' To obtain information to release on the WikiLeaks website...for distribution to the public...'* (Dwyer, §11) (Second Superseding Indictment, CB/12/P1043 – 1091, §1);

(iii) *'...As the website stated, 'WikiLeaks accepts classified, censored, or otherwise restricted material of political, diplomatic, or ethical significance...'* (Dwyer, §12) (Second Superseding Indictment, CB/12/P1043 – 1091, §2);

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7. Shayler disclosed that MI5 kept files on prominent politicians, including Labour ministers, that the bombings of the City of London in 1993 and the Israeli embassy in London in 1994 could have been avoided, and that MI6 were involved in a plot to assassinate Libyan leader Colonel Gaddafi.

8. *'...Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence...'*

(iv) *'...the WikiLeaks website...stated that documents or materials...must '[b]e likely to have political, diplomatic, ethical or historical impact...*' (Dwyer, §14) (Second Superseding Indictment, CB/12/P1043 – 1091, §3);

(v) '*...ASSANGE and WikiLeaks repeatedly sought, obtained, and disseminated information that the United States classified due to the serious risk that unauthorized disclosure could harm the national security of the United States...*' (Second Superseding Indictment, CB/12/P1043 – 1091, §2);

(vi) '*...ASSANGE designed WikiLeaks to focus on information, restricted from public disclosure by law, precisely because of the value of that information...*' (Second Superseding Indictment, CB/12/P1043 – 1091, §2).

2.26. The reason in law that offences such as espionage are pure political offences, per the government before the Australian Federal Court in ***Santhirarajah v Attorney-General for the Commonwealth of Australia*** [2012] FCA 940 at §103, 107, 111, 123, 145, is that '*The elements of pure political offences such as treason, sedition, and espionage contain a requirement that the offender intend to harm the government of the state. For this reason pure political offences do not require the demonstration of purpose by the alleged offender*'.

2.27. All 18 counts specifically allege that Mr Assange's knowing objective and purpose was '*that such information so obtained could be used to the injury of the United States and the advantage of any foreign nation*'.

'Relative political offences'

2.28. Asides the political motivations expressly ascribed to Mr Assange by the request itself (above §2.25 and 2.27), US government officials freely, publicly and regularly ascribe motives *'hostile'* to the USA to Mr Assange. For example:

(i) '*...WikiLeaks walks like a hostile intelligence service and talks like a hostile intelligence service ... it overwhelmingly focuses on the United States, while seeking support from anti-democratic countries and organizations. It is time to call out WikiLeaks for what it really is – a non-state hostile intelligence service often abetted by state actors...*' (Mike Pompeo, US Secretary of State, 13 April 2017);[9]

(ii) '*...He's waging cyberwar on the United States...'* (KT McFarland, deputy national security advisor, 2017);[10]

[9]. https://www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/pompeo-delivers-remarks-at-csis.html. In the same speech, Mr Pompeo emphasised that the CIA is '*engaged solely in foreign espionage. We steal secrets from our foreign adversaries, hostile entities and terrorist organisations. And we're damn proud of it'*.

[10]. https://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html

(iii) '*...a conduit for...some other adversary of the United States...*' (FBI Director, James Comey, testifying before the Senate Judiciary Committee on FBI oversight, May 2017);[11]

(iv) '*...a Sense of Congress that WikiLeaks and its senior leadership resemble a non-state hostile intelligence service, often abetted by state actors, and should be treated as such...*' it is '*...part of a direct attack on our democracy...*' (s.623 in the Intelligence Authorization Act for Fiscal Year 2018, approved by the U.S Senate Intelligence Committee on 18th August 2017);[12]

(v) '*...Julian Assange and Wikileaks have effectively acted as an arm of...'* foreign intelligence services (Richard Burr, Chairman of the Senate Select Committee, 11 April 2019: the day of Mr Assange's arrest).[13]

2.29. Even in cases where a 'common crime' is alleged (such as computer misuse; count 2), if it is plain from the context of the allegation itself, and the motivation ascribed to (or claimed by) the offender, that the conduct is directed against the interests of the state, it will nonetheless qualify in law as a '*relative political offence*':

> *'...Relative political offences, in contrast, are common crimes which acquire their political character from the political purpose sought to be achieved by an offender in committing them...For this reason it is conceivable that the commission of the common crime of fraud on the State could, because of the offender's purpose, constitute a 'political offence' for the purposes of the Act...'* (***Dutton*** (supra) at §186).

2.30. The greater part of the English law relating to '*political offences'* has concentrated on this broader concept of '*relative political offence'* in the context of '*ordinary crimes'.* The current state of law in respect of 'relative' political offences are that they include any offences alleged to be committed in furtherance of attempts to influence, alter or change governmental policy. For the assistance of the Court, we trace the evolution of the modern law on this topic below.

2.31. First, in ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540, Lord Goddard CJ stated at p551 that it was now *'...necessary, if only for reasons for humanity, to give a wider and more generous meaning to the words we are now construing [to encompass] ... ordinary crimes which have ... political significance'.* The Divisional Court thus recognised that the mere '*expression of political opinions*' (even if articulated through the medium of an ordinary criminal act, such as mutiny on a merchant ship) is a '*political offence*' if it becomes the subject of prosecution.

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[11]. https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/

[12]. https://www.intelligence.senate.gov/publications/report-accompany-s1761-intelligence-authorization-act-fiscal-year-2018-september-7-2017

[13]. https://thehill.com/homenews/senate/438456-top-senate-republican-assange-put-millions-of-lives-at-risk

2.32. Secondly, a number of core principles emerged from ***Schtraks v Government of Israel*** [1964] AC 556.

(i) First, the House of Lords confirmed that it is not necessary for the defendant to be seeking political power, or the overthrow of government (despite suggestions to the contrary in the earlier case law). Whilst the concept of a political offence is limited to opposition between citizen and government in power (i.e. it is not enough to be in contest with a political force not in power, per Viscount Radcliffe), the House of Lords rejected the necessity for open insurrection or for an intention to change the composition of the government: *'...I do not think that the application of the section can be limited to cases of open insurrection...And I do not see why the section should be limited to attempts to overthrow a government. The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugee's party should have been trying to achieve power in the State. It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it...'* (per Lord Reid at pp583 and 584).

(ii) Secondly, Lord Reid reiterated (at p583): *'...We cannot inquire whether a 'fugitive criminal' was engaged in a good or a bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose...*

(iii) Thirdly, Viscount Radcliffe thus summarised '*the idea that lies behind the phrase 'offence of a political character'*" as that: '*...the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of 'political' in this context is with 'political' in such phrases as 'political refugee,' 'political asylum' or 'political prisoner.' It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect... It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of...'* (p591). What is required is evidence to '*...suggest that the appellant's offences, if committed, were committed as a demonstration against any policy of the Government...itself or that he has been abetting those who oppose the Government...'* (p592).

2.33. Thirdly, ***Schtraks*** was confirmed in ***Cheng v Governor of Pentonville Prison*** [1973] AC 931:

> '*...Political character in its context, in my opinion, connotes the notion of opposition to the requesting state...taking political action vis-à-vis the American Government...*' (per Lord Hodson at p943A-B);
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> '*...it was no part of his purpose to influence the policy of the Government of the United States...*' (per Lord Diplock at p943C);
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> *'...'Political' as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a 'political act'...'* (per Lord Diplock at p945C), and if the government in question was the one seeking extradition, it would be a '*political offence'* (per Lord Diplock at p945E);
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> *'...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 [the government] to change its policy, or to enable him to escape from the jurisdiction of a government whose political policies the offender disapproved but despaired of altering so long as he was there...'* (per Lord Diplock at p945E-F);
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> '*...the most exacting relevant test, namely...[is] his crime was committed both from a political motive and for a political purpose...*' (Per Lord Simon at p952C);
>
> It is not part of the '*political offence'* exception that *'...the courts of this country [should] inquire into the merits of those who have committed crimes against the requesting state or to pass judgment upon the political acts or policy of the government of that state...'* if *'...a man who has committed a crime directed against the régime of the requesting state and which, in that sense, was a crime of a political character...'* (per Lord Salmon at p961C-G).

2.34. See, for an application of these principles, ***Prevato v the Governor, Metropolitan Remand Centre*** [1986] 8 FCR 358. Prevato was a member of the Ronde Armate Proletarie (Proletarian Armed Patrols) which opposed a system called the selection in schools program in Italy. He was charged with various offences involving damage to schools and threats to teachers and other officials, committed in furtherance of the Ronde Armate Proletarie's '*long and bitter campaign to induce a change in education policy in government schools in Padua*'. Extradition was refused on the ground that the offences were political offences. Per Wilcox J at §71-72:

> *'...the object of changing government policy...may...be sufficient to institute an offence of a political character. [The contrary view] would be inconsistent with the speeches in both Schtraks and Cheng....The early debate upon the necessity*

for there to be a campaign to change the government itself was decisively resolved in the negative in Schtraks; it is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely[14] to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be...'

2.35. Fourthly, in ***T v Immigration Officer*** [1996] AC 742, Lord Mustill reiterated that a '*relative political offence'* will '*look to the connection between the motive and political content of the crime and the criminal act itself*' (p764D). '*The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the 'incidence' theory. The essence of this is that there must be a political struggle 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 is an incident of this struggle*' (p764F-G). That is to say (p764G-765A): '*the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country'* (per Viscount Radcliffe in ***Schtraks***) and that '*the only purpose sought to be achieved by the offender in committing it'* is *'to change the government of the state in which it was committed, or to induce it to change its policy'* (per Lord Diplock in ***Cheng***). '*This principle underlies the major English decisions on extradition law'* (p765B).

2.36. The law, as formulated by Lord Mustill, covers an individual or organisation in conflict with the governmental policies of the requesting state who seeks to alter, influence or bring about a change in them. The unambiguous allegation in this case is that Julian Assange's actions were precisely intended to effect US Government policy. It is obvious that the motivation of WikiLeaks and Mr Assange was to *have an effect on US government policy and its alteration'* (Ellsberg, tab 55, §24). Independent observers commented at the time that '*Assange's position as the global spokesman for what is (loosely) an Internet-based international political movement in opposition to the United States has never been stronger, almost like a member of the opposition party…Clearly, WikiLeaks embraces policy goals and political outcomes'* (Forbes, 30 June 2013).[15]

2.37. It is moreover entirely obvious that the exposure of detainee abuse in Guantanamo and of war crimes in Afghanistan and the Iraq war was politically motivated and designed to induce a change in government policy. Indeed (a) The DJ accepted (judgment, CB/2, §156) that these were Mr Assange's political opinions as '*outlined and explained to the court by defence witnesses including Professor Rogers, Noam Chomsky and Daniel Ellsberg',* and **(b)** Professor Rogers' evidence was that his actions did *in fact* have the of inducing a change in government policy (Tr 9.9.20, EB/41, p5, ll 26-32).

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[14]. In fact, it is an '*error of law'* to regard political motivation and revenge as mutually exclusive (***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA 7 per Gleeson CJ at §§18-20).

[15]. https://www.forbes.com/sites/tomwatson/2013/06/30/is-wikileaks-now-an-international-political-party

The exceptions to the exemption: violent offences

2.38. All this would, of course, in theory also offer protection to acts of political assassination, or terrorism. In the nineteenth century that was acceptable. But in view of the societal shift described by Lord Mustill in ***T*** (supra), such means are no longer regarded as tolerable: '*certain acts of violence, even if political in a narrow sense, are beyond the pale'* (p755H). For this reason (and at the same time recognising and reinforcing the breadth of the definition of '*political offence'*),[16] international law has moved to exclude certain violent offences from qualifying as '*political offences'*.

2.39. In extradition law,[17] as Lord Mustill observed in ***T*** (supra) at p753G, 761B-763A, 765G-H, the limits are set by Treaties which '*depoliticise'* certain violent offences.[18]

2.40. For example, following Lord Simon's plea in 1973 in ***Cheng*** '*for governments in international conclave*' to set the applicable limits, the Council of Europe's Convention on the Suppression of Terrorism 1977,[19] excludes certain listed violent offences from being regarded as '*political'* for the purposes of extradition between Convention states. Those exclusions were, in turn, given effect to by s.1 of and Schedule 1 to the Suppression of Terrorism Act 1978.[20] As with other Treaties elsewhere, the UK/USA Supplementary extradition Treaty 1985 also erected a similar (but narrower) list of excluded offences. Accordingly, the 1978 Act was applied to extradition with the USA (with relevant omissions designed to reflect the more limited exclusionary list).[21]

2.41. The USA list (nor the wider Council of Europe list, nor even the EU list now contained within Article 602(2) TCA) has <u>never</u> excluded espionage[22] or computer misuse.[23] The USA exclusionary list is now contained in Article 4(2) of the 2003 UK / USA Treaty. It <u>still does not</u> include espionage or computer misuse.

The SSHD's decision

2.42. The SSHD does not dispute that this request is prohibited by the terms of the treaty.

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16. See e.g. ***Santhirarajah*** (supra) per North J at §250: *'...the fact that Parliament has expressed limitations on what amounts to a political offence recognises that the ordinary meaning of that term covers a range of conduct which today is viewed as inappropriate for exclusion from the process of extradition.... '*.
17. In asylum law, by contrast, under article 1F(b) of the Refugee Convention, no international rules exist which govern how to identify such cases and thus the Courts have sought to articulate and erect rules which exclude acts of terrorism and the like (***T*** (supra)); ***Singh*** (supra)).
18. See also ***Santhirarajah*** (supra) per North J at §250 '*...Any further limitation to be imposed on the ordinary scope of the term political offence is a matter for Parliament...*'
19. And now its 2003 Protocol.
20. For offences excluded from the ambit of '*political'* by the Convention, the UK is also obliged to establish extra-territorial or universal jurisdiction (see article 6 of the 1977 Convention, s.4 of the 1978 Act) so that if, for some other reason, extradition is not granted, the UK will be in a position to prosecute itself (*aut dedere aut judicare*). See ***T*** (supra) per Lord Mustill at p763.
21. See Schedule 2 to the Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order 1986 (1986/2146).
22. No doubt because it is a pure political offence.
23. Which is why, for example, neither espionage or computer misuse committed in the USA are offences which the UK has extra-territorial jurisdiction to prosecute (see above, fn. 20).

2.43. Other Western countries and governments stand firm against US extradition requests for *'political offences'*. For example, ***Santhirarajah*** (supra) concerned an allegation of purchasing night vision goggles (in the USA) to provide to the Tamil Tigers to support their cause for independence in Sri Lanka. Common crimes were alleged (conspiracy to violate export control laws, conspiracy to provide material support to a terrorist organisation, money laundering). All, however, were held by the Australian court to be exempt from extradition as '*relative political offences'*:

> *'When the applicant took the actions alleged against him it should be inferred from the circumstances that he did so in support of the political struggle of the LTTE. That is to say, he was at odds with the US over the political issue of support for the LTTE against the government of Sri Lanka in the civil war. These circumstances fall within the ordinary understanding of the expression 'political offence''* (§253).

2.44. Yet, the SSHD declined to intervene to halt this extradition; on the narrow legal premise that she possessed no powers outwith the four corners of s.93-102 of the 2003 Act (and hence had no power to do so):

> '*The Secretary of State's functions at this stage in the statutory extradition process under the 2003 Act are prescribed by ss.93-102. Those sections make no provision for the Secretary of State to decline to order extradition on any grounds outside that scope. The Secretary of State is required to act within the terms of the statutory extradition scheme enacted by Parliament in the 2003 Act'* [CB/9 p708].

Swift J

2.45. Swift J's refusal of permission is likewise based solely on the endorsement of the proposition that:

> *'The Secretary of State took her decision only by reference to the provisions of the 2003 Act. She was correct to do so; that is an inescapable consequence of sections 93(3) and (4) of the 2003 Act'* (decision §3).

Submissions on renewal

2.46. It is respectfully submitted that it is, at lowest, arguable that the Act does not operate in this manner, and specifically does not preclude the SSHD from halting an extradition which is patently prohibited by the treaty.

2.47. First, the UK / USA Treaty containing the '*political offence'* exception was ratified, and came into force, in 2007; after the 2003 Act had been passed. Both governments must therefore have regarded Article 4 as a protection for the liberty of the individual, whose necessity continues (at least in relations as between the USA and the UK). It would be surprising at lowest if the UK government was settling such protections in the sure knowledge that they could not be enforced in any way.

2.48. As stated above, it is a stark proposition (unsupported by authority) that the SSHD is *bound* by law to give effect to an extradition request which she knows to be prohibited by international law (and by legal principles applied around the globe, and which she herself has made the UK a signatory to). It would, in the context of individual liberty, take the strongest and clearest legislative steer to compel such a conclusion.

2.49. Secondly, nothing on the face of s.93 suggests that it is legally exhaustive of the SSHD's functions (and hence it does not employ language such as '*if, and only if*' found elsewhere in the Act, including for example in s.95).

2.50. It does not follow, from the bare fact that s.93 directs the SSHD to decide issues X/Y/Z (and that he to discharge / order extradition if X/Y/Z are / are not established), that non-specified issues A/B/C are thereby *legally precluded* from consideration or action.

2.51. It is for example the SSHD's duty to ensure (despite the absence of any reference to this in s.93) that mutual legal assistance she authorises (including extradition) complies with the legality requirements of Chapter 5 of Part 3 of the Data Protection Act 2018 (***Elgizouli v SSHD*** [2020] UKSC 10).

2.52. Thirdly, it is obvious from the overall scheme of the 2003 Act that the SSHD's powers under s.93-102 are not so limited. She had, until express amendments made to the Act in 2013 removing it, power for example to halt extradition at this stage on human rights grounds. Were the contention now advanced by the SSHD – that there are no powers co-existent with those under s.93-102 – correct, there would have been no need for Parliament to (and no lawful basis for it to) enact s.70(10)-(11) of the 2003 Act to *remove* a co-existent power.[24]

2.53. Fourthly, there is direct high authority that '*monitoring the provisions of the Treaty is an executive, and not a magisterial, function*' (***R v Governor of Pentonville prison, ex parte Sinclair*** [1991] 2 AC 64, per Lord Ackner at p89E and 91H). The point was reiterated in ***R (Guisto) v Governor of Brixton Prison*** [2004] 1 AC 101 where Lord Hope spoke at §36-37 about the '*basic point'* that '*...It is the function of the Secretary of State to see that the provisions of the treaty have been satisfied...*'.

2.54. Nothing in s.93-102, or the debates in Parliament which surrounded the 2003 Act, suggest that these functions and duties were being consciously withdrawn from the SSHD by the 2003 Act.

2.55. The absence of such statements is especially stark in circumstances where Swift J has also refused permission to argue that the courts possess such powers (such as were held to exist in ***R v Governor of Pentonville prison, ex parte Sotiriadis*** [1975] AC 1, per Lord Diplock at p33H-34C; ***In re: Nielsen*** [1984] AC 606 per Lord Diplock at p616B-C).

2.56. Swift J's decision addresses none of these issues.

[24]. Crime and Courts Act 2013, Sch.20(2) §11.

2.57. Fifthly, and in any event, the SSHD retains jurisdiction, at all times, to withdraw her originating s.70 certificate on the ground that its issuance was (and is) not within the terms of the treaty. A request for extradition that is expressly prohibited by the terms of the operating extradition treaty is not a '*request for extradition'* at all within the meaning of s.70; it is a request for unilateral non-treaty based expulsion.

2.58. Neither the SSHD nor Swift J acknowledge, confront or address this jurisdiction at all.

3. Ground of Appeal 2: ss. 94 and 95(4)(b): exposure to death sentence

3.1. The alleged facts with which Mr Assange is charged in the USA could constitute in law, but presently are not, a charge which attracts the death penalty (i.e. treason under 18 USC §2381 or espionage under 18 USC §794).

3.2. High US Government officials, including the former US President, have publicly labelled the allegations against Mr Assange as treason, and called for the death penalty for Mr Assange.[25] President Trump called for '*the death penalty or something'* for Mr Assange (Bundle E, Tab 10, p3-4) and had denounced the fact of Obama's commutation of Manning's sentence, describing her as a '*traitor who should never have been released from prison*' (Boyle, EB/3 §23). Chelsea Manning was of course charged out of these facts with '*aiding the enemy'*; carrying the death penalty.[26]

Section 95

3.3. Section 94 prohibits, in all circumstances, extradition which exposes a defendant to the death penalty.

3.4. The SSHD is accordingly expressly required, by s.95 of the 2003 Act, to ensure that arrangements are in place in this case to prevent the US adding future charges, post-surrender, which attract the death penalty. Section 95(4)(b) of the 2003 Act is mandatory. It requires arrangements to be in place to ensure that any subsequent post-surrender amendment or addition of charges for '*an extradition offence disclosed by the same facts as that offence'* be '*other than one in respect of which a sentence of death could be imposed*'.

3.5. Article 18(1)(a) of the UK/US treaty does not so provide. It provides instead for the US to amend, add or substitute charges, post surrender, consistently with specialty, for '*a differently denominated offense based on the same facts as the offense on which*

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[25]. For example, Mick Huckabee, Republican candidate for the 2010 Presidential election had called for those responsible for the leaking of the US Embassy cables to be executed ('*US embassy cables culprit should be executed, says Mike Huckabee: Republican presidential hopeful wants the person responsible for the WikiLeaks cables to face capital punishment for treason'*, The Guardian, 1 December 2010). '*WikiLeaks: guilty parties 'should face death penalty': Leading US political figures have called for the death penalty to be imposed on the person who leaked sensitive documents to whistle-blower website WikiLeaks as anger intensified against those responsible for the international relations crisis'*, The Telegraph, 10 January 2011). Sarah Palin, former Republican Vice-Presidential candidate, had said that Mr. Assange '*should be hunted down just like al-Qaeda and Taliban leaders*'.

[26]. Military charges which equate, in the civilian context, to treason.

extradition was granted, provided such offense is extraditable'. Under the treaty (article 7), charges which carry the death penalty are in principle '*extraditable'*. Therefore, under the existing specialty arrangements with the USA, re-formulating the charges '*based on the same facts as the offense on which extradition was granted'* to ones which carried the death penalty (such as for example treason under 18 USC §2381 or espionage under 18 USC §794) would be possible.

3.6. Arrangements which do not reflect the terms of s.95 must be met with discharge in a case where that lacuna might result in the defendant being dealt with outwith the terms of s.95: ***Dean (Zain Taj) v Lord Advocate*** [2019] HCJAC 31. That is especially so where the lacuna in question potentially exposes the defendant to the death penalty.

The SSHD's original decision

3.7. The SSHD does not dispute that charges which attract the death penalty can be laid in Mr Assange's case, as a matter of fact.

3.8. The SSHD nonetheless did not call for assurances from the USA regarding the death penalty. The SSHD's reasons for not doing so were:

> '*...the existence of speciality arrangements between the UK and the United States has been endorsed by a series of decisions of the High Court on each occasion this issue has been raised: see Welsh ... Bermingham ... Stepp ... Norris ... Barnes ... In light of those decisions, the Secretary of State does not consider there are no speciality arrangements with the US on any of the grounds you raise, e.g., regarding... your representations as to the risk of the death penalty being imposed...'* [CB/9 p708].

3.9. The SSHD's reasoning is incomprehensible. None of the cases cited by the SSHD (or any other decided cases) concern the death penalty, or consideration of the scope of Article 18(1)(a) of the treaty, at all.

The SSHD's subsequent arguments, endorsed by Swift J

3.10. The SSHD's DGO therefore advances a different case, unrelated to her own decision.

3.11. The SSHD now does not contend that Article 18(1)(a) of the Treaty prohibits that which s.95(4)(b) requires it to prohibit (i.e. adding a capital charge based on the same facts).

3.12. Neither does the SSHD dispute that treason or s.794 espionage could be charged on the strength of the facts alleged in this case. Nor that those offences carry the death penalty.

3.13. The SSHD's argument now [at DGO §12] is that the possibility of capital charges being added is factually '*speculative'* and that there is '*no proper basis to suggest that the Applicant is himself at risk*' of a capital charge.

3.14. It is this reasoning (alone) which underpins Swift J's refusal of permission (Decision §5).

Submissions on renewal

3.15. First, the reasons relied on by Swift J are not those which actuated the SSHD's actual decision. The decision actually under challenge (see above paragraph 3.8) was that Article 18 provides specialty arrangements consistent with s.95(4)(b). That was manifestly wrong.

3.16. Secondly, even if it had underpinned her decision (which it did not), evaluation of the degree of 'risk' that Mr Assange faces in respect of capital charges, is legally misconceived. The US '*may ... under the ... arrangements'* (s.95(3)), and '*could'* (s.95(4)(b)), add a death penalty charge post-surrender under the terms of the treaty. Section 95(4)(b) is engaged.

3.17. '*May' / 'Could'* is the lowest threshold legally possible, commensurate with what is at stake here. It is not qualified (as it is elsewhere in the act) by the adverb '*reasonably'*. It does not even carry the evaluative content of '*might be'* as in s.81 (which imports evidential thresholds such as '*serious possibility'* or '*reasonable chance'*: ***Fernandez v Singapore*** [1971] 1 WLR 987). In short, Swift J erred in law in seeking to evaluate the degree of 'risk' of the US adding capital charges. The fact is, they '*could'* do so in law, consistently with the legally deficient specialty arrangements that the SSHD has made.

3.18. Thirdly, as a matter of fact, the evaluation undertaken is wrong. A real risk in the extradition context is satisfied by a possibility qualifiable as low as a 5-13% chance (***Rae v USA*** [2023] EWHC 1072 (Admin) at §76-77). As stated above, numerous high US political officials have publicly urged the death penalty for these alleged facts. The risk here is not merely theoretical.

3.19. Moreover, the SSHD's suggestion (which Swift J adopts) that President Trump's statement on 2 December 2010 that '*I think there should be like a death penalty or something*' is a reference to Mr Assange '*leaking [his] taxes*' rather than to these alleged national security breaches, is factually wrong. The interview in question (which occurred 4 days after the Cablegate publication on 28 November 2010) read '*leaking of those documents*' not '*leaking of those taxes*' (which WikiLeaks only called for in 2017)

4. Conclusions

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

Tuesday, 12 June 2023

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