IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Case Nos: CO/2334-5/2022

BETWEEN:

JULIAN ASSANGE

Applicant

-v-

GOVERNMENT OF THE UNITED STATES OF AMERICA (1)
SECRETARY OF STATE FOR THE HOME DEPARTMENT (2)

Respondents

APPLICANT'S SPEAKING NOTE

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*Unless otherwise stated, all hearing bundle references are to the s.103 permission hearing bundles.
** GoR = Grounds of Renewal.

1. Introduction

1.1 This note addresses the arguments that Edward Fitzgerald KC will be dealing with. These are:-

(i) The Treaty point in Ground 7 of the section 103 appeal (section 14 of the Perfected Grounds; s.103 GoR at Part 7, Vol.1/Tab 2/p.20).

(ii) The Article 6 point in Ground 4 of the section 103 appeal – particularly in relation to the risk of a flagrant denial of justice in the sentencing process (Perfected Grounds at Part 11; s.103 GoR Part 6, Vol.1/Tab 2.p.18).

(iii) The point as to discrimination on grounds of alien status set out in Ground 5 of the section 103 appeal (section 12 of the Perfected Grounds; s.103 GoR at Part 5, Vol 1/Tab 2/p.16).

(iv) The issue of a risk of a violation of Articles 2 and 3 raised by the evidence of Protected Witness 2, and the Yahoo article in Ground 9 (section 17 of the Perfected Grounds, Vol.1/Tab 4/pp.147-8; s.103 GoR Part 8, Vol.1/Tab 2/p.23).

(v) The Treaty point in the **section 108 appeal** (see s.108 Hearing Bundle/Tab 1/p.3).

1.2 Mark Summers KC will in turn be dealing with Grounds 1, 2 and 3, and with the death penalty point in the section 108 appeal. The grounds are set out fully in the Grounds of Renewal and the Renewal Skeleton.

2. Introduction to Ground 7: Treaty Point

2.1 Extradition would constitute a fundamental violation of the express prohibition in Article 4 of the Anglo-American Extradition Treaty. Article 4 contains the safeguard that ***"extradition shall not be granted if the offence for which extradition is requested is a political offence"*** (Materials Bundle/Tab 5/p.297). The Applicant makes two points :-

(i) Firstly, the espionage offences for which extradition is sought are, on the prosecution's own case, **'political offences**.' Espionage is recognised in the leading authorities and the textbooks as a quintessentially political offence for which extradition **must not** be granted. None of the modern conventions that limit the scope of political offences have ever excluded espionage from the protection accorded to all political offences. Therefore, these alleged offences of espionage are governed by the prohibition in Article 4 of the Treaty. They are offences for which extradition should neither be sought nor granted.

(ii) Secondly, **the courts do have jurisdiction to refuse extradition on the basis of a fundamental breach of the terms of the Treaty.** That jurisdiction arises because the breach of the Treaty provisions renders the extradition arbitrary for the purposes of Article 5 of the European Convention; because proceedings founded on the very Treaty that is breached constitute an abuse of process; and because the prohibition in the Treaty should be accorded the status of domestic law and read into section 81.

2.2 The District Judge made no findings as to whether the offences for which extradition was sought, and particularly the 17 espionage offences, were indeed political offences within the terms of the prohibition in Article 4 (see judgment at Vol.1/Tab 16/p.391/§63). That is because she found that *"the defence has not established that the 2003 UK-US treaty confers rights on Mr Assange which are enforceable in this court."* (Vol.1/Tab 16/pp.386 and 391/§§ 41 and 61). She further dismissed the argument *"that it was an abuse of process for the US to seek extradition for such a [political offence]"* (Vol.1/Tab 16/p.391/§62).

2.3 Swift J upheld her rulings as to lack of jurisdiction on the basis that she was right to conclude that *"the Treaty does not give rise to any justiciable right. The 2003 Act is the governing instrument"* (Vol.3/Tab 15/p.366). That was the sole basis on which he refused leave on ground 7. He, too, made no finding as to whether the alleged offences of espionage were political offences.

2.4 Therefore, the Applicant will concentrate his argument on the question of whether the treaty confers any justiciable rights and whether extradition in breach of the treaty's express terms gives rise to bars to extradition. His broad submissions are:-

(i) Firstly, Extradition in breach of the prohibition in Article 4 of the treaty would result in detention that is arbitrary and **contrary to Article 5** of the European Convention. This is because it violates the provisions of

international law and the express terms of the treaty that is the foundation of the extradition request.

(ii) Secondly, it is **an abuse of process** to seek extradition for a political offence in breach of the express terms of the treaty that governs the extradition request.

(iii) Thirdly, the Treaty's prohibition on extradition for political offences should inform the interpretation of section 81(a) since it was the government's position that the political offence exception was incorporated in section 81(a) (see footnote 12 of Renewal Skeleton at pp.5 – 6; and see Materials Bundle/Tab 9/p.321, and Tab 11/p.325). So interpreted, section 81(a) itself prohibits extradition for political offences. This point clearly overlaps with the very point the Applicant takes under section 81(a).

(iv) Moreover, there is a wider approach relevant to all three of these pathways to reliance on the Treaty provisions. A breach of the Treaty is justiciable in accordance with the principles summarised in the case of ***Heathrow Airport Ltd v HM Treasury*** [2021] EWCA Civ 783 at §§149 ff. and 164 – 165 (Core Authorities/Tab 27/pp.839 and 847) (see Renewal Skeleton at Parts 3 and 4).

2.5 Both the District Judge and the single judge found that the 2003 Extradition Act was a comprehensive code that ruled out reliance on the Treaty. The Applicant makes three basic points in reply:-

(i) **Firstly**, the 2003 Act does not either disapply or rule out the political offence exception where the governing Treaty provides one. The Act simply does not make express provision for a political offence exception. That is partly because Parliament legislated on the understanding that the political offence exception was catered for by section 81(a) (see footnote 12 of the Renewal Skeleton at pp.5-6 and Materials Bundle/Tab 9/p.321).

(ii) **Secondly**, section of the Act 87 itself does expressly incorporate the safeguards of Article 5 of the European Convention into the statutory regime. And it would be contrary to Article 5 and arbitrary to extradite in breach of the express terms of the Treaty that is the foundation of the request. So the 2003 Act does permit reliance on the Treaty by reference to section 87 and Article 5.

(iii) **Thirdly**, it has long been recognised that the 2003 Act does not remove the court's jurisdiction to stay extradition proceedings as an abuse of process (see ***R (Bermingham) v SFO*** [2007] QB 787 at §100 (Core Authorities/Tab 12/p.416); and ***R v Bow Street Magistrates' (ex parte USA)*** [2007] 1 WLR 1157 at §§81 – 83 (Core Authorities/Tab 15/pp.515 – 516). And it is an abuse of process to continue extradition proceedings founded on a Treaty whose terms are being violated. There is good precedent for relying on the breach of an unincorporated Treaty to invoke the abuse of process jurisdiction. That comes in the cases of ***R v Uxbridge Magistrates Court, ex parte Adimi*** [2001] QB 667 (Full Authorities/Tab 14/p.409) and ***R v Asfaw*** [2008] 1 AC 1061 (Core Authorities/Tab 17/pp.583-4 and 595/§§34 and 71). And there is further precedent in the series of cases concerning prosecutions of persons reasonably believed to be the victims of trafficking (see §7.5ff below).

Heathrow Airport **principles**

2.6 More broadly, the assertion that unincorporated treaties do not give rise to justiciable rights is too simplistic. The relevant authorities are reviewed in the ***Heathrow Airport*** case – particularly at §§164 – 166 (Core Authorities/Tab 27/pp.847-8) which lays down the two key tests for reliance on unincorporated treaties – and in the Renewal Skeleton at §4.6.

2.7 **The first test** for invoking an unincorporated treaty is whether the treaty is **'grounded'** in domestic law. The Anglo-US Treaty is so grounded because it is relied on as the foundation of the extradition request. And because Article 4 gives

effect to a fundamental principle of international law recognised and adhered to by both the US and the UK.

2.8 The full reasons why it is so grounded are set out in the Renewal Skeleton at §4.6, pp.9 – 10. In summary, let me highlight them here.

(i) **First**, Article 4 of the Treaty expressly contemplates the creation of individual rights that are enforceable in domestic law before domestic courts, against one or other of the two signatory states. They clearly are enforceable in the US which operates a monist system.

(ii) **Secondly**, the UK has firmly endorsed the whole Treaty as governing and shaping its policy concerning extraditions to, and from, the USA (per ***Heathrow Airport*** at §166 (Core Authorities/Tab 27/p.848). It has never resiled from any of the terms of the Treaty (***ibid*** at §168). In particular, the UK as a state has firmly endorsed the political offence prohibition (see footnote 15 of Renewal Skeleton and below at §3.2). Further, there is no domestic common, constitutional or statute law with which the article 4(1) principles conflict. And there is nothing which otherwise stands in the way of the Government's stated adherence to the Treaty's provisions (***ibid*** at §170). As discussed fully in the renewal grounds, the 2003 Act does not address, still less disapply, the prohibition.

(iii) **Thirdly**, it is obvious that the Treaty played a part in the decision to authorise the Applicant's extradition (per ***Heathrow Airport*** at §166 & 171-2 (Core Authorities/Tab 27/pp.848-9). The Treaty operates in domestic law as the very foundation for the UK's action against the Applicant. It is the basis on which USA is designated at all under Part 2 of the 2003 Act. And it is the lynchpin on which the 2003 Act is therefore available for use against him by the UK and US authorities, per ***Ecuador v Occidental Exploration Production Co*** [2006] QB 432 (Full Authorities/Tab 28/p.1122).

(iv) **Fourthly**, the resultant executive and legislative action (under the 2003 Act) affected the position of the Applicant as an individual, because it took away his right to liberty and exposed him to extradition (***Heathrow Airport*** at §166 (Core Authorities/Tab 27/p.847-8). "*[W]hen Government does rely upon otherwise unincorporated international law to change or affect the nature of domestic rights and responsibilities or the status of individuals [then] the courts have a supervisory role*" (per Green LJ at Core Authorities/Tab 27/p.849/§173).

(v) **Fifthly**, the Applicant is not using the Treaty as a **sword,** asserting a cause of action against the state (or indeed anyone). He is deploying the Treaty instead as a **shield** against state intervention (in fact, state intervention based on the same Treaty) (***Heathrow Airport*** at §§167 – 168 and 176 (Core Authorities/Tab 27/pp.848-9).

(vi) **Sixthly**, the District Judge as decision-maker in this case (s.103) is at the international level an arm of the state. Therefore we rely on the principle stated in the judgment of Lord Steyn in the ***Kuwait Airways Corp v Iraqi Airways Co.*** [2002] 2 AC 883 (Full Authorities/Tab 21/p.838/§114; cited in ***Heathrow Airport*** at Core Authorities/Tab 27/p.840/§153): where the government has expressly endorsed a principle of international law found in an unincorporated instrument, then it would be *"contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the [instrument]."*

2.9 **The second test** is whether the treaty provision relied on is **intrinsically justiciable**, or whether it is incapable of being adjudicated on. Applying that test, the simple answer is that the 'political offence' exception has been shown to be justiciable by the decisions of the English courts since the case of ***In re Castioni* [1891] 1 QB 149,** and leading cases interpreting the political offence exception such as ***Schtraks v Government of Israel*** [1964] AC 556 (Core Authorities/Tab 1/p.5) and ***Cheng v Governor of Pentonville Prison*** [1973] AC 931 (Core Authorities/Tab 3/p.95) at the highest level. The English courts have interpreted the political offence

exception in such a way as to demonstrate that the offences of espionage alleged by the prosecution are political offences. That is both in their categorisation and in the way that the underlying conduct is framed and described in the indictment – as conduct directed against the national defence interests of the US and inspired by motives hostile to the policies of the US.

2.10 For this very reason, to deal with the justiciability point, the Applicant must first address the history and status of the prohibition in Article 4 and the basis of the submission that the espionage charges for which he is charged are political offences.

3. The offences charged in the extradition request are political offences

3.1 In accordance with long and well-established English 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"* (Materials Bundle/Tab 5/p.297).

3.2 The prohibition on extradition for political offences, reflected in Article 4, is age-old and enshrines a value long accepted by successive UK governments. The political offence exception is included in almost every treaty ever concluded by the UK (see footnote 15 at p.9 of Renewal Skeleton). 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. 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.

[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.

3.3 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.

Allegation is of espionage offences

3.4 The offences alleged in the current (second superseding) US indictment that now forms the basis of the extradition request are a series of offences under the Espionage Act 1917 (now codified in Title 18, USC chapter 37 'espionage and censorship', in particular section 793). They fall into three categories (**s.108 GoR at §2.4**; PG at §14.4, p.118), namely:

(i) Conspiracy to obtain, receive and disclose national defence information (Count 1) (Vol.1/Tab 22/pp. 865-6 – offence under s.793(g)).

(ii) Unauthorised obtaining and receiving of national defence information (Counts 3 to 9) (Vol.1/Tab 22/pp.869-875 – offences under s.793(b)).

(iii) Unauthorised disclosure of national defence information (Counts 9 to 18). (Vol.1/Tab 22/pp.876-885 – offences under s.793(e)).

3.5 There is also an offence (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, Vol.1/Tab 22/pp.867 - 868).

3.6 The gravamen (and defining legal characteristic) of each of the charges is thus an alleged intention to *"obtain, receive and disclose national defense information"* in a manner that was damaging to the security of the US state (see Indictment at Vol.1/Tab 25/p.865, and see appendix). These are all 'political offences' in law and extradition is prohibited in respect of all such offences under the express terms of the 2003 Anglo-US Extradition Treaty (Materials Bundle/Tab 5/p.294).

3.7 The reasons why the alleged offences constitute 'pure' or self-evidently 'political offences' and, alternatively, 'relative political offences' are set out in detail in the Perfected Grounds at Part 14, §§14.4 – 14.53, and in the s.108 Grounds of Renewal against the Secretary of State at Part 2 (2.10 – 2.41)[2]. They are set out briefly for present purposes.

4. A pure political offence (s.108 Grounds of Renewal at §§2.10 – 2.12[3])

4.1 Firstly, the offences are 'pure' or self-evident political offences because they are a alleged offences of 'espionage' contrary to section 793 of the US Code, which governs espionage.

4.2 Espionage is recognised in the leading academic authorities such as **Bassiouni** (Materials Bundle/Tab 13/p.339) and **Shearer** to be a 'pure' or self-evident political offence.

4.3 Espionage is also recognised as a self-evident political offence in a series of common law authorities. May I refer the Court to the following (see s.108 GoR §2.14 – 2.17):

- The English case ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540 where Mr Justice Cassell held that treason by spying *"was an offence of a political character"* (Full Authorities/Tab 1/p.15) (See GoR §2.14).

- The Irish case of ***Bourke v Attorney General*** [1972] IR 36 (Core Authorities/Tab 2/p.61). The Chief Justice held there that the offence of espionage was a political offence in the same category as treason and sedition, so that assisting a spy to escape was also a political offence (p.63).

[2] See also PG at §§14.4 – 14.53.
[3] See also PG at pp.119 – 121.

- Australian cases such as ***Minister for Immigration and Multicultural Affairs v Singh*** (2002) 67 ALD 257 (Full Authorities/Tab 78/p.2775) and ***Dutton v O'Shane*** [2003] FCAFC 195 (Full Authorities/Tab 79/p.2824). In those cases, the High Court of Australia and the Full Federal Court respectively expressly held that offences such as *"**treason and espionage**"* were 'pure' political offences. (See GoR at §2.15-16).

- US cases such as ***McMullen v Immigration and Naturalization Service*** (1986) 788 F.2d 591 (Full Authorities/Tab 92/3257) and ***Arambasic v Ashcroft*** (2005) 403 F Supp 2d 951 (Full Authorities/Tab 105/p.3373), where the federal US courts held that offences such *"treason, sedition and espionage"* were by definition 'pure' political offences (see s.108 GoR at §2.17).

Interpol Resolution identifies espionage as purely political offence

4.4 As set out in at §2.18 of s.108 GoR, 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...[such as] espionage...come within the scope of Article 3"* of **Interpol's Constitutional prohibition on extradition for political offences** (Materials Bundle/Tab 14/p.344/§II.i). **Interpol's Repository of Practice** concerning Article 3 further states that: *":...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."* Interpol has therefore consistently considered that such crimes fall within the scope of Article 3 of the Constitution (Materials Bundle/Tab 15/p.348/§3.4)

4.5 **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. And there can be no doubt that the Applicant is charged with espionage offences.

4.6 **Secondly, this is not just a matter of labels. The offences alleged in the second superseding indictment constitute political offences as a matter of substance.** That is because they involve alleged stealing and disclosing of classified information relating to the *"national defence of the United States*" and intentional damage to the intelligence services and armed forces of the US (see the analysis of Counts 1 – 18 in s.108 GoR at §2.4). So by definition they are offences "*necessarily committed against the state seeking extradition"* within the test formulated by Lord Simon in ***Cheng*** at p.949G (Core Bundle/Tab 3/p.1113).

4.7 **Thirdly,** certain offences of violence and terrorism are now excluded from qualifying as political offences by international conventions. But none of these conventions excludes espionage from the protection of being a political offence. And Article 4(2) of the UK-US Treaty contains no exclusion of espionage in its exclusionary list (Materials Bundle/Tab 5/p.297-8; s.108 GoR at §§2.38 – 2.41).

The offences are 'relative political offences'

4.8 In any event, the offences are 'relative political offences' because of the 'political motivation' attributed to the Applicant (see s.108 GoR at §2.25 and §2.28). One has only to look at the indictment itself, and **at the motivations ascribed to the Applicant** by US government officials and the Senate itself to see that he is alleged to have a political motivation hostile to the US. In the indictment, Wikileaks is described as being founded to be an "*intelligence agency of the people"* (Indictment, Vol.1/Tab 25/pp.839/§1). It was characterised as a "*non-state hostile intelligence service*" by the Senate (see Joshua Dratel's evidence at Vol.2/Tab 5/p.41/§54) and denounced as such by US Secretary of State Pompeo. And Julian Assange was accused of "*waging cyber war against the United States"* by the deputy national security advisor KT McFarland (see further s.108 GoR at §2.28(ii)).

4.9 Against that background it is well recognised as early as ***Schtraks*** that a motive and purpose that is directed against the government or its policy is sufficient to justify characterisation of an offence as a relative political offence: *"the use of force, or it*

may be other means, to compel a sovereign to change its policy may be just as political as the use of force to achieve a revolution" (Core Authorities/Tab 1/p/32).

4.10 In ***Cheng***, it was further clarified that an **intention to *"induce a change in the policy"* of the government seeking extradition was sufficient motive to render an offence political (**See Lord Diplock in ***Cheng*** at p.945C, Core Bundle/Tab 3/p.109). It was because Cheng was found to have no such intention that his offences did not qualify as political. The same test is referred to by Lord Mustill at p.764G-765B in ***T v Immigration Officer*** [1996] AC 742 (Core Authorities/Tab 5/p.180-1) (see s.108 GoR at §2.35).

Applying that test (see s.108 GoR at §.236 – 2.37)

4.11 **So the political offence test, as formulated in both *Cheng* and *T*, 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 interest and policy (see s.108 GoR §2.36). There was expert evidence before the District Judge that the motivation of WikiLeaks and Mr Assange was ***"to have effect on US government policy and its alteration"*** (Daniel Ellsberg, Vol.3/Tab 38/p.736/§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). The US government attacked both Assange and Wikileaks as a hostile nonstate agency.

4.12 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 the District Judge accepted that Mr Assange had relevant political opinions as *"outlined and explained to the court by defence witnesses including Professor Rogers, Noam Chomsky and*

Daniel Ellsberg" (Vol.1/Tab 16/p.421/§156). And Professor Rogers' evidence was that his actions did in fact have the effect of inducing a change in government policy (see his statement dated 12/02/20, Vol. 3/Tab 20/p.503/§30; and see summary in appendix to judgment at Vol.1/Tab 17/p.522/§68).

4.13 In an increasingly global world, it is not necessary for the fugitive claiming the protection of the political offence exception to be a national of the state whose policy they are seeking to influence or change. Nor is it necessary that their association be with a group confined to a particular nation-state. Julian Assange is just as entitled to the protection of the political offence exception if his conduct is alleged to be directed against the policies of a particular nation-state (the US) but he is motivated by the wider interests of humanity. In other words, it is possible to qualify for the protection from extradition not just if you are a spy for some nation-state, but also, more broadly, if you are a spy for humanity generally.

5. Jurisdiction and the reasoning of the District Judge

5.1 I turn to the issue of jurisdiction and the reasoning of the District Judge.

Alleged removal of political offences bar

5.2 The District Judge relied on the finding that *"when it enacted the EA 2003, Parliament clearly took the decision to remove the political offences bar which had previously been available to those facing extradition"* (Vol.1/Tab 16/p.388/§ 50). In fact, **Parliament was simply silent as to the fate of the political offences exception**. It simply did not expressly re-enact such a bar. That was apparently on the basis that the necessary protection was provided by section 81(a). Certainly, the relevant minister, Bob Ainsworth, explained it in that way to Parliament (Materials Bundle/Tab 9/p.321). Therefore, in a case where the governing Treaty makes express provision for a political offence exception, there is nothing in the Act to expressly remove or disapply that protection. And the incorporation of Article 5 of the European Convention by section 87 is a powerful reason why it should not be disapplied.

5.3 Next, the judge relied on the case of ***Norris v Secretary of State for the Home Department*** [2006] EWHC 280, at §§48 – 49 (Core Authorities/Tab 14/p.486). However, ***Norris*** was dealing with Treaty provisions in the UK-US Treaty of 1972 which required the requesting state to provide a prima facie case. These provisions were flatly inconsistent with the express provisions of section 84(7) of the Extradition Act 2003, which expressly disapplied the requirement to provide a prima facie case in cases where a designation order was made. And an express designation order exempting the US from the requirement to provide a prima facie case had been made pursuant to section 84(7). Therefore, it was held that the recent and express provisions of the 2003 Act and the designation order took priority and governed the position of the defendant (see ***Norris*** at Core Authorities/Tab 14/p.485/§§44 - 45).

5.4 It is true that the High Court in ***Norris*** held that the 1972 Treaty standing alone did not "*create personal rights enforceable by individual citizens"* and that their rights were "*governed by domestic legislative arrangements"* (Core Authorities/Tab 14/p.485/§44). But, in the present context, the application of that stark proposition was, and is, oversimplistic. Domestic legislative arrangements include Article 5 and exist alongside the abuse jurisdiction. The statement in ***Norris*** is also inconsistent with the line of authority that establishes that treaties can create justiciable rights where they have either been incorporated in English law or 'gained a foothold' in English law by executive adoption or reliance on those treaty provisions. The relevant line of authority is summarised in the ***Heathrow Airport*** case. And the ***Norris*** decision did not consider either Article 5 or abuse. It was a judicial review of the Secretary of State's decision to designate the US under section 84(7).

5.5 The case of ***Warner v AG of Trinidad*** [2022] UKPC 43 (Core Authorities/Tab 29/p. 916) was decided by the Privy Council after the hearing before the District Judge in 2019-20. It only deals with the primacy of statutory provisions over treaty provisions in situations where there is a **conflict between the provisions of the Treaty and the Act,** which is not the case here. Thus there is no proper basis for

relying on the general statement at paragraph 46 of ***Warner*** (Core Authorities/Tab 29/p.931) that: -

"*The context also requires recognition of the fact that the Treaty has no direct effect in domestic law in Trinidad and Tobago although it will have effect in the USA as it is a monist jurisdiction. The implication is that the protection of the fundamental rights of the alleged offender are to be found in the Act.* ***If the Treaty is in conflict with the Act the court is obliged to ensure adherence to the requirements of the Act."***

5.6 The cases of ***Norris*** and ***Warner*** make clear that the express provisions of primary legislation will prevail where there is a **direct conflict** between the provisions of the Treaty governing the request and the Extradition Act itself. But that is not the situation here. The Treaty does not conflict with any part of the Act. Moreover, where the Act encompasses Article 5 protections by way of section 87, and does not exclude the abuse of process jurisdiction, there are clear pathways to give effect to the principles of justiciability developed and summarised in the ***Heathrow Airport*** case (supra) at §164 (Core Authorities/Tab 27/p.847) and the many cases cited therein (cf. also the background at §§138 and 149 – 164). The political offence exception is not only grounded in English law but it is also intrinsically justiciable for the reasons set out more fully there. Moreover it is being invoked as a shield and not a sword (see ***Heathrow Airport*** judgment at §167).

6. <u>Article 5</u>

6.1 In any event, the District Judge failed to address the wider argument under Article 5 that extradition in breach of the express provisions of the Treaty governing this extradition would result in detention that was arbitrary. That is because there is a body of Strasbourg law that recognises extradition in breach of international treaty provisions that confer human rights protections to be arbitrary and unlawful (see Part 3 of Renewal Skeleton at 3.3 – 3.4).

6.2 In ***Ex parte Evans (No. 2)*** [2001] 2 AC 19 (Core Authorities/Tab 7/p.219), Lord Hope recognised that lawfulness under domestic law is only the first test of lawfulness for the purposes of Article 5. The second test is whether detention "nevertheless complies with the general requirements of the convention" – which include foreseeability. And the third test is whether the detention lawful under domestic law is nonetheless "open to criticism on grounds that it is arbitrary" (Core Authorities/Tab 7/p.238). In ***West v Hungary*** (2019) 5380/12, the European Court itself stressed again that for the purposes of Article 5(1) compliance with national law is not "sufficient in itself" (Full Authorities/Tab 152/p.4839/§49). And in the case of ***Szabo v Sweden*** (2006) 28578/03, the European Court made the point that the requirements of Article 5 and of the Convention 'should so far as possible be interpreted in harmony with other rules of international law, of which it forms part' (Full Authorities/Tab 123/p.3731, first para). The decision in ***Calovskis v Latvia*** (2014) 22205/13 at §181 is to like effect (Full Authorities/Tab 142/p.4498). In ***Szabo***, the relevant rules were in the Transfer of Prisoners Convention and its additional Protocol (cf. ***Medvedyev v France*** (2010) 51 EHRR 39 at §79-103 (Full Authorities/Tab 133/pp.4110 - 4115).

6.3 Extradition ordered in contravention of the governing Treaty is in direct breach of *"other rules of international law"* expressly agreed to by the UK in the Treaty. Therefore it necessarily involves arbitrariness under article 5. In ***Čalovskis*** **(**supra) at §§181 and 190 (Full Authorities/Tab 142/p.4498 and p.4500). the ECtHR examined extradition for compatibility with the bilateral treaty governing extradition between Latvia and the US. It is true that the relevant Treaty in the ***Calvoskis*** case had been incorporated into Latvian law. But in terms of English domestic law, given the analysis in the ***Heathrow Airport*** case, the absolutist distinction between incorporated and unincorporated treaties is no longer maintainable. Disregard of the express provisions of the Treaty that has *"gained a foothold in English law"* and actually governs the extradition request is just as arbitrary and unlawful for the purposes of Article 5.

6.4 **So the argument for arbitrariness goes deeper in this case** than the need to respect the requirements of international law. It is precisely the fact that the US are

violating the very Treaty that they are relying on to found their extradition request that renders detention arbitrary. Moreover, this is no ordinary Treaty provision. **Firstly,** this is a Treaty that **enshrines in Article 4 a long-established protection** from extradition for political offences. **Secondly,** it is a Treaty which is still **grounded in English law** for all the reasons set out above. **Thirdly**, Article 4 is a Treaty provision whose terms are not only **intrinsically justiciable** but have long been the subject of judicial determination in the series of cases summarised above. For those additional reasons, detention in violation of Article 4 of the Treaty becomes arbitrary; and the Treaty can be relied on to demonstrate the inconsistency of the Extradition Request with Article 5 of the Convention.

The *Neville Lewis* case (Full Authorities/Tab 16/p.496ff)

6.5 In this context, it is actually an oversimplification to say that the Applicant is erroneously relying on the provisions of an unincorporated treaty. In fact, he is relying on the requirements of Article 5 **which are incorporated into the Extradition Act 2003**. Article 5 extends the protection of the law to the Applicant, including the law contained in the Treaty that governs the extradition. In this way, Article 5 requires the courts and the government to respect the requirements of the Treaty in order to ensure that detention does not become arbitrary. This is directly analogous to the approach of the Privy Council in the case of ***Neville Lewis v Attorney General*** [2001] 2 AC 50 at pp.83H-85A, where it held that provisions in the constitution of Trinidad which guaranteed the *"protection of the law"* also guaranteed the right to invoke the provisions of an unincorporated treaty (the Inter-American Convention) in the case of a prisoner facing execution (Full Authorities/Tab 16/pp.529 – 530). You can domesticate the provisions of a treaty through the terms of a constitution or constitutional instrument (such as the human rights convention) guaranteeing *"the protection of the law"* or freedom from arbitrary detention. As the Privy Council stated in the earlier case of ***Thomas v Baptiste*** [2000] 2 AC 1, "*the applicants are not seeking to enforce terms of a domestic treaty, but a provision of the domestic law of Trinidad and Tobago contained in the constitution",* cited in ***Neville Lewis*** at Full Authorities/Tab 16/p.530).

***Kashamu* (Core Authorities/Tab 8/p.250)**

6.6 Moreover, in the case of ***R (Kashamu) v Governor of Brixton Prison*** [2002] QB 887 (Core Authorities/Tab 8/p.250) the High Court found that issues going to the lawfulness of detention under Article 5 must be determined by the courts. And they should be determined in accordance with the test of lawfulness under Article 5 enunciated by Lord Hope in the ***Ex parte Evans (No. 2)*** (supra) case so that detention vitiated by an improper motive or an abuse of process would be unlawful. Given that, extradition in circumstances which would constitute an abuse of process would also violate Article 5 (see **§§32 and 36** of ***Kashamu*** (**Core Authorities/Tab 8/pp.263-4**); see also the fuller analysis in the s.103 GoR at pp.21-2, §§7.5 – 7.10.**).** So the two grounds of challenge do overlap, and mutually reinforce each other to provide the protection sought here. And so we rely also, under Article 5, on the fact that an extradition request in breach of the terms of the Treaty that founds the extradition request gives rise to an abuse of process. To this I now turn.

7. Abuse of process and District Judge's mistaken reliance on *Arranz*

7.1 So finally we submit that the District Judge failed to address adequately the abuse of process argument. The Applicant had relied before the District Judge on Lord Bingham's reasoning at §§31 and 33 in ***Asfaw*** (supra), where he found that the proceedings on count 2 should have been stayed – partly for incompatibility with Article 31 of the Refugee Convention. Lord Hope's reasoning was to like effect at §71. In ***Asfaw,*** the court also cited with approval the approach of Lord Justice Brown (as he then was) in ***Ex parte Adimi*** (see ***Ex parte Adimi*** at Full Authorities/Tab 14/p.409 referring to the "*the abuse of process jurisdiction"* as a *"safety net";* and its approval by Lord Bingham, who held that ***Adimi*** was rightly decided at Core Authorities/Tab 17/p.579/§22, and applied the same remedy at §34). The underlying principle in ***Asfaw*** that breach of treaty provisions can render a

prosecution an abuse of process still holds good and has been adopted in later cases involving victims of trafficking[4].

Arranz

7.2 The District Judge held that the case of ***Asfaw*** was distinguishable insofar as it held that prosecution in breach of international law provisions protecting refugees could constitute an abuse of process. She so held on the basis that in ***Arranz v The 5th Section of the National High Court of Madrid, Spain*** **[2016]** EWHC 3029 (Admin) (to be provided) the High Court expressly rejected the argument that Article 31 created legitimate expectations that could be relied on in extradition proceedings (see DJ's judgment at §58). The ***Arranz*** case can be distinguished on a number of grounds:-

(i) Firstly, ***Arranz*** primarily addresses an argument based on legitimate expectation (see §§67 – 72). But the decision in ***Asfaw*** was not based on legitimate expectation, but on a wider concept of abuse which is equally applicable here.

(ii) Secondly, the court in ***Arranz*** stated that the relevant prohibition in Article 31 of the Refugee Convention applied to domestic prosecutions and not to extraditions. However, on any view, the prohibition invoked here, namely Article 4, applies directly to prohibit extradition itself being granted.

(iii) Thirdly, the High Court in ***Arranz*** actually found that Mr Troitino-Arranz did not in fact come within the terms of Article 31 of the Refugee Convention on which he was relying and was *"not entitled to the protection of Article 31"* (see §62 of that judgment, and see §74 where

[4] Nor does Lord Justice Simon Brown's later expression of some doubt as to the applicability of the legitimate expectation principle at §51 of the ***R (European Roma Rights) v Prague Immigration Officer*** [2004] QB 811 case alter the fact that the abuse remedy is not founded on legitimate expectation and that resort to the abuse remedy has been repeatedly reaffirmed as appropriate in cases where prosecutions breach or may breach the requirements of a treaty obligation.

reliance was placed by the court on the fact that the prosecution in ***Arranz*** was a foreign prosecution to which Article 31 did not apply). By contrast, there can be no doubt that the protection in Article 4 extends to this extradition context since it is specifically directed at non-extradition to a foreign state.

(iv) As a result, the remarks in ***Arranz*** about not being able to rely on the Refugee Convention to found an abuse of process argument were not part of the ratio, and the case is plainly distinguishable on the facts. Here, **there has been no finding that the Applicant, Mr Assange, does not qualify** for protection under Article 4. Here, there is no alternative remedy. And here the very Treaty relied on to justify his extradition is itself being violated by the state seeking his extradition and by the District Judge in granting it.

<u>*Asfaw* case not an isolated instance</u>

7.3 Moreover, the District Judge was unfortunately not referred to the further powerful line of authorities applying the abuse of process doctrine to stay proceedings that are in breach of unincorporated international conventions. That is in the case of those prosecuted in breach of conventions protecting victims of trafficking. In the light of that, it is clear that she was wrong in her approach to the ***Asfaw*** case.

7.4 Thus, contrary to the District Judge's judgment at §57-59, the UK courts have repeatedly confirmed the ***Asfaw*** power to stay proceedings where the result will be exposure to trial in breach of a specific international Treaty obligation not to do so, even where the Treaty obligation is not incorporated. In ***R v Ahmed*** [2011] EWCA Crim 184, an alleged rendition case, the Lord Justice Hughes cited ***Adimi*** (supra) as authority for the proposition that *"[t]he jurisdiction to stay may, in certain circumstances, be invoked where to try a defendant would involve a breach by this country of a specific international obligation not to do so"* (Full Authorities/Tab 39/p.1669/§24). And more recently in 2023 the Court of Appeal has recognised *"the*

importance of a class of case where the executive is proposing to prosecute a defendant in breach of a specific international obligation not to do so" (***R v BKR*** [2023] 2 Cr App R 20 per Edis LJ at Full Authorities/Tab 69/p.2664/§43). *"The test for limb two abuse is clearly established on the highest authority, including in the particular context of international Treaty obligations"* (**ibid** at §50-56).

Breach of Treaty obligations in modern slavery cases

7.5 It is that principle of law which has underpinned the recent Court of Appeal decisions over the past decade in modern slavery cases. These hold that criminal prosecution in breach of the UK's unincorporated Treaty obligations regarding modern slavery constitutes an abuse of process. Thus, in ***R v M(L)*** [2011] 1 Cr App R 12, Lord Justice Hughes at §§16 - 17 (Core Authorities/Tab 18/pp.631-2) referred to, and relied on, the decisions in ***Adimi*** and ***Asfaw.*** He interpreted the ***Asfaw*** case as establishing that the abuse of process jurisdiction could be invoked 'in effect for the purpose of ensuring that the United Kingdom's international obligations under the [Refugee Convention] was not infringed' (§17). In this sense, as Lord Justice Hughes recognised, the abuse jurisdiction is a *"mechanism' through which 'the implementation of [Article 26] is achieved"* (**ibid** at §7 (Core Authorities/Tab 18/pp.628-9). And that is despite the fact that it was an unincorporated treaty obligation.

7.6 This does not involve the creation of new principles. As Lord Judge stated at §21 in ***R v N*** [2013] QB 379, *"well-established principles [concerning limb two abuse] apply in the specific context of the Article 26 obligation, no more, and no less."* (Full Authorities/Tab 42/pp.1750-1). Then **in the case of *R v L(C)* [2013] 2 Cr App R 23**, Lord Judge reiterated that *"The court protects the right of the [defendant covered by the Treaty obligation] by overseeing the decision of the prosecutor and refuses to countenance any prosecution which fails to acknowledge and address the ... the international obligations to which the United Kingdom is party"* **(Core Authorities/Tab 20/p.672/§16).** Most recently, Lady Justice Carr put it in this way in ***R v AFU*** [2023] 1 Cr App R 16 (Core Authorities/Tab 31/p.980/§105): *"The law*

[of abuse] was developed so as to ensure that the UK complied with its international obligations where the [defence of duress] was not available". And she then made clear that the international obligations were those under Articles 26 and 4 of the unincorporated 2005 Europe Convention on Action against Trafficking in Human Beings ('ECAT').

7.7 For this reason, there is jurisdiction to stay these proceedings for abuse of process because the extradition sought is in breach of the Treaty prohibition on extradition for political offences.

Conclusion on Treaty point

7.8 For all these reasons, we submit that the Court has jurisdiction to address the political offence point and should refuse extradition on grounds that these are political offences of espionage for which extradition is barred on grounds of arbitrariness under Article 5, and as an abuse of process.

7.9 Furthermore, it is arguable that extradition for these "political offences" of espionage is also barred on grounds of presumptive political motivation under section 81(a), which has to be interpreted in conformity with the Treaty so as to exclude extradition for such political offences. This point was not taken before District Judge or in the Perfected Grounds. But, if permission is granted on the other grounds, it is respectfully submitted it is worthy of consideration at the substantive hearing.

8. Section 81b: Risk of discriminatory denial of First Amendment rights on grounds of Applicant's status as a foreigner

8.1 There was evidence before the Court that the US protection for free speech under the First Amendment may be denied to Mr Assange because of his status as a foreign national. That evidence was given by the US prosecutor Mr Kromberg who stated in his first witness statement that the US prosecution may argue at trial that *"foreign*

nationals are not entitled to protections under the First Amendment" (Vol. 1/Tab 21/p.741/§71 of Kromberg's first declaration).

8.2 This evidence would justify the finding that there is a real risk of discrimination on grounds of foreign nationality. That of itself justifies refusal of extradition under section 81b, which bars extradition altogether if the defendant *"might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his…nationality."*

8.3 Extradition to face a trial which may not even consider the substantive rights enshrined in Article 10 of the ECHR may well also constitute extradition to face a flagrant denial of justice.

8.4 The District Judge dismissed this point, in her judgment at paragraph 263, on the basis of her interpretation of the case of ***USAID v Alliance for Open Society*** 140 SC 2082 (2020) (Full Authorities/Tab 110/p.3429). She went on to state that *"no authority [had] been provided which supports the notion that a US court would remove the protections of the US constitution for someone in Mr Assange's position"* (Vol.1/Tab 16/p.436/§195). Therefore, she concluded that *"the defence has not discharged its burden to establish a real risk of a 'flagrant denial' of Mr Assange's [Article 6] rights if he is extradited to face trial in the US"* (Vol.1/Tab 16/p.453/§266). But she acknowledged that the US *"may or may not make this argument for the Court*" (Ibid, §265). That amounts to a real risk of prejudice given that it is the US prosecutor with charge of the case who is stating that he may take this point. A 'real risk' is something clearly less than a 'likelihood'. And, contrary to the judge's approach, the real risk issue arises most clearly under section 81b. Her reasoning at paragraphs 194 -195 (Vol.1/Tab 16/pp.435-6), and at paragraphs 263 - 266 (in relation to section 81b; Vol.1/Tab 16/pp.452-3) applied too high a test.

8.5 Moreover, there was a body of evidence to justify a finding of real risk for the reasons set out at paragraph 5.5 of the s.103 Renewal Grounds:-

(i) First, the USA's evidence positively asserts that it can happen. That is not *"immaterial"* (Vol.1/Tab 16/p.436/§195). What the prosecution posits is a trial in which, even if the Espionage Act would be unconstitutional under the First Amendment as applied to a US citizen who published truthful information, it would not be unconstitutional applied to a non-US citizen who published outside the US.

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

(iii) Thirdly, in the circumstances, the District Judge embarked on her own interpretation of the Supreme Court's recent decision in ***USAID*** (supra) to conclude it is *"no authority ... which supports the notion that a US court would remove the protections of the US Constitution"* (Vol.1/Tab 16/p.452/§263). Yet the US told her that *"The Supreme Court referred in the course of its judgment to it being long settled, as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution"* (US Closing Submissions §399). There was, in the end, no dispute between the parties as to the legal veracity of the US threat concerning the First Amendment. It is real as a matter of US law. It was simply not open to the District Judge to form her own contrary view about foreign law, without expert evidence.

(iv) Fourthly, the US prosecutor is not in fact the only US official to have propounded 'the notion' of a trial for Mr Assange bereft of First Amendment protections. In April 2017, the future US Secretary of State had also asserted that Mr Assange *"has no First Amendment freedoms"* because *"he is not a US citizen"*. The District Judge simply dismissed this evidence without explanation as 'immaterial' (Vol.1/Tab 16/p.436/§195).

8.6 The judge's reasoning was upheld by Swift J as a finding of fact that disclosed no error. But it is submitted that she had misapplied the real risk test. And there was

sufficient evidence that the Applicant may well be denied essential rights because of his status as a foreigner. That is all that he needs to prove under section 81(b).

9. **Real risk of a sentence based on relevant conduct for which the Applicant is not charged or even acquitted**

9.1 The evidence was that a sentencing court in the US can pass sentence on a criminal defendant for 'relevant conduct' with which he has not been charged and even conduct of which he has been acquitted so long as a judge finds that conduct proved by a preponderance of evidence (see Durkin at Vol.3/Tab 9/p.353/§§20 – 22, and see Durkin's oral evidence on 15/09/20 at Vol.4/Tab 10/p.288; and see Lewis in his report dated 18th October 2019 at Vol.3/Tab 6/p.332/§38).

9.2 The expert witness **Eric Lewis** gave evidence in his fourth statement of 18th July 2020 that *"The government is not required until after trial to identify what relevant conduct they may ask a sentencing court to consider, and so accordingly, we do not know at this juncture what the government might seek to introduce at the sentencing phase of the proceedings."* (Vol.3/Tab 42/p.1083/§17). **He identified for the District Judge multiple real examples of uncharged WikiLeaks publications in the Applicant's case which could operate in law to trigger an increased sentence under these laws,** including (a) publication of the Detainee Policies in 2012, (b) revelations of US espionage against European leaders, (c) revelations of US espionage against the European Commission, the European Central Bank and French industry, (d) the 2017 publication of US spying during the French presidential election campaign, or (e) publication of the DNC emails during the 2016 US presidential campaign.

9.3 **Moreover, the Applicant is alleged to have participated in the publication of Vault 7 in March 2017**, for which his alleged accomplice Mr Schulte has recently received a sentence of 40 years' imprisonment. The Vault 7 allegations are referred to in the Yahoo article exhibited to Gareth Peirce's 10th witness statement (Vol. 2/Tab 3/p.7). And it is clear that the publication of Vault 7 was of particular concern

to the CIA and led to strident denunciations of Mr Assange by Mr Pompeo in 2017, shortly before he was first indicted (see 2021 Yahoo Article at Vol.2/Tab 12/pp.158-8). So these untried and unproven allegations could well be taken into account in sentencing.

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

9.5 **Sentencing on the basis of uncharged conduct**: The evidence before the District Judge confirmed that there exists a long and consistent line of US authority holding that, in determining the appropriate sentence in respect of which a defendant has been convicted (or to which he has pleaded guilty), a US court may increase that sentence up to the statutory maximum (here, 175 years) by reference to other, uncharged 'relevant conduct', even conduct in respect of which a defendant has been acquitted. The government is not required until after trial to identify what relevant conduct they may ask a sentencing court to consider. Neither are extradited defendants protected - by treaties containing the rule of specialty - from this US domestic practice of 'sentence enhancement' by reference to uncharged conduct. On the contrary, this is a practice applied liberally by US courts to extraditees, including for completely unrelated conduct (see e.g. ***US v Lazarevich*** 147 F.3d 1061 (9th Cir. 1998); ***US v Garcia*** 208 F.3d 1258 (11th Cir. 2000); ***US v Garrido-Santana*** 360 F.3d 565 (6th Cir. 2004)). These cases are helpfully summarised in the judgment of Ouseley J in ***Welsh v SSHD*** [2007] 1 WLR 1281 at §§100 – 112 (Core Authorities/Tab 13/pp.458 – 460).

9.6 The only safeguard is that the sentence is premised on a judicial finding. **But that finding is by a judge applying the civil standard of proof.** In deciding on relevant conduct, the sentencing judge need merely conclude that such conduct is established

by the *"preponderance of evidence"* (see Thomas Durkin at Vol.3/Tab 9/p.353/§§20-1; and see Eric Lewis at Vol.3/Tab 6/p.332/§38).

9.7 **The judge's decision can be based on evidence which the Applicant may neither know nor see.** That is because it could be based on classified 'national security' information, there are severe restrictions on what Mr Assange may be shown and see. Eric Lewis explained to the District Judge the US Classified Information Procedures Act and the *"severely limited access"* to classified material that Mr Assange will have (see DJ's Annex at Vol.1/Tab 17/p.504-5/§9). His lawyers are forbidden by law from communicating with him about it. Even his counsel may be shut out of access to material deemed 'not helpful' to the defence (all allegations which result in sentence enhancement are, by definition, not exculpatory) (**See Perfected Grounds in s.108 Hearing Bundle/Tab 4/pp.32-2/§§3.13-16**). In Mr Assange's particular case, therefore, the 'enhancement' of his sentence may well occur by reference to materials, evidence, allegations or assertions that he will never even know about. In fact, the US judge may 'enhance' sentence even by reference to materials he has previously ordered to be withheld from Mr Assange's lawyers.

9.8 **Moreover, the evidence relied on to establish relevant conduct can be based on illegally obtained evidence** (see s.108 Perfected Grounds at §§3.17 – 3.19, pp.33-4)**.** There is evidence that the Fourth Amendment exclusionary rule regarding illegally obtained evidence which usually operates during the trial phase, does not apply at the sentencing stage (see, e.g. ***United States v Brimah*** 214 F.3d 854, 858 (7th Cir. 2000) at **Full Authorities/Tab 99/p.3316-17).** This is significant given that Mr Assange's legally privileged communications were the subject of unlawful electronic surveillance by Spanish agents operating on behalf of the US government during Mr Assange's asylum in the Ecuadorian embassy.

9.9 Swift J held at §7 (Vol.1/Tab 15/p.365) that *"there is no error apparent in the District Judge's reasoning"* in respect of '**excessive sentencing'** in §236 of the District Judge's reasoning.

9.10 The District Judge at §236 treated the argument as settled by the decision in ***Welsh v SSHD*** (supra) concerning specialty. But ***Welsh*** does not consider, nor has any

other decided extradition case in the UK considered, the implications for Article 6 of a sentencing regime that permits the imposition of additional punishment for a crime for which the requested person has not been charged. **This is, with respect, not about 'excessive sentencing'**. It is about the fundamental principle asserted by Lord Bingham in ***R v Kidd*** [1998] 1 WLR 604 that 'it is inconsistent with principle that a defendant should be sentenced for offences neither admitted nor proved by verdict' (Full Authorities/Tab 11/p.325).

9.11 Permission to appeal was granted on this very issue on 25 September 2020 by **Sir Ross Cranston in the case of *Jabir Saddiq (aka Motiwala) v USA* (**Core Authorities/Tab 26/p.789). In that case, permission was granted to challenge extradition on Article 6 grounds (flagrant denial of justice) because there was a real risk of a 'terrorism enhancement' for a defendant not charged with any terrorism offence. The Court thereby decided that the challenge to the US system of sentencing by reference to unproven relevant conduct was arguable under Article 6. And this issue remains undecided by this Court because that request was ultimately withdrawn by the USA. As to the observations of Mrs Justice Dobbs in the case of ***MacKellar v United States of America*** **No. 06385/2017** in the Grand Court of the Cayman Islands, these were obiter since the judge had already decided to discharge on other grounds.

9.12 Article 6 precludes criminal law consequences being imposed without foundation in a criminal charge which has been determined in an Article 6 compliant process. Even where there has been a finding of guilt, the notion that mere 'allegations about a convicted person's character or conduct at sentencing stage' (e.g. for confiscation purposes), do not engage Article 6(2) is subject to the clear qualification "unless such accusations are of such a nature and degree as to amount to the bringing of a new 'charge'" (***Phillips v UK*** 41087/98 (05.07.2001), §35, cited in ***Geerings***). A fortiori, there cannot be confiscation which *"relates to a criminal act of which the person (…) has not actually been found guilty. If it is not proved beyond reasonable doubt that the person affected has actually committed the crime (…) This can hardly be considered compatible with Article 6 § 2"* (***Geerings v Netherlands*** 30810/03 (01.03.2007), Core Authorities/Tab 48/p.1175/§47-50).

9.13 It is also a "fundamental aspect" of an Article 6-compliant process involving equality of arms and adversarial process that it requires disclosure of evidence. The disclosure is a core Article 6 requirement cross-applicable to other proceedings relating to deprivation of liberty: ***A & Others v UK*** 3455/05 (19.02.2009)(Full Authorities/Tab 128/p.3857).Therefore it is doubly offensive to ECHR standards to detain or punish someone by reference to allegations they cannot know about or respond to (see for example ***A v UK*** (supra)).

9.14 On all these grounds it is submitted that there is an arguable case that the sentencing system to which this Applicant is likely to be exposed creates a real risk in his particular case of a flagrant denial of justice contrary to Article 6. No assurances to meet this risk have been offered throughout the proceedings.

10. **Articles 2 and 3**

10.1 There was evidence before the District Judge and there is further evidence before this Court of a real risk of unlawful attack or killing by US agencies in order to incapacitate the Applicant. This will be summarised in turn. The Court is also referred to the analysis in the Reply on section 108 at pp.59 - 60

10.2 Firstly, there was evidence before the District Judge from an anonymous Spanish witness (now repeated in his statement at Vol.2/Tab 8/p.104/§10). He stated that there were plans developed by UC Global at the request of some US agencies to explore kidnapping the Applicant or even poisoning him. At the hearing, the written statement of anonymous Spanish witness 2 was put before the District Judge uncontradicted. The District Judge referred to *"reported plot to kidnap and poison him"* at §181 (Vol.1/Tab 16/p.431) of her judgment. But she ruled at §183 that it would be inappropriate for her to draw any conclusion as to the allegations of unlawful surveillance and planned attacks given that the Spanish High Court was investigating the matter. She referred to the evidence present as *"partial and incomplete"* (Vol. 1/Tab 16/p,432/§183).

10.3 However, the likelihood that the request to explore these extra-judicial attack options came from an official agency is now borne out by the additional evidence of the Yahoo article, and the further explanation by the American legal expert Joshua Dratel of the legal context of the contemporaneous resolution by the US Senate that the Applicant was a *"hostile non-state actor"*.

10.4 Secondly, there is that additional evidence which has now become available from the Yahoo article exhibited to Gareth Peirce's 10th witness statement, and the statement of Joshua Dratel. The evidence, taken together, justifies a conclusion that there is a real risk of unlawful attack or killing in order to incapacitate the Applicant. The Yahoo article is admissible under the principle in ***Schtraks*** (supra) and ***R (on the application of B) v Westminster Magistrates' Court*** [2015] AC 1195 (Core Authorities/Tab 21/p.698/§§21-3) that the strict rules of evidence do not apply to extradition proceedings where issues of human rights and political motivation are being considered. Moreover, **Mr Dratel's expert report is admissible and relevant** to explain the legal context of the new evidence and how the evidence of a plan to kidnap or assassinate is linked to the resolution the Applicant to be a *"hostile non-state actor"*.

<u>The Yahoo Article of September 2021</u>

10.5 The Yahoo article, dated 26th September 2021, provides evidence gathered by a responsible team of journalists after interviews with *"more than 34 US officials – eight of whom described details of the CIA's proposals to abduct Assange"* of a plan by CIA operatives under the Trump Administration to either kidnap or kill the Applicant after the disclosure of Vault 7 by WikiLeaks (see s.103 HB Vol.2/Tab 12, pp.133 – 134). The report in that article gains credence from the fact that it is linked to the CIA's angry reaction to WikiLeaks' disclosure and publication of the contents of CIA Vault 7 in 2017.

10.6 The Yahoo report gains further credibility from the fact of **Mike Pompeo's comments on the Yahoo article**. These are contained in the Yahoo report by Michael Isikoff and Zach Dorfman of 29th September 2021 (Vol 2/Tab 10/p.120 –

124). Mr Pompeo is reported as commenting on the Yahoo News account that 'pieces of it are true' and that *"when bad guys steal those secrets, we have a responsibility to go after them"*. However it is true to say that Mr Pompeo denied any plan to conduct assassination whilst leaving unanswered the claim that there was a plot to abduct.

Contextual support from contemporaneous governmental action

10.7 The overall credibility of the allegations is enhanced by the fact that the Yahoo article links the plot to kidnap or assassinate the Applicant to the historical fact that WikiLeaks was declared by Mr Pompeo in April 2017 to be a 'a non-state hostile intelligence service'. The significance and effect of that declaration is explained by Joshua Dratel in his report of 26 August 2022 (Vol.2/Tab 5/p.43ff, particularly §59 ff.). He explains that Mr Pompeo's characterisation coincides with an **express Senate Resolution of August 2017** which *"can be viewed to have been intended to produce legal authority and cover (with the Senate's endorsement) and thereby clear the legal decks for the kidnapping and/or killing of Mr Assange"* (Joshua Dratel at Vol. 2/p.43/§59). The Pompeo statement and the Senate Resolution predated the December 2017 discussions about kidnapping or poisoning.

Conclusion on Articles 2 and 3

10.8 All in all, there is sufficient evidence to justify a finding that there is a real risk that the Applicant could be targeted by US state agencies as a 'hostile non-state actor' meriting the application of clandestine and extra-legal attack or elimination. There is historical evidence of the development of such plans by the CIA under the Trump administration. There is evidence of the assertion, with Senate approval, of some form of legal authority to develop and execute such plans by means of the 2017 Resolution. And given that the CIA remains constant under any administration, and has a powerful say in the location of prisoners who allegedly pose a threat to national security; given also the real possibility of a return of a Trump administration that was prepared to contemplate such extreme measures against the Applicant, there is a real risk to the Applicant of extreme and unlawful measures to

punish or incapacitate him for his conduct as 'hostile non-state actor'. This could well extend to resort to the extra-judicial measures contemplated in the year 2017 such that there are substantial grounds for finding a real risk to his rights under Articles 2 and 3.

11. Part B: Submissions on Treaty Point in relation to Section 108 Appeal

11.1 For the reasons set out in the section 108 Renewal Skeleton, the Applicant submits that his extradition is prohibited by the Treaty because the allegations against him are of political offences for which is extradition is prohibited under Article 4 of the Treaty.

11.2 This point was clearly set out in representations to the Secretary of State who declined to address the issue on the basis that sections 93 – 102 of the 2003 Act *"make no provision for the Secretary of State to decline to order extradition"* for any other reasons than those expressly set out in the sections.

11.3 Swift J upheld the Secretary of State's reasoning and held that she was correct to decline to consider the Treaty point and that this *"is an inescapable consequence of sections 93(3) and (4) of the 2003 Act"* (s.108 HB/Tab 9/p.73/§3).

11.4 We make five submissions in response as set out in the GoR at §2.47 onwards.

11.5 **Firstly**, as set out at GoR §2.47, the UK-US Treaty came into force after the 2003 Act. It must surely have some significance. It would be surprising and contrary to the rule of law if it its express provision for the political offence exception could not be given effect in any way.

11.6 **Secondly**, section 93(3) does not expressly indicate that the prohibitions to extradition set out in section 93(2) are the only grounds on which discharge could be ordered (see GoR at §2.49).

11.7 **Thirdly**, and most importantly, **the Secretary of State's powers are not so limited**. Indeed, it was long accepted that the Secretary of State, as a public authority, was bound by section 6 of the Human Rights Act 1998 to discharge if extradition would be incompatible with a requested person's human rights. There was nothing express in the 2003 Act to say so. But the power and duty was implied into the Act. That power was exercised in cases such as that of ***Mckinnon.*** It was only removed by the introduction of an express statutory bar on the Secretary of State discharging on human rights grounds by means of the new section 70(11), inserted by the Crime and Courts Act 2013. Section 70(11) now states that:- *"The Secretary of State is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998."* But the need for the express removal of the power to consider human rights shows that sections 93ff. of the 2003 Act were never a comprehensive code of all the Secretary of State's powers and duties (see GoR at §2.52).

11.8 **Fourthly**, there is high authority that *"monitoring the provisions of the Treaty is an executive and not a magisterial function",* per Lord Ackner in ***Ex parte Sinclair*** [1991] 2 AC 64 (Core Authorities/Tab 4/p.128) (see GoR at §2.53).

11.9 **Fifthly**, and in any event, the Secretary of State retains jurisdiction at all times to withdraw her originating section 70 certificate on the grounds its issuance was not within the terms of the treaty. The grounds for exercising this power of withdrawal are that a request for extradition which is expressly prohibited by the terms of the operating extradition treaty does not qualify as a 'request for extradition at all' within the meaning of section 70 (see GoR at §2.57).

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February 2024

Appendix: Chronology in relation to Articles 2 and 3

7 March 2017	Publication of Vault 7 containing revelations about the CIA. Publication continues through until fall of 2017.
13 April 2017	Mike Pompeo makes public statement. He attacks Wikileaks as "*a nonstate hostile intelligence agency".*
20 April 2017	Attorney-General Jeff Sessions states that the arrest of Julian Assange is now priority.
June/July 2017	According to Protected Witness 2 (in his statement of 4 July 2019), he is instructed to initiate surveillance by UC Global (Vol. 3/Tab 2/p.8).
20th July 2017	Pompeo gives speech in which he states that "*Wikileaks will take down America in whatever way they can";* and he repeats that "*Wikileaks is a nonstate hostile intelligence service".*
18th August 2017	US Senate Resolution that *"it is the sense of Congress that Wikileaks and the senior leadership of Wikileaks resemble a non-state hostile intelligence service often abetted by state actors and should be treated as such a service by the United States"* (See Joshua Dratel at Vol.2/Tab 5/p.41/§52-53).
December 2017	Protected Witness 2 states that there was discussion at UC Global Headquarters about "*putting an end to the situation"* at the request of US friends. There was even discussion of "*allowing persons to enter from outside the embassy and kidnap the asylee".* And "*even the possibility of poisoning Mr Assange was discussed"* (Vol.3/Tab 2/p.13).
September 2020	The statement of Protected Witness 2 is admitted into evidence before the District Judge.
January 2021	In her judgment, the District Judge deals with the statement at §§181 – 183 (Vol.1/Tab 16/p.431-2) that it would be inappropriate for her to draw any conclusions because the Spanish High Court was investigating the matter.
September 2021	**The Yahoo Article "*Kidnapping, assassination and a London shoot-out"* is published by Yahoo News.** This refers to the statements taken from *"more than 34 US officials – eight of whom described details of the CIA's proposals to abduct Assange"* (Vol.2/Tab 12/pp.158-9).
December 2021	High Court gives judgment allowing the US appeal. It does not address the fresh Article 2 and 3 materials since it rules that Article 3 was effectively dealt with at the extradition hearing.

17th August 2022	Second statement of Protected Witness 2 reaffirming evidence in the light of the fresh revelations (Vol.2/Tab 8/pp.104 - 107/§10 - 14).
26th August 2022	Report of Joshua Dratel interpreting the 'hostile non-state actor' statements and Senate Resolution in the light of the evidence of plan for extra-judicial kidnap or killing (Vol.2/Tab 5/pp.37-40 and pp.41-3/§43ff. and §53ff.)