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TRANSCRIPT OF PROCEEDINGS

Ref. U20200010

IN THE CROWN COURT AT WOOLWICH

Belmarsh Road
London

Before DISTRICT JUDGE VANESSA BARAITSER

GOVERNMENT OF THE UNITED STATES OF AMERICA

-v-

JULIAN ASSANGE

MR J LEWIS QC, MS C DOBBIN & MR J SMITH appeared on behalf of the Prosecution
MR E FITZGERALD QC, MR M SUMMERS QC & MS F IVESON appeared on behalf of the Defence

WHOLE HEARING
26th FEBRUARY 2020, 10.14-16.09

JUDGE BARAITSER: Thank you, good morning.

Just before you start, Mr Fitzgerald. It has come to my attention that a photograph was taken in this courtroom yesterday. I just want to make it absolutely clear that it is a criminal - ah, Mr Assange is not here yet. I am going to repeat what I have got to say in a moment. I will pause for him. Have you called for him?

COURT OFFICIAL: Yes.

MR FITZGERALD: Madam, I think just administratively, there is a new bundle of authorities. I have a blue one.

JUDGE BARAITSER: Yes. Thank you very much.

MR FITZGERALD: Yes, thank you.

JUDGE BARAITSER: Please sit down, Mr Assange. Thank you. Just by way of opening and before Mr Fitzgerald begins, I just want to repeat what I have just said a moment ago, that it has come to my attention that a photograph has been taken - please sit down in the public gallery - that a photograph has been taken in this courtroom sometime this week, I am told. I want to make it absolutely clear that it is a criminal offence to attempt to take a photograph or to take a photograph of any court. The prohibition on taking photographs is absolute. As far as I am concerned, if a person is identified repeating that activity, either attempting or succeeding in taking a photograph, I will consider that person to be in contempt of this court and I will deal with them accordingly. I hope that is perfectly clear now.

Thank you, Mr Fitzgerald.

MR FITZGERALD: Yes. Madam, I hope you have them. The basis documents are tab 2 of the submissions bundle, which is our submissions on political offence and the protection of the treaty; tab 10 of the bundle, which is our reply; and tab 3 which is the prosecution's submissions on it.

JUDGE BARAITSER: Thank you.

MR FITZGERALD: Yes. Madam, there is one thing I should just mention before I start, which is that Mr Assange is on medication and it may be that he will have difficulties following. If he needs a break, can I invite the court to give - sorry. If he needs a break, can I invite the court to give one?

JUDGE BARAITSER: I would be very happy to do that. If you could indicate, that would be very helpful to me.

MR FITZGERALD: Yes. Of course, yes. I am sure it will be drawn to my attention if the occasion arises, madam.

Madam, just to start with, if I could start with the submissions which are found at tab 2.

The essence of those submissions, as set out there, is that we rely on Article 4.1 of the Anglo-US extradition treaty, which expressly provides that extradition shall not be granted if the offence for which the extradition is requested is a political offence. Madam, you have that at tab 1 of the bundle; just to show you there. The extradition treaty is set out. And Article 4, headed "Political and military offences", Article 4.1: "Extradition shall not be granted if the offence for which extradition is requested is a political offence."

JUDGE BARAITSER: Now, when you say tab 1; tab 1 of this bundle is the opening note, so you are not referring to that?

MR FITZGERALD: No. This is in the core bundle of authorities on political offence. So there should be three bundles of authorities.

JUDGE BARAITSER: Yes.

MR FITZGERALD: So it is the first bundle of authorities. Really behind A, there is A1.

JUDGE BARAITSER: Yes, I have it.

MR FITZGERALD: And that is the treaty. Do you have that? So madam, that is the first point. And of course, behind that, as we have set out in the reply, there is a long history, just to summarise before I go into the details. It has been in every one of the Anglo-US extradition treaties; and indeed it is an essential and fundamental protection which the US puts in every single one of its extradition treaties and we have given you the schedule of that, appended to the Janson book. So I will take you to that in due course. So it is regarded throughout the world as a fundamental protection; and it is regarded by the US as so important that it is contained in every one of their extradition treaties. And we say, at 1.2, that the offences with which Mr Assange is charged, and for which his extradition is sought, are, on the face of the extradition request itself, political offences.

Madam, I will not go into all the details, but we have set out at 1.3; it is first of all very important that 17 of the 18 charges are under the Espionage Act itself; and they involve conduct which is set out in summary at 1.3(a): "Conspiracy to obtain, receive and disclose national defence information."

Count 1. Counts 2 to 8 are unauthorised obtaining and receiving of national defence information. (d), unauthorised disclosure of national defence information at counts 9 to 14. And then, of course, at 15 to 17, the allegations of publication of national defence information.

Madam, there is, in addition, of course, Count 18, and that is an offence of conspiracy to commit computer intrusion; but again it is in order to facilitate Manning's acquisition and transmission of classified information, related to national defence of the United States.

Madam, if I could just pause there for a moment to establish that this is, in effect, also an espionage allegation. Madam, in the blue bundle which we have handed up today, just behind the index, you will see the DOJ prosecutor's guidelines which helpfully sets out at (b): "Obtaining national security information." And the statute under which he is charged, the section under which he is charged, stating: "Any steps in investigating or indicting a case under section 10.30(a)(i) require the prior approval of the national security division of the Department of Justice." And then it sets out ---

JUDGE BARAITSER: Mr Fitzgerald, I know that you are going to spend some time discussing whether or not these allegations do amount to a political offence.

MR FITZGERALD: Yes.

JUDGE BARAITSER: But perhaps more importantly for my purposes is the relevance of the treaty to these proceedings.

MR FITZGERALD: I appreciate that. Madam, can I just take that as read, then, that you will - can I summarise the position in relation to ---

JUDGE BARAITSER: Can you begin with that and then perhaps deal with whether it is a political offence second?

MR FITZGERALD: Madam, if I can summarise the points in this way. So we say, firstly, Article 4.1 prohibits extradition for political offences, in accordance with long-established practice. Secondly, and this I hope begins to answer your question; secondly, that treaty is the basis for this extradition request under international law. So that is the first point about the significance of the treaty. Lord Diplock in *Cheng* says: "To have an extradition request, you have to have a treaty." That is the foundation of the extradition request. And we have cited in the reply a number of statements by Laws LJ in *Bermingham*; it is at 3.4 of the reply, madam, where he says that: "A proposed extradition [this is at 3.4 of our reply] must be [I quote] properly constituted according to the domestic law of the sending state and the relevant bilateral treaty." So he says that.

And if we go to *Cheng* which is at tab 6. If we go to *Cheng* which is at tab 6 of the authorities bundle, madam, you will see there set out the point at page 943, E to F:

> "In public international law, there is no general obligation upon any state to surrender to another state persons who have taken refuge in its territory to avoid trial or punishment for crimes which they have committed within the territorial jurisdiction of the courts of that other state. The extradition of a fugitive criminal is a bilateral transaction between the state where he has taken refuge and the state where he has committed the crime. It

> takes place pursuant to the terms of an extradition treaty made between the two states and providing for reciprocal rights to requisition the surrender of fugitive criminals and obligations to surrender them."

So madam, first of all, that is Lord Diplock in *Cheng* saying that the foundation for the legality of the request is a treaty; and Laws LJ repeating that in the case of *Bermingham*. It has to be properly constituted, according to the domestic law of the sending state and the relevant bilateral treaty. And Laws LJ then quotes Lord Bingham, who talks about the great desirability of honouring extradition treaties. We say it is not a one-way street. You cannot say: "You must honour the treaty on the one hand, but if there is something in it we do not like, you do not have to honour it". That would be contrary to the international rule of law and we submit that any detention, pursuant to a request that violates the international rule of law, would violate Article 5. It would not be prescribed by law.

So madam, this is a very specific situation, like some of the situations we have referred to in the case of *Thomas v Baptiste*, where the treaty becomes part of the legality of the extradition request and compliance with the treaty becomes part of the legality of detention, pursuant to that request, for the purposes of Article 5. And in 3.6, Laws LJ in *Bermingham* cited the fact that there is a strong public interest in respecting, I quote, "treaties involving mutually agreed and reciprocal commitments". So therefore we say that principle is always there.

Now, I appreciate that what my learned friend says is that the 2003 Act removed any reference to a political offence exception. It was in all the other Acts from 1870 onwards, 1989; it was removed. He says "abolished". We say that that, perhaps, is putting it too strongly. What we would respectfully submit is that the position is this, and we have set that out at part 5 of the reply, madam. We say that the abuse of process jurisdiction can be invoked where extradition or a prosecution resulting therefrom would involve a violation of the principles of public international law. And in the case of *Mullen*, which is in the abuse bundle, there is talk about it being - one of the reasons why it was an abuse of process was that it was a violation of public international law to extradite without complying with the treaty. So we say that the abuse jurisdiction can be invoked where there has been a breach of an international Human Rights Convention.

Madam, at 5.3 we say that the prosecution's simplistic rejection of any reliance on the requesting state's duties under public international law, as of relevance even to the abuse jurisdiction, is over simplistic. It ignores the fact that the abuse of process jurisdiction is

there to protect against the rule of law, of which international law itself forms a part.

And then we cite the - madam, can I just summarise before going into the details? This issue has arisen in other human rights contexts. It has arisen particularly in the death penalty context. And when the Jamaican government proposed to execute people, in breach of the Inter-American Convention of Human Rights, they ran the same argument that my learned friend is now arguing. International law, they said, is no part of domestic law. You cannot invoke your rights under the Inter-American Convention. If we want to execute you, then the fact that we have signed and ratified this treaty is neither here nor there; domestic law takes precedence over international law. And the Privy Council said: "plain wrong," and they said that before, in the case of *Thomas v Baptiste*, the Trinidadian case, where again the Trinidadian government said: "We may have conferred a right to apply to the Inter-American Commission and court, but that is just international treaty law. We do not have to follow international treaty law, because we follow the English system where international law plays no part.

And the Privy Council said: "wrong". For the time being, that becomes part, that right to petition the international body becomes part of the criminal justice system. And you do have a right under the due process clause of the constitution in Trinidad to appeal to the court, even though it is not part of domestic law. We have made it part of domestic law.

Now, I say this is an even stronger case. The whole substratum, the whole basis, the whole foundation of this extradition request is a treaty. As Lord Diplock said in *Cheng*: "No treaty, no extradition". As Laws LJ said in *Bermingham*: "Without a treaty, you cannot have an extradition". It is based on reciprocal obligations under the treaty.

So to say, as they say: "OK, it is a pure political offence, espionage. OK, we have committed ourselves in the treaty not to extradite for a political offence. But tough, international law is no part of domestic law and therefore the court can simply disregard it." Madam, what we have sought to show is that that is over simplistic, and that the abuse jurisdiction is precisely there to supplement, as it were, the defects of the austerity of tabulated legalism and to provide some remedy where there is a breach of public international law.

Madam, that in essence is how we answer that point. But madam, it goes further than that. We have cited the case of *Kashamu* in the submissions; and we have cited the case of *Fuller*. If you are detained, and Mr Assange is detained, in pursuance of an extradition request, that engages Article 5 of the European Convention. *Kashamu* says that and *Fuller* says that. If you are detained in accordance with Article 5 of the Convention, you must be

detained in a manner prescribed by law that is not arbitrary. *Kashamu* clearly says that. And I will take you, if necessary, to it. *Kashamu* clearly says that. So ---

JUDGE BARAITSER: It is that part, is it not, Mr Fitzgerald, the unlawfulness; that is the sticking point for you.

MR FITZGERALD: Exactly.

JUDGE BARAITSER: It must be unlawful, surely, in accordance with the English law. This is the difficulty. You pray in aid the international law.

MR FITZGERALD: Yes.

JUDGE BARAITSER: But of course, it is the English law that this court enforces. So when you talk about "unlawful" in accordance with Article 5, generally speaking, that would be unlawful in accordance with English domestic law.

MR FITZGERALD: Well ---

JUDGE BARAITSER: So tell me how that is wrong.

MR FITZGERALD: OK madam. Can I try? OK.

The concept of being detained, in accordance with the law, in Article 5, is autonomous. It does not depend on what domestic law says, because otherwise the European Court would never be able to say: "You are not detained in accordance with Article 5, provided there is some domestic law that authorises it". It has an autonomous power. It can go beyond domestic law and the test is, is that detention in accordance with the strict law, domestic law, arbitrary or non-foreseeable? And we respectfully submit that if there is a treaty which is the foundation of the legality of detention, I accept together with the Act, and you are detained in plain violation of the requirements of that treaty, pursuant to a request that itself violates the plain requirements of that treaty, then on that autonomous test under Article 5, you are not detained in a manner prescribed by law; you are detained in a manner that is arbitrary.

Can I just take you to *Kashamu*? Because it is quite helpful in this respect, madam. If one goes to *Kashamu*, at tab 15. This, of course, was the foundation of the abuse of process jurisdiction.

JUDGE BARAITSER: This is tab 15 of the second bundle?

MR FITZGERALD: Tab 15 of the second bundle, yes. So if one goes to it. Madam, it is page 899 at B, paragraph 27.

So this was the case which established that the abuse of process jurisdiction was reposed in the courts and not the executive. And Rose LJ says at paragraph 27:

> "I turn from these wide-ranging submissions to my conclusions.

> It is, in my judgment, plain that Article 5 expressly requires the lawfulness of the detention of a person detained with a view to extradition under paragraph (1)(f) to be decided speedily by a court. It is equally plain to my mind that, in the extradition context, the Secretary of State lacks the qualities of independence and impartiality required of the court-like body by the Strasbourg jurisprudence, in particular *Weeks*."

So they overturned a series of earlier cases. And if I can take you on to paragraph 32, at page 900C:

> "What is in issue in the present case is whether, when lawful extradition procedures are being used, a resultant detention may be unlawful by virtue of abuse of the court's process. The Magistrates' Court, rather than the High Court, is, in my judgment, the appropriate tribunal for hearing evidence and submissions, finding facts relevant to abuse and doing so speedily. Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act to act compatibly with Convention rights requires him to make a determination under Article 5(4). It seems to me that that determination should be in accordance with Lord Hope's analysis in ex parte *Evans*, that is he must consider whether the detention is lawful by English domestic law."

That is the first, "lawful by English domestic law". Secondly: "Complies with the general requirements of the Convention," and thirdly: "Is not open to criticism for arbitrariness." Now, my learned friend says stop at the first colon: "Detention is lawful by English domestic law." But it is clear that Lord Hope, in ex parte *Evans* and Rose LJ in *Kashamu* goes on to say: "Complies with the general requirements of the Convention and is not open to criticism for arbitrariness."

I respectfully submit there can be nothing more arbitrary than to say the whole basis of this extradition is a treaty. The treaty makes an express prohibition on extradition for political offences. We are extraditing him for a political offence; but on a narrow view of English domestic law, you can do that, because there is nothing in the Act that says you cannot. So we do not have to go on, beyond English domestic law, to see whether it complies with the general requirements of the Convention and is not open to criticism for arbitrariness.

So madam, that is the way we put it, is that the test of non-arbitrariness, the test of whether it complies with the general requirements of the Convention, the rule of law in the European and international sense, can be a test of compliance with Article 5.

Now, madam, there is a further step. Section 87 is part of English law. Section 87 requires that any detention for extradition comply with the requirements of the European Convention. And one of those is that any detention should be not just in accordance with the English domestic law, but also comply with the general requirements of the Convention and not be open to criticism for arbitrariness.

Madam, I can show you also, since we are on it, the case of *Fuller*, where the same approach was approved, admittedly in the context of the constitution of Belize, but it is the same basic principle. So madam, if I can go to the case of *Fuller*, which you have in the authorities at tab 21, the same bundle. And this again was reading in an abuse jurisdiction to the Belizean extradition law. And madam, it was a case of delay and they found that on the facts, the delay was not sufficient or did not prejudice. But on the issue of whether there was an abuse jurisdiction, you will see that they refer to a number of cases. So if I can take you to paragraph 51. They refer to *Kashamu* and then they refer to the case of *Knowles*. This is in the judgment of Lord Phillips. And then at paragraph 53, Lord Phillips says:

> "The abuse of process argument goes to the legality of the extradition proceedings. Abuse of process is a paradigm example of a matter that is for the court and not for the executive. For these reasons the Board has concluded that the appellant has made out his case that the Supreme Court had jurisdiction to consider the issue of abuse of process.
>
> "Because it is not, in reality, the appellant's right to liberty that is at the heart of this appeal, Mr Lewis' submission that he has no cause to complain because he has been released on bail is off target. There is no merit in that contention in any event. It is well established that, on an application for habeus corpus an applicant on bail is to be treated as if he were in custody. The legality of bail depends upon the legality of the prior detention and it must be open to a person who has been bailed to challenge his being subjected to bail on the ground that this was a consequence of the violation of his right to liberty."

So the right to liberty there is not just the right to liberty in accordance with tabulated statutory provisions, but the wider test of: is this non-arbitrary? Is this in accordance with the normative requirements for non-arbitrariness? Otherwise, they would have just said: well, it is not in Belize domestic law, so go home, as it were.

JUDGE BARAITSER: Is there a case that you can point me to where non-compliance with the treaty forms the basis of a decision about arbitrariness of detention?

MR FITZGERALD: Madam, well, *Thomas v Baptiste* is one, and *Neville Lewis* is another;

those which I have cited further on.

Madam, can I just take you, I have set it out at page 7 of the reply, to *Mullen*, which is in the abuse authorities. So it is the abuse authorities. Madam, I am not going to be able to, as it were, point to a specific case post the 2003 Act. What I can point to is principles which I say would underlie the reason why we are right about this. That is *Mullen* in the abuse authorities at tab 7. We did cite this in the abuse skeleton which did not turn out to be necessary in the end. Can I just take you there ---

JUDGE BARAITSER: So tab 7 is *Bermingham*. Is that the one?

MR FITZGERALD: Oh. In mine, it is tab 7 of the abuse authorities. Do you have that?

JUDGE BARAITSER: Oh, the abuse authorities? Not the political offence authorities. The abuse authorities?

MR FITZGERALD: I am so sorry, yes. If you would not mind. You will recall, we cited it in the skeleton.

JUDGE BARAITSER: Yes.

MR FITZGERALD: So madam, *Mullen*.

JUDGE BARAITSER: Yes.

MR FITZGERALD: If one goes to 535. Yes. So one of the reasons for finding abuse is at 535 E: "In summary, therefore, the British authorities initiated ---"

MR LEWIS: Sorry, what was the ---

MR FITZGERALD: Page 535. It was before the paragraphs came in. So it is page 535 E. So at page 535 E:

> "In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe."

I.e. not in accordance with the treaty. "In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law." Now, it was in breach of public international law, because it was not in accordance with the treaty; and that was one of the reasons why they found it was an abuse of process.

So madam, that is an example of a breach of public international law. The failure to comply with the requirements of a treaty where the treaty is there was found to constitute an abuse of process. And that is the *Mullen* case.

Madam, I did summarise, as it were, anecdotally the *Thomas v Baptiste* case, and I accepted it is - that is in tab 26 of the bundle in relation to political offences. I think it says "police offences", unfortunately. But tab 26, madam. Volume 2 of the political offence bundle.

Madam, I have summarised it briefly. The Trinidadian government wanted to execute, without waiting for the person to exhaust his rights under the Inter-American Convention, and they ran the same argument as my learned friend is arguing here: international conventions are no part of domestic law. In fact, all the cases he cites, *Rayner (Mincing Lane)* are all referred to, about the irrelevance of domestic - of international law duties. You will see *Rayner (Mincing Lane)*, the whole sad litany of cases, abdicating any responsibility for international law, are all recited at page 4 and 5. And then one has, at page - I am so sorry, yes. There was a reliance on the concept of due process under the constitution there. And one sees the due process clause is dealt with at page 21 F:

> "The 'due process' clause in the Constitution of Trinidad and Tobago can be traced to the confirmation of Magna Carta by Edward III in 1354, when the expression 'due process of law' replaced 'the law of the land' in article 39 of the original version."

So Magna Carta, of course, is still part of our law; and the due process provision is still part of our law, and indeed has been cited in cases. So the right to due process is part of our law.

> "They protected the subject from absolute monarchy and the exercise of arbitrary executive power. This interpretation may have been appropriate in the absence of either a written constitution or a doctrine of the separation of powers and at a time when a sovereign legislature was in the habit of passing Acts of Attainder. But such expressions mean different things to different ages. The words 'due process of law' were introduced into a New York statute in 1787 for the purpose of protecting the individual from being deprived of life, liberty or property by the act of the legislature alone. Madison had the same object in 1791 when he drafted what became the Fifth Amendment to the Constitution of the USA. The 'due process' clauses in the Fifth and Fourteenth amendments underpin the doctrine of the separation of powers in the USA and serve as a cornerstone of the constitutional protection afforded to its citizens. Transplanted to the constitution of Trinidad and Tobago, the 'due process' clause excludes legislative as well as executive

> interference with the judicial process. But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of 'the sentence of a court of competent jurisdiction'. The 'due process' clause requires the process to be judicial; but it also requires it to be 'due'."

So it is something more than just: there is a statute that lets you do it.

> "In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law. The clause thus gives constitutional protection to the concept of procedural fairness. Their Lordships respectfully adopt the observation of Holmes J in *Frank v Mangum*."

And he deals with that. And then at E:

> "The appellants contend that their constitutional right to due process would be infringed if they were to be executed while their current petitions to the IACHR were still pending. They seek a stay of execution until the petitions have been determined and the rulings of the IACHR and the Inter-American court of human rights have been considered by the authorities in Trinidad and Tobago. It invokes the fundamental principle that legal rights are neither created nor destroyed by executive action, and contends that the 'due process' clause does not incorporate into domestic law rights created by an unincorporated treaty such as the Convention. To this the government ---"

So this is my learned friend's argument, "makes several objections. It invokes the fundamental principle that legal rights are neither created nor destroyed by executive action." Exactly what my learned friend says.

MR LEWIS: Do I? Can I see where my learned friend is reading from?

MR FITZGERALD: It is at 22 F:

> "And contends that the 'due process' clause does not incorporate into domestic law rights created by an unincorporated treaty such as the Convention. It insists that rights granted by the

> executive may be withdrawn by the executive. It also relies on the principles, well settled by [this board] that constitutional protection does not extend to rights created after the constitution came into force."

So that is the point. Then at 23A:

> "Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law."

So that is my learned friend's *Rayner (Mincing Lane)* point.

JUDGE BARAITSER: Yes.

MR FITZGERALD:

> "The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law nor deprive the subject of existing legal rights unless and until enacted into domestic law ... When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness."

So that is one of the arguments that we reserve the right to advance; and which they do not say is wrong. They just say: "We will leave it to another day".

> "In their Lordships' view, however, the appellants' claim does not infringe the principle ... the right for which they contend is not the particular right to petition [the Commission] or even to complete the particular process ... It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law ---"

So see here, and we would say Article 5:

> "And affirmed by section 4(a) of the constitution. The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the constitution."

Likewise we say we are seeking to enforce Article 5 of the European Convention and the common law principle of due process, which is present in Magna Carta in any event, which is ---

JUDGE BARAITSER: Is that right, Mr Fitzgerald? Are you really doing that or are you, in fact, seeking to enforce the provisions of the treaty? Because you are saying the breaches of the provisions of the treaty is what makes it unlawful, the detention unlawful.

MR FITZGERALD: Madam, it depends on the - because the same could have been said there. The only reason that those condemned men had the right to appeal to the Inter-American Commission and court was because of a treaty, an unincorporated treaty. What the Privy Council did, in order to afford justice, was to recognise that the principle of due process, which is analogous to the Article 5 protection and to the protection in Magna Carta, extends to include not being arbitrarily detained.

And madam, that is the point. What we are not doing is to invoke some treaty which is totally extraneous to this matter. The treaty is the substratum for what is being done and we have countless domestic law cases that say that; Lord Diplock in *Cheng*, Laws LJ in *Bermingham*. We are not saying that there is some international law convention which gives you a right to equal pay or whatever it is, international labour law. We are saying: you cannot actually do this exercise at all lawfully, without complying with the treaty.

And madam, in the end, it may be said that this is, as it were, light footwork by the Privy Council to get round the principle of *Rayner (Mincing Lane)*. But we say they were doing that in accordance with a deeper principle of justice, that you should not have your right to due process violated; that you should not be, in our case, arbitrarily detained.

So madam, in answer to your question, I accept that if one adopts the approach that the Privy Council has described in the cases as the "austerity of tabulated legalism", you do not get very far. You just get to where my learned friend gets you.

But if you adopt a broader and more profound approach and say, "What are we doing here?" We are involved in an extradition process that depends on a treaty. Without a treaty, it would be wholly unlawful. And then in accordance with the *Mullen* principle, to extradite

in breach of the express provisions of the treaty would not be in accordance with law, because it would not be in accordance with public international law.

Now, the only remedy, I accept, is an abuse remedy, madam. But I say that the abuse jurisdiction is wider than simply saying: does the statute allow for it? And ---

JUDGE BARAITSER: Is your argument undermined, the argument to adopt a broader approach in this case, by the change in the Extradition Act in 2003, specifically removing the political offence bar? Does that go against your invitation to adopt a broader approach?

MR FITZGERALD: Well, madam, what I say in response to that is, in the old days, one would have been able to say: it is in the Act itself, it is a political offence, and therefore you cannot extradite. That, as a statutory bar, was removed and I accept that.

But we say that where the treaty, as it were, puts it back in, it does not have to, but if the treaty puts it back in, and it is a later treaty, it was ratified in 2007, then if one is asking oneself: "Is the extradition request in accordance with law?" the answer is "no". And if one asks oneself the question: "Is detention pursuant to that request arbitrary?" the answer is yes because it is a violation of the very treaty which forms the basis of it.

I am sorry, can I just show you *Neville Lewis*, because that takes it a little bit further, because this is the due process clause. I do make the point that Magna Carta, the due process clause in Magna Carta, is still part of our law. But if we go to *Neville Lewis*. *Neville Lewis* is tab 14 of this bundle. It is in bundle 2. So the Privy Council having made that break-through in *Thomas v Baptiste*, the question was: would it be applied to a constitution which did not have the language of due process, but instead had the language of "the protection of the law", which is very similar to Article 5, where we talk about: "Is it prescribed by law?" And the Privy Council's answer was yes.

Madam, can I just show you the - unless you want me to, I will not go through the headnote, but basically the Jamaican government brought in a new law which effectively, they said: "Well, this is domestic law, so it trumps the international law, cuts short the period during which you could appeal to the Inter-American Commission". And one sees that at page 84G, it is picked up in the judgment of Lord Slynn:

> "It is of course well established that a ratified but 'unincorporated treaty', though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts."

And this was the principle applied in *Fisher*. Can I just stress: "does not in the ordinary

way." So it is not saying never: "But even assuming that that applies to international treaties dealing with human rights," So they are not saying it self-evidently does. They are making that assumption; and clearly this particular treaty provision, enshrining a fundamental protection against extradition for political offences, recognised throughout the world for about a century, is a fundamental rights one. "Their Lordships agree with the Court of Appeal in *Lewis* that 'the protection of the law'" That is in the constitution: "covers the same ground as an entitlement to 'due process'. Such protection is recognised in Jamaica by section 13 of the constitution and is to be found in the common law."

Again, so there is a domestic law basis for it, be it in Magna Carta or in the common law there:

> "Their Lordships do not consider that it is right to distinguish between a constitution which does not have a reference to 'due process of law' but does have a reference to 'the protection of the law'. They therefore consider that what is said in *Thomas v Baptiste* to which they have referred is to be applied mutatis mutandis to the constitution like the one in Jamaica which provides for the protection of the law. In their Lordships' view, when Jamaica acceded to the American convention and to the international covenant and allowed individual petitions, the petitioner became entitled under the protection of the law provision ... to complete the human rights petition procedure and to obtain the reports of the human rights bodies ---"

Et cetera. And then it cites various other cases. At E:

> "Accordingly their Lordships are of the view that the time limits imposed by the Governor General In his instructions ... violated the rules of natural justice and were unlawful."

Can I just show you, madam, and again all the old favourites relied on here by my learned friend are cited. We had days and days of *Rayner (Mincing Lane).* Yes, there they are; OK. At 54D, *Rayner (Mincing Lane). Brind.* All the cases about: you cannot rely on an unincorporated treaty. Again, we respectfully submit, as in *Mullen*, as in *Thomas v Baptiste*, the court found a way not to be defeated in giving effect to a fundamental protection incorporated in a treaty; even if that treaty was not incorporated in domestic law.

And so madam, all I have tried to do is to give you some examples of how this fundamental principle, which we do say is enshrined in Article 5, can be given effect. We submit that, therefore, if one is asking oneself the question: "Would Julian Assange's

extradition violate the protections of Article 5 if, though the treaty prohibits extradition for a political offence, he is extradited for a political offence?" The answer is:

> "It would violate Article 5, because it would result in arbitrary detention in a procedure that violates the due process clause of Magna Carta and that, therefore, is inconsistent with the requirement recognised in *Kashamu* and *Fuller* that any detention be in accordance with law."

Madam ---

JUDGE BARAITSER: When there is a clear statement in domestic law, a statement by Parliament that the political offence should not be a bar, should not be something that is considered as capable of barring an extradition, a clear determination by Parliament, does that not trump the due process, the Magna Carta references that you are making?

MR FITZGERALD: Well, madam, if there were clear statements, supposing Parliament said expressly: "No-one shall rely on a political offence exception"; express prohibition. Then I accept that that would be primary legislation.

But madam, can I just deal with this? We have dealt with it in the reply at 3.2, at the very least. So if I could back up and start at 3.1. We say that there is nothing in the 2003 Act to prohibit reliance upon the express provisions of this treaty, protecting against extradition for political offences. And it is significant that this treaty was ratified after the 2003 Act came into force.

JUDGE BARAITSER: Sorry, are you reading from your reply?

MR FITZGERALD: Yes, madam, my reply at page 4, paragraph 3, part 3. Do you have 3, "The 2003 Extradition Act has not removed the duty"?

JUDGE BARAITSER: I think tab 7, although it deals with the reply ---

MR FITZGERALD: Tab 10. Tab 10.

JUDGE BARAITSER: Thank you.

MR FITZGERALD: I am so sorry, madam. In that case, can I ---

JUDGE BARAITSER: Yes.

MR FITZGERALD: Madam, obviously we have set it out there. So tab 10.

JUDGE BARAITSER: Yes.

MR FITZGERALD: We say that there is nothing in the 2003 Act to prohibit reliance upon the express provisions of this treaty, protecting against extradition for political offences. And it is significant that this treaty was ratified after the 2003 Act came into force. At the very

least:

> "(i) There is nothing in the 2003 Act to exclude reliance on the abuse of process protection invoked here, where extradition would be in direct conflict with the express provisions of the treaty that forms the whole bedrock of the extradition request.
> (ii) Section 81 need not be interpreted to remove the protection from extradition for a political offence, in a case where that express protection is contained in the treaty. It may simply express provision for the minimum statutory safeguards set out in section 81."

And then we make the point: in case after case, the courts have stressed the importance of respecting treaty obligations as a cardinal principle that guides the whole extradition process and the way the courts should approach it. And that is where I would invite you, if you would, madam, just to write in, "See *Cheng*, tab 6, page 943E to F". And then we have set out after that, at 3.4, the citation from Laws LJ in *Bermingham* about: "It must be properly constituted, according to the domestic law of the sending state and the relevant bilateral treaty.

Now, madam, what I do accept is that the earlier cases which we cited, which we have cited in the footnote, where the House of Lords had said in *Sotiriadis*, that to be lawful, extradition must be both in accordance with the treaty and in accordance with primary legislation, were the creatures of the particular scheme under the 1870 Act; and we accept that. What I do submit, nonetheless, is that there is not what you, madam, have posed to me; that is to say, an express prohibition.

What my learned friend says is: well, it was there in the 1870 Act. It was there in the 1989 Act. It has been removed in the 2003 Act. You have got to attribute some significance to that. And the answer is: yes, there is plenty of significance to that. If your treaty does not give you that right, you have not got that right, because it is not in primary legislation and it is not in the treaty. It has just gone.

But if your treaty does give you that right, there is nothing in the 2003 Act, in the primary legislation of the 2003 Act, to say that you cannot rely on it. It does not say: no-one shall rely on a political offence exception from now on. It is simply silent. And in the presence of that silence, we say that the protections of the treaty can operate; particularly where it is a fundamental protection. This is not just something about 60 days to get the materials in; *Postlethwaite*, my learned friend's - this is a fundamental protection.

Madam, so can I just put it in this way.

We say: (1) the abuse of process jurisdiction is not ousted by anything express in the 2003 Act; and we can rely on that, where there is a breach of the treaty. We say: (2), Article 5 of the European Convention is not ousted; indeed, it is actually there, because section 87 says that you cannot be extradited if it is incompatible with your convention rights. And we say it would be arbitrary to extradite in breach of the treaty, and it would be arbitrary detention to hold you in prison, as it were, pending such an extradition. And the third thing we say, madam, is that it may well be that there is a doctrine, a jus cogens norm, protecting from extradition for a political offence in a non-violent situation. The exceptions, which we accept are now present, may only apply to situations where there is a violent offence, such as terrorism.

Madam, if I can put it frankly, the more we have researched this point, the more one sees that this is a universal norm; that if it is not a terrorist case, not a violent offence, then in our respectful submission, the principle that you shouldn't be extradited for a political offence is of virtually universal application. It dates back for 100 years. It is in every US extradition treaty. It is in the UN Standard Model Treaty, a prohibition on extradition for political offences. It is in the European Convention on Extradition, a prohibition on extradition for political offences. It is in the Interpol Convention. We say that it is of general, virtually universal application.

The US, of course, writes it into every treaty because they do not want their citizens being extradited for political matters to any other country. That is why they write it in. But then when someone invokes it the other way, they say, through my learned friend, "No part of law, no part of the protection, you cannot rely on it". That, we say, is inconsistent and it defeats the respect for the international law. Madam, I am sorry that I had not made it clear that it was this document ---

JUDGE BARAITSER: No, you have been very clear.

MR FITZGERALD: --- of reply that we have - but you will see that we have also dealt with the case of *Norris* here. My learned friend relies on the case of *Norris* and we say that that is distinguishable. Can I just take you, madam, to at 1.4, we say the ---

JUDGE BARAITSER: 4.1?

MR FITZGERALD: 1.4 of the reply.

JUDGE BARAITSER: 4.1?

MR FITZGERALD: No, if I can go back to 1.4 of the reply.

JUDGE BARAITSER: OK. I only say that because 4.1 is headed decision in *Norris*, but I am very happy to go to 1.4.

MR FITZGERALD: Oh, yes, sorry. Well, this is a short summary but I will go to *Norris* then.

JUDGE BARAITSER: Yes.

MR FITZGERALD: But just you see, "1. If it is a recent treaty, extradition shall not be granted. 2. The protection is still one of extensive application. It is a prominent and important feature in the US, including all US treaties with western democracies". I will take you to the various bits, but it is quite helpful that there is the book, *Terrorism, Criminal Law and Politics*, in which there is a commentary on this case. Then, "3. The specific protections set out in part 2 of the 2003 Act and section 81 in particular cannot reasonably be read to exclude any additional protection where such additional protection is contained in the particular treaty and, at the very least, this additional protection can be invoked by reliance on the abuse jurisdiction". And, then, "It becomes an abuse to disregard such a treaty protection because a state which seeks extradition in reliance on its bilateral treaty should be expected by the court to honour the fundamental protections guaranteed in the treaty by which it has bound itself".

Then, we say that the decision in *Norris* is distinguishable. We have set it out briefly there but, as you observed, madam, we have dealt with it in more detail at part 4. So perhaps I better take you to part 4. If we go to the *Norris* case, which my learned friend relies on, it is at tab 18 in bundle 2 of the "Political Offences", yes. Madam, we say the first point about *Norris* is it was a completely different situation. The issue in *Norris* was the much vexed issue about the inequality of the provisions in the Treaty that only a case for arrest had to be made out and that the prima facie protection, the protection against extradition where there was no prima facie case, had been removed by the Secretary of State by designating the US a country that did not need to provide a prima facie case.

Madam, that obviously is a very controversial issue and we certainly would say that if they had to provide a prima facie case they would not satisfy that test here. But that is not our point. It is that in the *Norris* issue - and *Norris* is a separate challenge - the context was completely different. It concerned a challenge to the designation by the Secretary of State under section 84(7) of the US as a part 2 requesting state that did not need to provide a prima facie case even though such a requirement was retained in the 1972 Treaty. In that case, there was express provision in the 2003 Act for the Secretary of State to remove the requirement of a prima facie case. That is the contrast. There was an express provision saying you can remove it.

By contrast here, there is no express provision in the 2003 Act to dispense with the

requirement not to extradite for a political offence where the Treaty continues to require it and where it would be an abuse of process to disregard this fundamental human rights' protection in the case of an extradition request founded on a Treaty that retains that protection.

Madam, if I can just show you in the issue. One sees it is set out in the case from paragraph 23 onwards of *Norris*, the 1870 Extradition Act and the old situation where both the Treaty protection and the protection in domestic law operated in tandem. We can see *Nilsson*, that the Bow Streets Magistrates' jurisdiction, "His jurisdiction cannot be extended" - that is at paragraph 24 - "beyond that maximum, but it may be limited in the case of fugitive criminals from a foreign state by the terms of the extradition treaty with that state". Under the old law you got the benefit of, whichever was more generous, the statutory law in England or the treaty and if the treaty gave you an additional protection you were entitled to that extra protection, which is of course our case here.

Then, the 2003 Act comes in:

> "This Act which came into force on 1 January 2004 introduced a reformed, radically changed scheme and provides the legislative structure which governs the process of extradition from the United Kingdom to the United States. The earlier legislation, and in particular the 1870 Act, is no longer in force. The most obvious feature of the 2003 Act is that it created a new extradition regime."

It then deals with the particular provision for the Secretary of State to designate that some part 2 country need not provide a prima facie case.

We see at paragraph 29 the Designation Order 2003 which has been so controversial here,

> "The United States was designated for the purposes of part 2 and specifically designated for the purposes of section 84(7). Since 1 January the United States has relied on these provisions. Therefore, prima facie evidence of the kind envisaged in Article 9 of the 1972 Treaty has not been produced."

So although there was an interregnum when the 1972 Treaty still applied which required a prima facie case, the United States have been designated as a country that did not need to provide a prima facie case under the 2003 Act and this case decides that that designation was lawful.

You can see at paragraph 33 after lots of talk about why the US has not ratified the Treaty:

> "The continuing absence of ratification by the United States of the 2003 Treaty was plainly disturbing, among others, to those who had supported the amendment moved by Lord Goddard. Their concerns are reflected elsewhere in serious public debate. No evidence purporting to the suggested timetable for completion of the process culminating in ratification or answering the concerns expressed about the perceived difficulties of obtaining such ratification has been placed before us on behalf of the Secretary of State or, indeed, the Government of the United States."

Then, the vexed issue of reciprocity is set out there with Lord Baker saying:

> "You raised the issue of reciprocity. It is true that the new Treaty removes the requirement upon the United States to provide a prima facie evidential case when making an extradition request. However, this requirement was also removed for Australia, Canada and New Zealand and it has not been applied to most European states. It is true that the US authorities have yet to ratify the Treaty."

And then there was talk about when they will ratify, and we know they ratified in 2007, madam. "There is, at present, a lack of symmetry ---" this is at paragraph 34:

> "--- between the United States and the United Kingdom which will continue until either the United States has ratified the 2003 Treaty or the Secretary of State seeks to obtain and receive parliamentary approval for the removal of the United States from its current designation. In the meantime, although Article 9 continues to govern any extradition proceedings at the request of the UK, it no longer applies to extradition proceedings here at the request of the United States. In short, the procedure which applies on one side of the Atlantic does not apply on the other."

Then, one sees at paragraph 37:

> "Mr Jones established the Designation Order altered the arrangements for extradition between the UK and the US and he has demonstrated that, for the time being, the extradition arrangements between the two countries are not symmetrical. These are the essential features of the new arrangements for the

> extradition of United Kingdom citizens to the United States which represent the basis for criticism of the continued designation of the United States."

And, then, Rose LJ, "When I first read the papers, it appeared the claimant's case proposed a direct interference by this court in the legislative process. Then it was accepted that you could challenge a designation."

If I can just take you to paragraphs 29 to 34 deals with the Designation Order. At paragraph 43 the starting point for consideration is the 2003 Act:

> "Nothing in the 2003 Act itself suggests that designation is dependent on a bilateral treaty between the UK and requesting country. The extradition process created by Parliament for United Kingdom citizens does not require reciprocity or mutuality. That is consistent with the approach of Lord Diplock in *Nilsson* ---"

--- and then it is cited. "In my judgment, the argument based on the current absence of reciprocity does not by itself advance the claimant's claim."

And, really, paragraph 45 is the ratio. That forms the context in which they considered the order which deprives the claimant of the protective condition found in Article 9 of the 1972 Treaty:

> "In my view, the Treaty obligations to which Lord Browne-Wilkinson referred in ex parte *Venables* are conceptually different from rights created by a treaty which is subject to and derives its authority from unequivocal statutory provisions. In a wide-ranging reform of the law relating to extradition, Parliament chose to give the Secretary of State power to make orders which, subject to affirmative resolutions in both houses, permitted the Government of the United Kingdom to afford other states, including the United States, greater assistance in the extradition process than that provided in the 1972 Treaty."

So it is a subsequent piece of legislation, as it were, overriding the prior Treaty and our situation is the complete opposite because we are saying the Act, which is silent on political offences. It does not say you cannot rely on them. It just says nothing. Then you have a Treaty which postdates the Act, quite differently from in the *Norris* case which restores the age-old protection, the fundamental protection against extradition for a political offence, and, "Unless an affirmative resolution was then passed, the protective conditions of

the 1972 Treaty, in particular Article 9, cannot obstruct or hinder or postpone the application of the 2003 Act." We are not doing any of those things. The 2003 Act is silent on this issue.

JUDGE BARAITSER: It is silent but, Mr Fitzgerald, I am sure you will accept it was not silent immediately before ---

MR FITZGERALD: No, and madam ---

JUDGE BARAITSER: --- and then it removed the provision.

MR FITZGERALD: Madam, I accept that that is an aid to statutory construction, the history, but it is not determinative.

JUDGE BARAITSER: No.

MR FITZGERALD: The fundamental principle is you ---

JUDGE BARAITSER: It cannot be ignored.

MR FITZGERALD: Madam, I am not pretending that this is an easy issue for one moment. I do not think my learned friend would pretend it is an easy issue either, but it is a fundamental issue and we respectfully submit that there is a way, consistent with Article 5, that is required and is not excluded by the statute.

So, madam, if I can then just summarise at part 4, *Norris*. Firstly, the context in *Norris* was completely different and I have set that out. In that case, there is express provision in the 2003 Act to remove the requirement for a prima facie case. Here, by contrast there is no express provision in the 2003 Act to dispense with the requirement not to extradite for a political offence where the treaty continues to require it and where it would be an abuse of process to disregard that fundamental human rights protection. Secondly, the decision in *Norris* did not relate to a protection contained in a treaty that post-dated the 2003 Act but to the 1972, the old Treaty, which it was said, "The old Treaty has passed away, we have the 2003 Act".

Now, on the contrary, we have a silent 2003 Act and then a new Treaty which restores the right not to be extradited for a political offence. Thirdly, there was no reliance in the *Norris* case on the abuse jurisdiction. What they were trying to do was judicially review a designation order. That had nothing to do with abuse of process. That is fundamental since Mr Assange primarily invokes the abuse jurisdiction. The second point I make, which we have not really spelt out until the very last paragraph of this, is there was no reliance there on Article 5. There is no doubt that if one is searching for a domestic law provision that can ground our submission, the domestic law provision that grounds our submission is section 87. It would be inconsistent with Article 5 and inconsistent with the European Convention to extradite in breach of a fundamental protection in a treaty.

Moreover, madam, I would point out before perhaps breaking, with your consent, my learned friend, fairly I say in his response in his submission, and this is at submissions bundles tab 3 under the heading "Political Offences", says this, "There is an accepted divide between pure political offences and relative political offences. Pure political offences are directed against the government or political organisation of the state (treason, sedition, espionage)." So he himself accepts that espionage, which is what we are being charged with, is a pure political offence. He cannot deny that it is prohibited to extradite for a political offence in the Treaty itself.

Therefore, we submit it would be pretty strange if the court was powerless to do anything about it and it would just have to sit there and say:

> "Well, a modern treaty has given you this right, has conferred this particular protection on you, after the 2003 Act; you are charged with 17 counts of espionage and another count which is espionage too; the treaty says you cannot be extradited for a political offence; espionage is a political offence but, nonetheless, the court cannot do anything."

It would be strange. It would not be in accordance, we respectfully submit, with the international rule of law or public international law which Rose LJ referred to in the *Mullen* case. Madam, I am sorry if I have not dealt with everything but that ---

JUDGE BARAITSER: No, you have very ably put your argument, Mr Fitzgerald.

MR FITZGERALD: I have tried to grapple with the first point. I would ask you, if I could briefly after the break just explain why we say espionage is a pure political offence.

JUDGE BARAITSER: Let me just check, is that agreed, Mr Lewis, do you dispute that it is a political offence? I do not need to know why but just whether you do.

MR LEWIS: It is not quite agreed because, first of all, we do not say that on a proper construction of the Treaty, if you were allowed to construe it, we do not accept that it deals with pure political offences. It is relative political offences.

JUDGE BARAITSER: Is the short answer in relation to this Treaty, no, you do not accept it?

MR LEWIS: That is right.

JUDGE BARAITSER: Yes. In that case, you will need to ---

MR FITZGERALD: Madam, then I will need to show you that what all the authorities say is if it is a pure political offence you need not get into all the relative stuff because that is the end of it.

JUDGE BARAITSER: All right. Well, there is clearly a dispute about it and so I will have

to hear about it.
MR FITZGERALD: Yes, of course, thank you.
JUDGE BARAITSER: 15 minutes then, quarter to 12?
MR FITZGERALD: Thank you, madam.
JUDGE BARAITSER: Thank you.
(Short adjournment)
(The court reconvened at 11.50)
JUDGE BARAITSER: Thank you.
MR FITZGERALD: Well, Madam, shall I ---
COURT OFFICIAL: No, no, no. We keep doing this. Mr Assange is ---
MR FITZGERALD: I am so sorry. Forgive me. Forgive me.
JUDGE BARAITSER: Thank you. Please sit down. Yes, Mr Fitzgerald.
MR FITZGERALD: Yes, Madam. In relation to the question of is – are these allegations, being allegations of espionage, allegations of pure political effects – I was just taking you through the skeleton argument at tab 2, and I reached 1.3, and at 1.4, we deal with count 18 and the fact that it is, in essence, an espionage count 2. Can I just take you to the indictment itself, at tab 1 of the prosecution bundle, and to page 35 and 36 of the indictment? Madam, just looking at that, you see set out the allegation of accessing a computer and then, over the page, purpose and object of the conspiracy: the primary purpose of the conspiracy was to facilitate Manning's acquisition and transmission of classified information related to the national defence of the United States so that WikiLeaks could publicly disseminate the information in its website.

So obviously, all of this is assuming the face of the indictment is correct, which we do not accept, of course, for a moment. But on the face of the indictment, that is an allegation about the disclosure of classified information relating to national defence of the United States, and this offence, contrary to section 1030A(1) of the Code, is one which is recognised in the prosecutor's guide to effectively be an espionage offence, and I think I was just trying to show you that that – when we began to deal with the more fundamental point that you raised, but can I just show you – it is in the blue bundle behind the index. Do you see Prosecuting Computer Crimes: the DOJ Guidelines?
JUDGE BARAITSER: Yes.
MR FITZGERALD: And, Madam, you see 18 USC 1030A(1), and it is set out – the text of the offence and the crucial bit is, "We have reason to believe such information could be used to the injury of the United States and being communicated."

And one sees, at paragraph 2 explaining this offence:

> "A violation of this section requires that the information obtained is national security information, meaning information that has been determined by the United States Government, pursuant to an executive order, to require protection against unauthorised disclosure."

And then it gives various examples of national security information. And you can see that it treated as, effectively, an espionage offence if one goes to the – back at page 155 of this excerpt, where it is dealing with this particular offence, and ---

JUDGE BARAITSTER: Sorry. I have lost you now. Dealing – what page are you ---

MR FITZGERALD: If you go to the back of – there is an appendix right at the very back of this note.

JUDGE BARAITSTER: Of which note? The note we are looking at now – Prosecuting Computer Crimes?

MR FITZGERALD: Prosecuting Computer Crimes.

JUDGE BARAITSTER: Yes.

MR FITZGERALD: If you go to the last two pages of that document.

JUDGE BARAITSTER: Yes.

MR FITZGERALD: Sorry, Madam.

JUDGE BARAITSTER: That is all right.

MR FITZGERALD: You see page 155 at the top – 'Unlawful Conduct: Espionage.' And do you see 18 USC 1030A(1) Accessing a Computer. So it is, essentially, a simulator to an offence of espionage, and interestingly, when my learned friend was doing the exercise of transposing to the equivalent offence under English Law, he too you to section 1 of the Official Secrets Act, with the heading, 'Spying'. So we know where we are. This is comprehensively a series of 18 allegations of espionage and we have set out 1.5 of the gravamen, and defining legal characteristics of each of the 18 charges is an alleged intention to obtain or disclose US State Secrets, in a manner that was damaging to the security of the US State and that is described as espionage.

Now, Madam, I am going to show you authority after authority – textbooks that recognise espionage to be a pure political offence. But first, the concept of a pure political offence is dealt with – we have analysed that at 2.2 and 2.3 and I know my learned friend has accepted that it is a pure political offence, but just ---

MR LEWIS: Well, just for the avoidance of doubt ---

MR FITZGERALD: Paragraph 6.

MR LEWIS: Paragraph 6. But perhaps it should have the word "some" because when we go and look at Simon Brown LJ in *FinInvest*, for example, he will give the example of sedition if a neighbour kills the King – for some particular reason, even though that might be charged as treason, that would not be a political offence.

JUDGE BARAITSTER: Well, Mr Fitzgerald has not finished yet. I think you were just trying to clarify the points of dispute.

MR LEWIS: Yes. He was putting word – he was saying I had conceded. I want to make it clear that I have not conceded in the way he is trying to put forward.

JUDGE BARAITSTER: All right.

MR FITZGERALD: Well, if words mean anything ---

JUDGE BARAITSTER: He hears you.

MR FITZGERALD: --- then these words must mean that it is – I mean, the concession – sorry ---

MR LEWIS: It is not a concession.

MR FITZGERALD: All right. The statement that espionage is a pure political offence, we thought we could take on its face, but there we go. It is paragraph 6. So in that case, I better go the long route. If we can go to *Schtraks*, which is at tab 4 of the authorities – and I am on the points that are summarised at 2.2 to 23. *Schtraks* tab 4, page 581, one sees that there, one has ---

JUDGE BARAITSTER: I am just going to put away the political offences for a moment and – sorry. The abuse of process ---

COURT OFFICIAL: Problems with your (inaudible)

MR FITZGERALD: OK. I am so sorry. I will make sure I speak into the mic.

JUDGE BARAITSTER: Tab 4.

MR FITZGERDALD: Page 581 – one sees that Lord Reid says:

> "The interpretation of this subsection is not free from difficulty." And then he says: "Not only is the word 'political' capable of more than one interpretation, but the two parts of the subsection do not fit well together."

And then he says: "For example, there is no mention in schedule 1." And then: "Secondly, 3(2) requires if extradition is granted the accused is not to be tried in a foreign country for

offences other than extradition crimes." And then he says that – he describes political offences as crimes – offences obvious of a political character, treason, sedition or any other offence of that kind.

(Counsel conferred)

MR FITZGERALD: Madam, I will go on and we will come back to Lord Reagan in due course. Viscount Dilhorne at page 588 spells it out very clearly what the difference between the two are. 588, "I do not think that it did" – that is to say extradition -

> "in my mind, sub-section 1 envisages two alternative ways of identifying a political offence. (1), a charge that on the face of it smacks of the political say caricaturing the Head of State or distributing subversive pamphlets, and the other a charge which has sensibly criminally in the ordinary sense is nevertheless shown to be political in the context in which the actual offences occurred."

So, he is distinguishing between self-evidently, and we would say purely political offences, which are directed against the state, and we would say espionage is a classic of that. And then as contrasted with an ordinary crime for example, murder, which is committed in the course of a political uprising or commotion, or for the purposes – or for political purposes which is what the case of *Castioni* deals with. But Viscount Dilhorne draws that distinction – sorry, Viscount Radcliffe draws that distinction and that distinction is present throughout the case law.

And then, yes, one sees at page – if you go back to 581, I am sorry I could not find the place, but one sees in – half-way down the first full paragraph, "in the first place offences obviously of a political character are not within the scope of extradition at all. For example, there is no mention of treason, sedition or any other offences of that kind."

So, you cannot be extradited for those on the basis that they are purely political offences and that really goes back right to the protection afforded to the rebels of the Risorgimento and of the Hungarian uprising in 1848. That is the background of the protection.

And so, then if we go to the case of *Cheng* in tab 6, there is also further illumination on this concept of a pure political offence, and we say espionage is one – an offence directed against the State, and then a common crime which is nonetheless committed in a political context. Lord Hodson at 9 (4) (1) talks about – he talks, and we have set it out in the 2.2, he talks about a – crimes such as – I am so sorry – treason or sedition. Yes, 9 (4) (1) (e), 9 (4),

(1) (e). So, one sees that there are – they normal crimes, not crimes such as treason or sedition which might well be of a political character. So, the contrast is between ordinary crimes and then treason or sedition.

And then if one turns to Lord Diplock's judgment at page 943 (e), he says, "in public international law there is no obligation upon any State to surrender to another State persons who have taken refuge." And that is the bit about you have to have a bilateral treaty. Then at (f):

> "The practice of making extradition treaties was pioneered by Belgium in 1833, three years after it had achieved its independence. A fact which may have influenced its exclusion of extradition for offences of a political character. The government of the United Kingdom was slow to follow this example, but nevertheless in 1842 and 1843 extradition treaties dealing with a limited number of serious crimes were made with the United States of America and France. Crimes which were on the face of them political, such as treason and sedition were not included."

So, he is saying that they are on the face of them political and they were excluded for that reason. And at 944 (f) he says:

> "The list of extradition crimes contained in schedule 1 in respect of which a loan or surrender may be demanded is to be construed according to the law existing in England. It comprises ordinary serious crimes in law, but like the earlier treaties include none which are on the face of it is of a political character as respects the requisitioning State such as treason or sedition."

So, the conceptual distinction between ordinary crimes and crimes of an essentially political nature is there in the *Cheng* case and Lord Symon at 949 (f) to (g), one sees extradition crime is defined at (f),

> "Schedule 1 sets out the list of extradition crimes. They include attempt to murder and other serious crimes. They do not include crimes such as treason, sedition, or lèse-majesté. This indicates that offence of a political character does not mean merely the type of political offence which is necessarily committed against the State seeking extradition since such offences are in any event unscheduled crimes. Here is an important internal linguistic guide to interpretation."

And then, if we go on to "*T*" at tab 12 to the case of *T*. Lord Mustill deals with the question of as it were the purely political, it is 761 (c) to (d). Can I just say, he talks about common crimes at 761 (c) and then he says:

> "the result was a broad division at (d) established by a series of bilateral treaties and a handful of decisions into (a), common crimes, (b), purely political crimes such as treason, and (c), relative political crimes which are common crimes with a political overlay. And this approached endured for a century with little strain."

Madam, that is as it were the concept – so the question then is, is espionage, what is described as a pure political offence, as we had understood it to be conceded, and the answer we respectfully submit is in the academic authorities. We have started with – at 2.4 with *Bassuni* and we have referred to the fact that he speaks in terms of purely political offences as offences against the State itself in his analysis at pages 677 to 679, and he identifies treason, sedition, and espionage. Now, his excerpt is I believe at 29 or 30 of the ---

(Counsel conferred)

MR FITZGERALD: --- so, 30, so if we go to volume 3 of the authorities at tab 30, there is the – and he is the – well, was the great authority in the US on extradition, the as it were the leading textbook and the leading authority on this issue. I hesitate to say that Knowles and Montgomery and Summers, but perhaps I should. He is of equivalent status but *Bassuni*, tab 30, and one sees that one has that in – yes, we have got a long extract from his book, but I can just take you to that at tab 30.

If you can go to page 676, you will see the political offence exception is introduced:

> "The political offence is in a large part designed to ensure the integrity of the legal process of the requested State will not be used by the requesting State to achieve certain political ends by prosecuting an individual for his/her political beliefs or politically motivated conduct."

And then it deals with the various encapsulations of that. And then over the page, 677, at 2.1.4, heading "The Purely Political Offence – the purely political offence is" ---

MR LEWIS: Sorry, what page are you?

MR FITZGERALD: Page 677.

> "The purely political offence is usually conduct directed against the Sovereign or its political sub-divisions and constitutes opposition to a political, religious or racial ideology, or to its supporting structures without having any of the elements of a common crime. The conduct is labelled a crime because the interest sought to be protected is the Sovereign or public order as distinguishing from any private wrong.
>
> "The word Sovereign include all the tangible and intangible factors, refers to the violation of laws designed to protect the public interest by making an attack upon it, a public wrong, as opposed to a private wrong as in the case of common crime. Such law exists solely because the very political entity, the State, has criminalised such conduct for its self-preservation."

So, we say again, that is exactly how they describe it contrary to the interests of the United States espionage.

And then this at the top of page 678:

> "Treason, sedition and espionage are offences directed against the State itself and are therefore by definition a threat to the existence, welfare and security of the entity. As such, they are purely political offences. A purely political offence when linked to a common crime loses its political character. This is illustrated in the foreign ---"

– and then it deals with another case, a case of murder. But there is no doubt we say that in the case of a – if you go to page 679, he goes on with espionage. "Espionage" – that is the third full paragraph down madam:

> "Espionage on the other hand has a more easily recognised common denominator which is the act of obtaining or attempting to obtain information deemed secret or vital for the defence of a given State for the benefit of another State. Unlike treason, there is no element of allegiance required on the part of the offence, hence no duty that must be breached. As with treason and sedition, it is predicated on the notion that what offends the public interest constitutes a public wrong."

And then,

> "Treason, sedition, espionage, peaceful dissent and freedom of expression of religion, if they do not incite to violence, are considered purely political offences because they lack the

> essential elements of a common crime in that the perpetrator of the alleged offence acts on the basis of his/her beliefs alone or as an instrument or agent of a political or religious thought or movement but does not commit a common crime that results in a private part."

And we say that absolutely expresses what is alleged in the indictment itself. A crime of espionage directed against the national interests of the United States, and therefore a classic case of a pure political crime. Now, then we have Jansson, the – who has written – Julia Jansson, who has a written a whole treatise, a whole book on this very issue, and madam, you will see it is at tab 42 in the bundle, the same bundle 3 I hope.

JUDGE BARAITSER: No. That ends at 41. So, it must be ---

MR FITZGERALD: Do you not have it?

JUDGE BARAITSER: Well, my bundle ends at tab 41.

MR FITZGERALD: Oh. Oh, it is in 41 in yours. Oh, I am sorry. OK. Well, if you have Jansson then ---

JUDGE BARAITSER: I do not because my tabs only go up to 41.

MR FITZGERALD: I had understood that it had been ---

(Counsel conferred)

MR FITZGERALD: We will get one down.

JUDGE BARAITSER: No, I have not got it. Thank you.

MR FITZGERALD: Madam, can I just enquire? So, we will try to sort that out for you. Do you have tab 42, terrorism, criminal law, and politics? The Julia Jansson book?

JUDGE BARAITSER: Let us just have a look. Tab 42 on this bundle is the *Belbin* case.

MR FITZGERALD: That seems to be the wrong one.

(Counsel conferred)

MR FITZGERALD: It ---

JUDGE BARAITSER: 41, this is case law.

MR FITZGERALD: All right. Well, shall I just take this course madam? Shall I just read out what it says and then provide you with a copy ---

JUDGE BARAITSER: All right.

MR FITZGERALD: --- in due course. She is dealing with the question of pure political crimes and she says that,

> "The importance of a political offence exception is still highly visible in current days. More recently, very high profile cases

> that have at least partially concerned the application of a political offence exception have been those of known whistle blowers, Assange, Manning and Snowden. It is the political offence exception to extradition that has kept Julian Assange, the founder and director of WikiLeaks wanted by the US for leaking diplomatic and military communications, hiding in the Ecuadorian Embassy.
>
> "The US/Ecuador extradition treaty dates from 1872 and contains the classical form of the political offence exception. The stipulations of this treaty shall not be applicable to crimes or offences of a political character."

And then there is a long citation from Otto Kirchheimer about the South American tradition of non-extradition for political offences. And then there is a quotation from Fox News in which it was written, "WikiLeaks' founder Julian Assange" – I am quoting now:

> "is not some well-meaning anti-war protestor leaking documents. He is waging cyber war on the United States and the global world order. Mr Assange and his fellow hackers" – and we say that that is a totally inappropriate description of the activity, but that is the Republican members' description – "are terrorists and should be prosecuted as such."

And the comment of this leading authority, "it is telling that a criminal whose deeds are clearly and purely political, no matter how they are judged, is called a terrorist by one of the main news channels in the United States."

It goes on to analyse the case of Snowden and it says, after that:

> "These recent cases, including the case of Chelsea Manning, who is accused of leaking hundreds of thousands of US classified documents, demonstrate that political criminals whose actions can be judged in different ways still exist even within western states."

So there is no doubt that she is describing the actual activities alleged against Julian Assange as purely political, no matter how they are judged. Now my learned friend has put in, or we put in at his request an article by somebody called Manuel Garcia-Mora, which I hope you find at tab 40

JUDGE BARAITSER: Tab 40 of?

MR FITZGERALD: Of bundle 3.

JUDGE BARAITSER: Bundle 3.

MR FITZGERALD: Has that ---

JUDGE BARAITSER: I hope, so, yes.

MR FITZGERALD: Thank you.

JUDGE BARAITSER: I am sure.

MR FITZGERALD: OK, Julia Jansson we will provide.

JUDGE BARAITSER: Yes, I have that.

MR FITZGERALD: So if you see, so this is put in at my learned friend's request. If we go to pages 1234 to 1235, one sees there:

> "From these broad outlines of treaty and case law, it is possible to project a more useful enquiry into the acts which are usually classified as purely political offences. Because of the variety of means and methods by which an offence against a state can be committed, courts and publicists have carefully limited the concept of purely political offences to treason, sedition and espionage."

Now that may be why my learned friend made the conception because he relies on this authority.

> "Thus, in *Chandler v United States*, a case involving an American citizen accused of treason for broadcasting propaganda hostile to the United States from Germany during World War II, the First Circuit held inter alia that political offenders include persons charged with treason and that, in respect of this offence, it has long been the general practice of states to give asylum. In like manner, a British court said recently in ex parte *Khochinsky* that treason is an offence of a political character."

And then it deals with, then, "British law does not make a distinction between pure and relative political offences" and then it cites a whole series of cases.

And, then, at page 1237, it says at the first full paragraph:

> "It is reasonably clear that treason, sedition and espionage are regarded as purely political offences for at least five compelling reasons. First, they lack the essential elements of an ordinary crime, as for instance malice in the technical criminal law sense; secondly, the underlying object of the offence is to cause a change in a given political situation by illegal means, thereby injuring the public rights of an existing government; thirdly,

> since the government is the target of the offence, there is no violation of the private rights of an individual; fourthly, the individual who perpetrated the offence is largely motivated by reasons of public concern and, as the Supreme Court of *Chiliabli* observed he is impelled by, 'altruistic or patriotic sentiments' and, finally, closely connected with the preceding observation, it may persuasively be argued that a person committing reason or any other purely political offence may well do so because of his political convictions and, certainly, extradition should not be granted where a person unsuccessfully attempts to change what he firmly believes to be an unjust political situation."

Well, it was not us who put this document in, but it says absolutely clearly that this is a pure political offence, espionage. That is the offence of which he is charged in the US and we say it comes clearly within that test. So every one of the leading textbooks that we have cited, *Bassuni*, Jansson, Garcia-Mora, say that it is a purely political offence. You have seen that the cases say that if it is a purely political offence you do not even go on to the relative thing. That is the end of it.

We have cited further *Khochinsky*, which is at tab 12. I will come back to that later, but that was the Polish mutiny case where it was remarked by the court that there were allegations of spying, weakening of the armed forces going over to the enemy and that that was regarded as an offence of a political character. That was during the Cold War, of course. I will show you that when I come on to relative political offences. Then, madam, I will not go through each of these cases, but in the case of *Singh* the High Court of Australia, this is in tab 48 in the new blue bundle, said that:

> "Offences such as treason, sedition and espionage are purely political offences. Crimes designated as purely political would involve such offences as high treason, capital treason, activities contrary to the external security of the state."

That is actually cited in the case of *Santhirarajah* but it is at tab 48 in the blue bundle, madam. Then *Dutton v O'Shane*, that is full Federal Court in Australia, and this is at tab 49, madam, "It is well accepted, though the terminology is not used in the Act itself, that there are two analytically distinct kinds of political offence; the one being political offence, the other relative political offence." And then it says, over the page, "Illustrative of pure political offences are offences such as treason, espionage, sabotage". So over and over again, the courts and the leading textbooks are saying, espionage is a purely political offence. And then at 2.8, we have the US court of appeals in *McMullen* saying that, "Pure political crimes

includes offences such as treason, sedition and espionage".

Madam, if we go to the case of *Arambasic*, that is at volume 2, tab 17. Just to show you that afresh, as it were, if you go to in the *Arambasic v Ashcroft* case, if you look at the bottom at page 4 of that report, so this is the US opinion denying petition for writ of habeas corpus, Chief Judge Peersal and in the United States District Court the Southern Division. You see at the bottom of page 4 in the right-hand column right at the last paragraph:

> "A purely political offence involves conduct directed against a 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 offences and, by contrast, a relative political offence involves a crime prompted by ideological methods. It involves a private wrong directed against personal property but committed in furtherance of a political purpose."

Interestingly, they are citing *Bassuni* as the authoritative textbook, the gold standard, as it were.

If we go to the case of *Santhirarajah*. I look forward to my learned friend pronouncing it, but that is at volume 2, tab 22, *Santhirarajah*. So there one has the paragraph, that is an analysis by the Federal Court of Australia in *Santhirarajah v Attorney General* of the issue of pure political offence. Madam, can I just take you through it in a little bit more detail. We have analysed it under the heading of "Relative Political Offences" lower down in this skeleton. If I can just give you the reference. Yes, it is analysed in more detail at 5.8.

JUDGE BARAITSER: Thank you.

MR FITZGERALD: If you want to see this in the context, it was an allegation of purchasing night vision goggles in the United States to provide to the Tamil tigers to support their cause for independence in Sri Lanka. There are allegations of common crimes but all, however, are exempt from extradition as relative political offences and we have set out at 5.8 the reasons why. Just because this is a compendious summary of the leading law on this matter in Australia, and indeed in the common law world, can I just take you to certain paragraphs.

Paragraph 103 sets out the legal advice, providing the legal analysis of the nature of political offence and one sees there, this is the Government legal advice:

> "It is well accepted there are two distinct types of political offence: the 'pure political offence', consisting of conduct

> violating laws designed to protect the political institutions of a state, for example treason, espionage and sedition, and the 'relative' political offence consisting of conduct violating the criminal law of the state which acquires a political character for the political purpose sought to be achieved by an offender in committing it."

Then, madam, paragraph 107, "In relation to the applicant's primary submission that offence 1 was a relative political offence and offences 2, 3 and 4 were pure political offences, the legal advice responded." And then it sets out the legal advice of the Government. One sees again, treason, sedition and espionage being recognised in that formal legal advice as pure political offences.

Then, importantly, if I can take you to paragraph 111. There, it sets out the submissions of the applicant and one can see the references to cases. At 111:

> "Treason, espionage sabotage, subversion and sedition are examples of pure political offences. They are directed solely against the public order. Their purpose has been described, variously, as to protect the political institutions of the state, the state itself or the sovereign or public order. Relative political offences, in contrast, are common crimes which acquire their political character from the political purpose sought to be achieved ---"

And then there is the citations from *Dutton v O'Shane* which is referred to.

Then at paragraph 123 one has the submissions of the Attorney General, again all of them really agreeing on this point about pure political offence. At 123:

> "The elements of pure political offence 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."

That is important, so we do not even get into that if it is pure.

Then, just finally, if I can take the court to 145, it cites from the case of *Singh* which we have referenced earlier up. Gleeson CJ:

> "Once it was accepted that the concept of a political crime was not limited to offences such as treason, sedition and espionage, and could extend to what would otherwise be 'common' crimes,

> including unlawful homicide, then it became necessary to find means of avoiding the consequence that any crime could be political if one of the motives for which it was committed was directly or indirectly political."

There is no bright line between crimes that are political and those that are non-political. Essentially, all the authorities are saying is if it is purely political that is it and espionage is purely political but then, in addition, you can bring yourself within the test of relative political offence if you have committed a common crime such as murder or theft but you have committed it in the context which renders it a relative political offence. But, at the present, I am simply on the point that if you set out an indictment alleging espionage, you are self-evidently setting out an indictment alleging a pure political offence and, therefore, definitely within Article 4(1).

So, in sum, when we have put it at 2.9:

> "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."

But, madam, we go on and we say, in any event, we say it is enough that it is called espionage and that is it, but if you look at the underlying conduct alleged it is self-evident that is what is being alleged is conduct which is directed against the state and in the language of paragraph 111 of *Santhirarajah*, the prohibition on this conduct is designed to protect the political institutions or to protect the political order of the USA, and so we have really set out then the nature of the allegations at 3.2. The allegation is of 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 defence and international relations.

The disclosure of these documents was damaging to the work of the security and intelligence services, damaged the armed services and endangered the interests of the United States. That is what is said in Kelly Dwyer's affidavit at paragraph 4, and then going on, under count 1, the objective of the conspiracy charged was to obtain, receive and disclose national defence information. Counts 2 to 8, proof for the purpose of obtaining of information connected with the US National Defence. I should take it 9 to 14 and then 15 to 17, but 9 to 14 is wilful obtaining and receiving, and then if we could put a double C – 15 to

17 is publication of information relating to national defence, and I made the point about count 18. It is not an allegation of common computer misuse. It is a legally necessary part of the allegation that it be to obtain information that it has been determined by the United States Government requires protection, and we have set out that section 1030A(1) of the USC requires that the conspiracy is directed at the national defence of the United States. And then one sees, at 3.4, the government's opening note itself says that Mr Assange caused damage to the strategic and national security interests of the United States.

So, Madam, just stepping back for one moment, the conduct alleged against Mr Assange is, by analysis as well as by label, espionage. On the authorities, it is a violation of laws designed to protect the political institutions or protecting the political order of the US, activity contrary to the external security to the US. So within the test laid down in *Dutton v Singh* and applying the test in *Bassuni* against the State itself, applying the test in *Schtraks*, it is on its face political. Applying the test in *Cheng*, it is necessarily committed against the State. Applying the test in *T*, it is directed at the sovereign and is apparatus of State, and it is significant that, in the *Shayler* case, prosecuted under the Official Secrets Act, for passing top secret documents to The Mail on Sunday, a request was rejected by the French Court of Appeal on 18 November 1998, on the basis that it was a political offence. That was under article 3(1) of the European Convention. You have the European Convention in the prosecution bundle of authorities. Madam ---

JUDGE BARAITSER: Do you want me to turn to it?

MR FITZGERALD: If you would, just momentarily. I would be very grateful. My learned friend provided – do you remember he provided with the Official Secrets Act, the Expedition Act and the European Convention.

JUDGE BARAITSER: Yes. Do you know what that bundle is called?

MR FITZGERALD: It is called Prosecution Core Bundle. Prosecution Bundle. I can ---

JUDGE BARAITSER: Is it the core bundle?

MR FITZGERALD: No. It is the – core bundle is a series of indictments and it – I think it is called a statutes bundle.

MR LEWIS: It is just a white bundle.

MR FITZGERALD: It is a white bundle, but they all are.

JUDGE BARAITSER: You think it is called a statutes bundle?

MR FITZGERALD: Anyway madam, can I do this? Can I just read it out and then provide it in due course?

JUDGE BARAITSER: In relation to the core bundle on behalf of the United States, that does not include the European Convention.

MR FITZGERALD: OK. It is called Statutes and it has got the Extradition Act in it and the Official Secrets Act.

JUDGE BARAITSER: All right. Well, the articles of the Convention are relatively well-known. So which article are you referring to?

MR FITZGERALD: Article 3. I will just read it out, if I may, Madam. Article 3, headed Political Offences. This is the European Convention on extradition. Article 3(1):

> "Extradition shall not be granted if the offence in which it is requested is regarded by a requested party as a political offence, or as an offence connected with a political offence."

So if it is regarded as a political offence, extradition – we will provide you with it.

JUDGE BARAITSER: I am sure I can find it, but it might take a few moments.

MR FITZGERALD: So that was what was relied on by the French Court of Appeal in refusing extradition to David Shayler who, of course, in his case, he was the civil servant under the obligation of confidentiality, not the recipient. But it was still held that this was a political offence of providing official secrets, and we say, therefore, we now have the UN treaty, which prohibits extradition – the UN Draft Treaty on extradition prohibits extradition for political offences. The European Convention on extradition prohibits extradition for political offences and, indeed, the INTERPOL Convention, which we have got, I think, at the beginning of the – yes, of our bundle, at tab 3 – A3 of our own bundle. And it is set out there. So of our ---

JUDGE BARAITSER: Your political offences authorities?

MR FITZGERALD: Yes. Yes.

JUDGE BARAITSER: Yes.

MR FITZGERALD: Article – the commentary – I can take you to the primary objectives of article 3 and it says there, at 2.2, page 6 of 48:

> "The historical background provided above manifests that Article 3 primary objectives may be defined as follows:
> (a) To ensure the independence and neutrality of INTERPOL as an international organization.
> (b) To reflect international extradition law.
> (c) To protect individuals from persecution."

JUDGE BARAITSER: Are you still on political offences, as in trying to establish that ---
MR FITZGERALD: Yes.
JUDGE BARAITSER: --- that this is one of those?
MR FITZGERALD: Yes.
JUDGE BARAITSER: Or have you returned back to the treaties point?
MR FITZGERALD: No. I am on the point that all of them say the same – that this is a general prohibition on extradition for political offences. It is on the front page. You will see the text. But, Madam, I am so sorry if I have strayed from – I think it was just because we were on Article 3 of the European Convention. So if I could just pause and take a slight moment to say we now have the European Convention on extradition, the INTERPOL Convention and the UN Draft Convention on extradition.
JUDGE BARAITSER: This goes back to your Article 5 point?
MR FITZGERALD: Yes. Yes. I am very grateful for the – you are absolutely right. It was a digression but I hope a helpful one. And then at 3.8, in addition to alleging the commission of political conduct, the motivation and purpose attributed to Mr Assange is to damage "the work of security and intelligence." And we then set out the series of allegations made by – in the indictment and by Mr Dwyer in his affidavit, where it is expressly stated that the – he knew the disclosure of these documents would be damaging to the work of the security and intelligence services of the United States, that Assange is the public face of WikiLeaks, a website he founded with others as an intelligence agency of the people, and then the website then stated: "WikiLeaks accepts classified, censored or otherwise restricted material of political, diplomatic or ethical significance."

I will not read them all out, but the essence of each of these allegations is that these offences are knowingly directed against the United States, and that is the complaint. And, madam, then drawing it up, we make the point that count 1, count 2 to 8, counts 9 to 14 and this is at page 11 – obviously, counts 15 to 17 and count 18 all allege offences that are contrary to the interests of the United States and that are, in essence, offences of espionage but also offences which are purely political offences, because they are directed against governmental institutions of the requesting state.

Santhirarajah, which we have cited at 3.10 – the citation comes from paragraph 123 of *Santhirarajah*, at volume 2 tab 11, but it is set out there. The elements of pure political offences, such a treason, sedition and espionage contain a requirement that the offender intend to harm the Government of the State. And so, Madam, there is further statements about the motives attributed to him by members of the US State, which I really had

summarised on Monday but you see, over and over again, guilty of treason, waging cyberwar on the United States – a bit difficult to know how you are guilty of treason if you are not a citizen of the US but, anyway, there we go – and then a conduit for some other adversary of the United States to push out information, et cetera, et cetera. And acted as an arm of foreign intelligence services, et cetera.

Madam, just pausing there, in case it befall, "Well, there is some distinction because this spy, which is clearly within the context of a purely political offence, wasn't on behalf of another nation state." If one pauses for a moment to reflect on that, there are numerous NGOs accused in numerous countries – for example, Russia and China – of effectively treasonous behaviour by disclosing information. For example, China does not want it to be known how many people they execute every year. An NGO located there may go to a civil servant and get information about how many people are executed there. The disclosure of that classified governmental information would come within the test of espionage, but it would be protected from extradition by the political offence exception. And my learned friend has very helpfully indicated that, apropos of that, if you look at the INTERPOL guidance – I am so sorry, if I can go back to that. It is A3 in our bundle of authorities.

JUDGE BARAITSER: Yes.

MR FITZGERALD: You can see there why it – May data be processed about a – you see ---

JUDGE BARAITSER: What page are you on?

MR FITZGERALD: If you look at page 21 of 48, Madam.

JUDGE BARAITSER: Yes.

MR FITZGERALD: OK. So it says: "Examples – Pure political offence: treason/espionage/disclosure of government secrets."

> "Case 1: A diffusion was issued by an NCB seeking the arrest of the individual for 'treason in a particularly aggravated form'. The individual worked in the department of counterespionage and eventually became the head of the group handling the country's intelligence services. He was suspected of disclosing information regarded as State secrets, which should have been kept secret to avoid the risk of causing severe damage 'to the external security of the country'. It was decided not to record the data in INTERPOL's databases since the crime was considered a pure political offence.
>
> Case 2: A diffusion was issued by an NCB, seeking the arrest of a national of another country, for 'high treason'. By using publicly accessible websites, he 'fomented agitation within the country', which included urging his country's

> government to invade the country. It was concluded that the case was purely political within the meaning of Article 3, considering the nature of the offence,"

Et cetera.

"This conclusion was further supported by the protest submitted by the individual's country of nationality, and by open-source reports. Case 3: A diffusion was issued by an NCB, seeking the arrest of an individual for "disclosure of government secrets". As a member of a military unit in the country, he took keys used for encrypting and decrypting messages and tried to sell them for money to foreign entities. It was determined that the case was of a purely political nature within the meaning of Article 3. The fact that the individual requested a monetary reward did not affect the political nature within the meaning of Article 3. The fact that the individual requested the monetary reward did not affect the political nature of the case.

> "Case 4, a red notice request was sent by an NCB. The individual was alleged to have engaged in espionage. As a former high-ranking official, he disclosed classified information on subjects likely to affect the security and foreign relations of the country. He then fled the country, using a false passport provided by an official of another country. It was concluded that the case was of a purely political nature and thus fell within the scope of Article 3.
> Case 5. A red notice request was sent by an NCB. The individual was charged with espionage. According to the facts, the individual, a national of another country, was alleged to have revealed state secrets; et cetera. It was concluded that the charge and facts provided were of a purely political nature. The case therefore fell under Article 3."

And then again: "case 6; a red notice was issued. The subjects were accused of being part of a regional secessionist group and they found that that was political."

So that gives an indication, madam, we say that shows that this is of a purely political nature; and at 3.12 we have made the point that had the Katharine Gun prosecution continued and not been discontinued and had she fled to another country, she would have been able to say: 'This is a purely political offence.'

And so, of course, domestically it is no defence, but in extradition terms it is a defence. And equally, of course, we know that Dreyfus was charged with espionage,

providing information to the German armed forces. It turned out to be a totally false and wrongful allegation. But there is no doubt that had he gone to the UK and the French sought his extradition, it would have been a purely political offence, even if the allegations had been accepted.

So we make that point and madam, we also make the point that you do not have to, as those examples show, be acting necessarily on behalf of another nation state. The examples are legion, where people's extradition might be sought by powerful countries, not just America - China, Russia - on the basis of disclosures made which are uncomfortable or threatening to the requesting state; all would be covered by this protection which, therefore, is of fundamental importance, as well as of general application throughout the European Convention, the INTERPOL convention, the draft UN Convention.

So madam, that is the points on pure political. Turning to relative political offence, to some extent we do not need it, because we say it is self-evident that this is pure. But even if one has to go there, can I just summarise the position? It started off with quite a constrained definition that it had to be in the course of a civil war or a political disturbance that you committed your crime.

And the *Castioni* case which we have summarised at page 14, 4.3, that was murder in the course of an uprising in a Swiss canton, but it was held to be a relative political offence, because of the context of a political uprising. And in that case, it was being said that it should be incidental to, or form part of, a political disturbance, or something akin to a civil war; and I think it was in that case that there were citations from John Stuart Mill's definition of a political offence by James Fitzjames Stephen in the judgment. That is how it started off: if it was in the course of an uprising or a disturbance. But it has definitely evolved, so that it is now wide enough to cover where the person is not just seeking the overthrow of the government, but where they are seeking to compel a government to change its policy or trying to make the government concede some measure of freedom.

And that evolution, one can trace in the cases, starting with *Castioni*. Madam, can I just give you the references? It is at 4.3 that we deal with *Castioni* and we have set out the passages there, in that more confined protection for a relative political offence. So this is even if it is murder, even if it was said that it was a relative political offence; if it was incidental to that. And it is sometimes called the incidence theory: is it incidental to an uprising? Is it incidental to a civil war? Is it incidental to an attempt to change governmental policy?

We say we do not need that, but if we did, these alleged crimes would certainly come within that definition. Madam, we have set it out at 4.3, *Castioni*, where Justice Denman is saying: "It must at least be shown that the act is done in furtherance of, or done with the intention of assistance, as a sort of overt act in the course of acting in a political matter ..." And:

> "The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of ... a political character with a political object."
> And Justice Hawkins then says that the test is: "Is it incidental to, or does it form part of, political disturbances?" That is probably why it is called the incidental theory, because it starts with *Castioni*, talking about: "Is it incidental to a political disturbance?"

And the point is made at 4.5, Justice Denman made the point: "Whether the act done at the moment at which it was done was a wise act, in the sense of being an act which the man who did it would have been wise in doing ... is not for the court."

It is a question of: "Is it in the course of some political uprising or disturbance?" Then it develops, and we have got the subheading: "The modern law, attempts to alter governmental policy in a disturbed political atmosphere". *Kolczynski* is simply mutiny on a Polish vessel, because of the fear on behalf of the Polish sailers, facing return to Poland in the time of the Cold War, that they would be tried for treason; and therefore they mutinied. And Lord Goddard says, and we have set it out at 4.6, this is tab 4, page 551:

> "It is necessary only for reasons of humanity to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary citizens which have no political significance will thereby be excused."

And the Divisional Court recognised that the mere expression of political opinion, even if articulated through the medium of an ordinary criminal act, such as revolt, is a political offence.

JUDGE BARAITSER: Mr Fitzgerald, it is 12.55. Do you think you will need more than five minutes remaining?

MR FITZGERALD: I may, but not much more, madam. Shall I pause here? I think I will be 15 minutes after the break, at a maximum.

JUDGE BARAITSER: All right. I will hold you to that, Mr Fitzgerald. We will do that, then. We will come back at 2. 15 minutes, Mr Fitzgerald. And then you will be in a position, Mr Lewis, to respond?

MR LEWIS: Yes.

MR FITZGERALD: Yes, thank you.

JUDGE BARAITSER: Right. We will do that, then, thank you. 2 o'clock.

(Luncheon adjournment)

JUDGE BARAITSER: Thank you. Please sit down. Mr Fitzgerald.

MR FITZGERALD: Yes madam, just three short points then. Firstly, we submit that it is now sufficient to constitute a relative political offence that the objective be the objective of changing government policy. That is established by the case of *Schtraks* which we have summarised from 4.7 onwards. It is established by the case of *Cheng* which we have summarised from 4.12 onwards.

And it is clearly stated in the case of *Provato*, the High Court of Australia case summarising the whole history and it makes it clear that the object of changing government policy maybe sufficient to constitute an offence of a political character, and makes clear that the debate, the early debate upon the necessity for there to be a campaign to change the government itself was decisively resolved in a negative – you do not have to necessarily change the government, it is enough as a concerted campaign to change government policy. That is at 4.13.

And in the *T* and immigration officer, the same point was made in relation to relative political offences. So, we respectfully – it is enough that you are inducing it to change its policy. If you look at the facts of this case, on the government's own case, this is about policy in Guantanamo, policy in the Iraq war, policy in the Afghan war, and an attempt to seek to change that policy by publishing secrets which revealed what was really going on and the loss of civilian life, the torture, the war crimes. Nothing could be clearer than this is an allegation of seeking to influence or change government policy on matters of the greatest importance.

The second point we make is that once you have – so, we say, Julian Assange's alleged crimes certainly come within the test of pure political offences. They also come clearly within the test of relative political offences. The second point we make, and this is at part 5 from page 21 onwards madam, is that none of the accepted violent offences which do not qualify as political offences, are alleged or made out here, and we set that out at 5.6.

Very shortly, neither the USA list nor even the wider Council of Europe list have ever included espionage or computer misuse. So, there is no suggestion that any of the list of excluded offences which cannot qualify for political offence are made out. And the point about the case of *Santhirarajah* which is summarised at 5.8 and 5.9 is if it is not on the list of accepted crimes, then it qualifies as a relative political offence if it satisfies the test of being there – of being an offence to seek to change government policy. And that is on the authority of *Schtraks*, on the authority of *Cheng*, and on the authority of *Provato*.

And madam – so, that is the point we make in relation to it, I will not label all the quotations but you have them all set out. But madam, if my learned friend is right, if he is right, then it leads to this disparity between the treatment of UK citizens and US citizens and it leads to this glaring asymmetry. A person requested from the UK to the US according to my learned friend cannot rely on the political offence exception because although it is in the treaty, although that exception is there, although that protection is there, in England you cannot avail yourself of that protection.

By contrast, if it is a US citizen or someone in the US who wants to fight extradition, they can on the political offence exception and the reason for that is that in America they have a monist system not a dualist system, and the treaty is part of domestic law. And Oppenheim says that very clearly in volume 3 ---

MR LEWIS: I accept that.

MR FITZGERALD: My learned friend fairly accepts that ---

JUDGE BARAITSER: But in any event, Norris makes it clear that the disparity in the treaty between the two countries makes no difference.

MR FITZGERALD: Well, that was not in the context of abuse of process madam.

JUDGE BARAITSER: But the point was nevertheless clearly stated in that case.

MR FITZGERALD: Well madam, my respectful submission would be this. That one of the reasons why consistently with the rule of international law one should seek for an approach which does not deny British citizens or people in the UK this protection, is that such a disparity and such an asymmetry would be inconsistent with the international rule of law, and therefore it is an abuse to say we can charge you with a political offence although it is contrary to the treaty, but you cannot do anything about it. So madam, that is our point. I just give you the reference in Oppenheimer that it is part of US law and therefore a protection you can avail yourself of in the US. It is volume 3, tab 29, at pages 968 and 969.

We submit that that is a further reason why our submissions as to the violation of the treaty giving rise to abuse of process should be accepted by you madam. And madam, for all

those reasons we submit firstly it is a pure political offence, espionage, on the face of the indictment.

Secondly, in any event on the face of the indictment, it is a relative political offence, therefore he would be entitled to protection under Article 4 (1) of the treaty and that to deny him that protection would be an abuse of process, and any detention pursuant to such a denial would be inconsistent with Article 5 because it would be arbitrary and you have our point madam, that section 87 as it were, repatriates that entitlement or makes it part of English law, part of the protection of English law. Not just that, but also we would say *Magna Carta* and the whole concept that is invoked by Lord Justice Rose in *Mullen* that it is an abuse of process to act on conflict with the principles of public international law.

Madam, those are my respectful submissions.

JUDGE BARAITSER: Thank you. That is very helpful.

MR FITZGERALD: James, do you want ---

MR LEWIS: Madam, we are sharing the lectern so this is going to come this way.

JUDGE BARAITSER: All right.

MR LEWIS: Madam, our answer to the application made by my learned friend is that there are fundamental errors that he has put forward - my fault, my fault - and madam, the core of the submission made by my learned friend is at 6.4 of his skeleton argument.

And at 6.4 of his skeleton argument, madam if you have it there, the first skeleton argument. It is page 25, reliance on the treaty. The bold claim which he has made is Mr Assange is entitled to the substantive protection of the treaty. First, we say as a matter of law that is just wrong. He is not entitled to derive any rights from the treaty. It is common ground that the treaty has not been incorporated into domestic law, and only once a treaty has been incorporated can individuals claim rights from the statutory corporation. It is always a derivation from the statutory provisions and not a derivation from the treaty that rights arise.

Secondly, parliament has expressly abrogated the political offence extradition, the political offence exception to extradition when passing the Extradition Act 2003 which we say is a complete code for extradition. So again, Mr Assange has no right to argue a political offence exception. It has been abrogated by parliament.

The next position we take which is a fundamental error is that somehow it is an abuse of process not to afford Mr Assange the protection which he says he can derive from the treaty. We would submit that as no rights are derived from the treaty, it follows from that alone there can never be an abuse in extradition proceedings. Abuse of process in extradition

requires a bad faith manipulation that deprives an accused of a challenge to the extradition process he could otherwise make, the usurpation of the extradition process.

The operation of law has deprived Mr Assange of the challenge he wishes to make, not the conduct of a prosecution of the requesting state.

Also, we dispute that these would, in fact, be political offences. If the court was entitled, and we say it is not, to afford a right to Mr Assange from the treaty, the first thing to do would be for this court to construe what a political offence under the United Kingdom-United States treaty meant. And we say that there is, in the United Kingdom and the United States, and in fact Australia, developed an autonomous definition of a political offence. It may not be the same definition as shared by other countries who differentiate between pure and political offences.

However, we say in the United Kingdom, our autonomous definition is simply synonymous with what is otherwise described as the relative political offence; and is defined in all the English jurisprudence. And therefore it is not simplistically, as Mr Fitzgerald would have it, that you can say: "Well, because this crime is called treason or sedition or espionage, that automatically makes it a political offence within the meaning of English law". And I will show the court that.

We have set out in our skeleton argument other points. But we do say, insofar as any allegation of abuse is concerned, it appears to us that in order to make that good, Mr Fitzgerald is asking this court to determine: as a matter of American law, would it amount to a political offence, because otherwise there is no bar to the prosecutors asking for it.

And on this side of the Atlantic, again, if this court had jurisdiction to decide whether or not it was a political offence, the only standard that this court could use is that set out in the English authorities; all of which do not support his argument that the conduct of which Mr Assange is accused are political offences.

In our skeleton argument, I think, madam, you have it at tab 3 of the core bundle of submissions. We have set out an introduction. And our first starting point, madam, is at paragraph 3 which deals with constitutional law; and we have set out four grounds. Do you have that?

JUDGE BARAITSER: I do, yes. Thank you.

MR LEWIS: I am obliged. I wonder if, then, I could make good that very brief introduction by reference to the authorities.

And I first need to deal with the first point, which is the proposition that unincorporated treaties are not part of English law, and do not provide any rights to individuals.

Could I start with the case of *Rayner*. We have had it mentioned, but we have not actually looked at the speeches of their Lordships in that case. It is in volume 3, tab 31 of the bundle of authorities on political offence. I wonder if we can just pick it up. Madam, this was about the - it is sometimes called the "tin case", but it is of high authority, and it deals with the incorporation of treaty provisions.

Can I take you to page 476 in the report, where Lord Templeman sets out in his speech the position? If I can pick it up on 476 at F:

> "Losing the construction argument, the appellants put forward alternative submissions which are unsustainable. Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary in the functions of the government and of Parliament. The government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws. Judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."

And dropping down to H:

> "A treaty to which Her Majesty's government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation; except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute; the courts of the United Kingdom have no power to enforce treaty rights and obligations at the request of a sovereign government or at the request of a private individual."

If we go to page 480 in the report. Again, in the speech of Lord Templeman, just between D and E, he says between the two perforations: "Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom."

481, going over the page, still in the speech of Lord Templeman, between B and C:

> "The courts of the United Kingdom have no power to enforce, at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state, rights granted by

> a treaty or obligations imposed in respect of a treaty by international law."

And just at E on page 481: "Public international law cannot alter the meaning and effect of the United Kingdom legislation." If we go to page 499F, we see in the speech of Lord Oliver, just below F:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this house in *Cook* and was succinctly and convincingly expressed in the opinion of the Privy Council in *Kamachee*."

If we go over to page 500 and pick it up at B: "The first of the underlying principles," that is the first. The second is that:

> "As a matter of constitutional law of the United Kingdom, the Royal Prerogative, while it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law, unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations and it is outside the purview of the court not only because it is made in the conduct of foreign relations which are the prerogative of the Crown, but also because as a source of rights and obligations it is irrelevant."

And at 512B, picking it up just above B:

> "If the treaty contained such a provision and Parliament had not seen fit to incorporate it into municipal law by appropriate legislation, it would not be for the courts to supply what Parliament had omitted and thus to confer on the Crown a power to alter the law without the intervention of the legislature. The remedy, if there be one, lies in international law, not in the domestic courts."

So madam, just pausing there for a moment. That is on all fours and a complete answer.

So what has happened here is that Parliament did not see fit to incorporate the political offence exception; notwithstanding that the Act is subsequent to the signing of the treaty.

I accept from my learned friend's point of view, he says: well, this did not come into force as of 2007, but the treaty was signed by both parties, the United Kingdom and the United States, in March 2003. So it predates the coming into force of the 2003 Act. And that alone is a full answer to abuse.

Can I then just go, while we are in the same bundle, it is convenient just to look at one or two of the other cases, again in the House of Lords. The next tab, tab 32, we have got *Brind*. Madam, you may remember that this is a case whereby just before, or before the Human Rights Act came into force, the argument was that because the United Kingdom was a signatory to and ratified the European Convention on Human Rights, those rights set out in the ECHR could be relied upon by individuals.

That argument was rejected and if I can just show you where that is. It is at page 718, if we look at 718; we see Lord Donaldson. Actually, this is in the Court of Appeal; but it is upheld in the House of Lords. Between A and B:

> "By contrast, the duty of the English courts is to decide disputes in accordance with English domestic law, as it is, and not as it would be if full effect were given to the countries' obligations under the treaty; assuming that there was any difference between the two."

It goes on to say:

> "It follows from this that in most cases, the English courts will be wholly unconcerned with the terms of the convention. The sole exception is when the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, can affect the construction."

That does not arise in this case. It is quite a common maxim of a statutory construction that if there are two ways in which you can interpret, you would interpret the domestic statute in line with a treaty obligation. But that simply does not arise in this case; and no suggestion has been made that it does.

If we also look at page 760 in *Brind*, which is the House of Lords. And in the speech of Lord Ackner; this is Article 10 of the European Convention on Human Rights. Picking it up

at the top perforation, between C and D:

> "The Convention, which is contained in an international treaty to which the United Kingdom is a party, has not yet been incorporated into English domestic law. The applicants accept that it is a constitutional principle that if Parliament has legislated and the words of the statute are clear, the statute must be applied, even if its application is in breach of international law."

Simon v the Commissioners of Customs and Excise. If we go on a couple of pages further at 762, between A and B, Lord Ackner says: "The treaty [this is just above B] not having been incorporated in English law, cannot be a source of rights and obligations." And he then cites with approval the speech of Lord Oliver, which I have already referred the court to.

If we go to tab 36 in the same bundle, we have the House of Lords in *Lyons*. Again, this was an argument that one of the defendants who had been convicted in the Guinness case, Sir Jack Lyons, should have his conviction quashed because the European Court had held inadmissible his section 236 interviews.

Importantly at paragraph 27, Lord Hoffmann sets out the position with prelusive clarity. He says at paragraph 27, page 992 of the report:

> "In other words, the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question is whether the appellant's convictions were unsafe as a matter of English law. It is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them."

Just pausing there. Of course, madam, on my learned friend's position, you would have to interpret the words "political offence" in Article 4.1 of the treaty in order to see whether or not this was a political offence. So you would be forced, on his position, to interpret the treaty which the House of Lords said this court cannot do, while it remains unincorporated. "The English courts have no jurisdiction to interpret or apply them." He relies on *Rayner*.

> "Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty English term into English law, but even then the metaphor of incorporation may

> be misleading. It is not the treaty but the statute which forms part of English law and English courts will not, unless the statute expressly so provides, be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so."

And then at 28:

> "But for present purposes, the important words [this is to do with statutory interpretation] are 'when I am free to do so'. The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not."

If we go to - following the case of *Romer* which is 337. It may be that my learned friend only relies on it in his written argument. The reason I draw it to the court's attention is because there is reliance by my learned friend on *Adimi* and *Ashbal*; and we see in *Romer*, I will simply give you the references because my learned friend has not dealt with it in any detail in his oral argument. Paragraph 51, Simon Brown LJ, as he then was, doubts what he had previously said in *Adimi* that you may be able to derive rights from the treaty. He says in terms: "What he said then should be regarded as superficial and suspect."

That is between D and E on page 830 at paragraph 51. And Laws LJ, in the same case, says at paragraph 97, page 842:

> "There is no analogue to these procedures in a case of an international treaty. Treaties are, under our constitution, made by the executive and not by the legislature. Save in certain arcane exceptions, the executive is not a source of law in England. Hence the rule that no treaty comes within the body of the law of the land, unless it is specifically incorporated by an Act of Parliament. The rule is a benign one. No-one is to be subject to any burden or requirement imposed by the state, unless it is given by the common law or under statute. The rule applies no less whether the treaty under consideration confers advantages. Advantages here are burdens there."

And then he says it is salutary to repeat the well-known words of Lord Oliver.

If we go to the next case, D38, the decision of Burnett LJ, as he then was, in the Divisional Court; so specifically in an extradition context. If we go to paragraph - sorry, it is MLA, it is not extradition. It is MLA. But it is ---

JUDGE BARAITSER: Mutual legal assistance. Just pause for one moment, Mr Lewis. Ms Peirce, can you just make sure Mr Assange is happy to carry on? He is looking a little tired. Ms Peirce, would you mind?

DEFENDANT: The problem is that I am not able to participate in these proceedings, because I have not - I cannot speak to my lawyers, with any confidentiality. There is a whole series of (inaudible) and for that, it is (inaudible). I have a untreatable - I cannot concentrate as it is. I cannot ask my lawyers if I am understanding something correctly. I cannot instruct them without these figures seeing (inaudible) Julian's health. I have had very little contact with ---

JUDGE BARAITSER: All right, Mr Assange. Mr Assange, I appreciate you have something to say.

DEFENDANT: I have had very little contact with my lawyers. These (inaudible) must have something like 100 times more contact and hours per day than I do.

JUDGE BARAITSER: Mr Assange, the purpose of my interrupting Mr Lewis was simply to make sure that you were able to continue to concentrate whilst he proceeded. Generally speaking, as I said yesterday ---

DEFENDANT: And is there any point in me ---

JUDGE BARAITSER: It is not ---

DEFENDANT: --- in any of these, if I am not able to participate?

JUDGE BARAITSER: Generally speaking, defendants do not normally have a voice, unless and until they decide to give evidence, which is why I have asked Ms Peirce to speak to you, so that she can speak on your behalf to the court. So I am going to stop you, because I would not normally allow any defendant to speak in these circumstances.

DEFENDANT: But I cannot generally speak to my lawyers. I cannot speak to my lawyers.

JUDGE BARAITSER: And there is no reason to make an exception in your case, I am afraid. Please give her instructions if you wish to, to Ms Peirce, and no doubt she will convey them. Otherwise I will carry on.

DEFENDANT: I cannot provide them. I cannot with any confidence give her instructions, in this case already, when ---

JUDGE BARAITSER: All right. Well, I have made my position clear.

DEFENDANT: This case already has enough spying on my lawyers as it is.

JUDGE BARAITSER: Mr Assange, I am not going to let you speak anymore, for the reasons I have given. Not because I have any desire to stop you speaking but because in these proceedings, unless you choose to give evidence and give an account of yourself, it is

completely unusual to let defendants speak for themselves, when they are so well and ably represented as you are and therefore, for that reason, I am not going to let you continue to speak.

DEFENDANT: That is why I have been speaking through my lawyers, but I cannot instruct them from here.

JUDGE BARAITSER: I am going to rise for a moment and let Ms Peirce take some instructions from you, if she wishes to, and when she comes back, she can let me know what it is you would like to say in the usual way. I will do that, then. Five minutes, please.

(Short adjournment)

JUDGE BARAITSER: Thank you.

MS IVESON: Madam, can you excuse me for a moment.

JUDGE BARAITSER: Yes. Mr Fitzgerald, are we able to carry on?

MR FITZGERALD: Madam, yes. Can I just make two short points then. Firstly, Mr Assange is finding it very difficult and, understandably, feels it is very unfair that he cannot properly communicate with us whilst these proceedings are going on. It is difficult for my instructing solicitor who I think is simply not allowed to pass a note to him and, therefore, he cannot communicate with us.

JUDGE BARAITSER: Can I just ask you, Mr Fitzgerald, is this different from any other usual criminal or extradition proceedings?

MR FITZGERALD: Well ---

JUDGE BARAITSER: The position that Mr Assange currently is in?

MR FITZGERALD: The difficulties are both because of the medical condition you have heard about and the difficulty of not being able to communicate with us about the issues that are arising as they arise. Those are the problems. Madam, I understand that the prosecution will be neutral as to him being able to come and sit with us so that we could at least, throughout the rest of the afternoon, be able to take instructions from ---

JUDGE BARAITSER: Outside the dock on the bench?

MR FITZGERALD: Yes, we would have to apply.

JUDGE BARAITSER: I strongly suspect that those that administer the security provisions would not be able to accommodate that. I have made enquiries, but I strongly suspect that that would not be acceptable. It is not really a matter for me but I cannot imagine that could be accommodated.

MR FITZGERALD: Well, madam, obviously, our respectful submission would be he poses absolutely no threat to anybody.

JUDGE BARAITSER: Well, that is not a risk assessment I can undertake.
MR FITZGERALD: I understand. Madam, I do have instructions that, in the interests of the matter soldiering on, he would be prepared not to hold matters up while I make a formal application, but I would perhaps invite you to hear us further on that issue if we go into tomorrow.
JUDGE BARAITSER: On the issue of his coming out of the secure dock?
MR FITZGERALD: Of him being able to sit with us, yes.
JUDGE BARAITSER: Do you think that is a matter that I can adjudicate upon given that it is a security issue?
MR FITZGERALD: Well, madam, it would be a question of bail for him to be present.
JUDGE BARAITSER: Are you making an application for bail today?
MR FITZGERALD: No, it would be a question of bail so that he could leave the dock and sit with us. It would be ---
JUDGE BARAITSER: So it is an application for bail?
MR FITZGERALD: Madam, as I said, if the matter goes into tomorrow I would wish to make such an application, yes.
JUDGE BARAITSER: I am very happy to hear an application for bail.
MR FITZGERALD: Thank you. But, in the meantime, madam, I have spoken to Mr Assange and, in the interests of my learned friend concluding, he has indicated that those are his concerns. Those are the circumstances in which, ideally, we would wish to conclude the hearing but, in the circumstances, perhaps the best thing is for my learned friend to conclude today.
JUDGE BARAITSER: Mr Fitzgerald, I agree that Mr Lewis should be allowed to finish. I am wondering then, if you wish to make an application for bail, whether the prosecution should have some notice in relation to that.
MR FITZGERALD: Yes.
JUDGE BARAITSER: And whether it might be better perhaps to make your application in the morning if you are going to do so.
MR FITZGERALD: Yes, madam, I am content to do that, yes.
JUDGE BARAITSER: Mr Lewis, do you have any observations about that course?
MR LEWIS: Well, madam, I am not certain it is actually an application for bail. I would have thought when a person surrenders and he is in the custody of the court, so for instance if he was giving evidence he would be there and there would be security, usually in all criminal cases where the defendant is in custody and gives evidence he gives evidence from the

witness box.
JUDGE BARAITSER: Yes.
MR LEWIS: And it is organised. It is not a question of the defendant being given bail to go into the witness box.
JUDGE BARAITSER: No, but that would be when he was giving evidence.
MR LEWIS: Yes.
JUDGE BARAITSER: And my understanding is that he is unlikely to do so. This is a very different scenario.
MR LEWIS: I am thinking on my feet but, jurisdictionally, I am not sure it is particularly different. It would be a matter for you taking into account any observations which are made by the security personnel. It is your call, madam, and you can deal with the court as you see fit, in my respectful submission.
JUDGE BARAITSER: I think if he is to be released from custody that requires an application for bail.
MR LEWIS: We would not agree to a release from custody. I think that is a different ---
JUDGE BARAITSER: Well, how do you think he would remain in custody whilst freely in the well of the court? He would not be in the dock and, therefore, he would not have surrendered to the dock. He would be in the well of the court.
MR LEWIS: I do not know, madam, but I am just surmising if there were security officers on either side of him he would still be in custody. He is in custody and would then sit in the well of the court.
JUDGE BARAITSER: Well ---
MR LEWIS: But it is obviously not my ---
JUDGE BARAITSER: Well, if that is a risk assessment, do you think that I am in a position to make that assessment, that it would be appropriate on a risk basis for him to be in the well of the court with a security guard on either side of him?
MR LEWIS: I do not know what the, I would say prison service but I think it is G4 would say about him sitting in the well of the court, whether they think it is accommodated. For instance, I simply say this, that on occasions when one is dealing with habeas corpus with people in custody and we are dealt with in the High Court or the Court of Appeal, I have known defendants to actually be in one case handcuffed to a prison officer and just sat next to his lawyer. There have been other matters, but the court have determined the way in which they see fit. That is, generally speaking, when there has not been an ability in the High Court to have a dock because I think there are only three courts in the RCJ which have that facility.

But, madam, from the prosecution's point of view we take a neutral stance. I am just saying I am not sure that a bail application would necessarily be the most appropriate form because we would oppose bail.

JUDGE BARAITSER: Yes. Well, since you are on your feet, Mr Lewis, surrender involves, as far as I am concerned, a surrender to the dock of the court. That is how somebody surrenders to the court.

MR LEWIS: Yes.

JUDGE BARAITSER: Release from the dock requires an application for bail. They are no longer surrendered to the court once they leave the dock.

MR LEWIS: I do not think it is quite as technical as that in that people can surrender to the court even if they are on bail. They then sit in the well of the court and then they can be released again on bail.

JUDGE BARAITSER: Well, if you have authority for that, then I would be happy to hear it.

MR LEWIS: I am ---

JUDGE BARAITSER: But I do not think you are right, Mr Lewis.

MR LEWIS: I am ---

JUDGE BARAITSER: I think surrender is surrender to the dock of the court.

MR LEWIS: We will check.

JUDGE BARAITSER: And, if that is the case and someone is released from the dock and not in circumstances in which they are giving evidence, I would imagine it follows that there must be an application for their release from the custody of the court onto bail and that would require an application.

MR LEWIS: Madam, I would rather have the opportunity to think about it overnight.

JUDGE BARAITSER: Yes, all right.

MR LEWIS: Because I do not want to give an erroneous position to the court.

JUDGE BARAITSER: All right. Mr Fitzgerald, are you happy, at the very least for today and overnight, for things to remain as they are and if you wish to make any formal applications no doubt you can do so in the morning?

MR FITZGERALD: Yes. Well, madam, obviously, I have only just been able to take instructions down in the cells and what Mr Assange communicated then was, for the present purposes, he is content that we carry on. But I do invite the court, if the matter goes into tomorrow, to reconsider the matter and obviously we will research the authorities. We respectfully submit that this is a gentle man of an intellectual nature where there is no reason why he should not sit with us and be able to communicate, if he needs to, during the hearing.

But, madam, I accept that it may be in the interests of all us that the matter proceeds today and that we make the application first thing in the morning.

JUDGE BARAITSER: All right.

MR FITZGERALD: If it is necessary.

JUDGE BARAITSER: When you make the application, bear in mind that I am going to be in a difficult position making an assessment of risk ---

MR FITZGERALD: I appreciate that.

JUDGE BARAITSER: --- in relation to security personnel.

MR FITZGERALD: Yes.

JUDGE BARAITSER: If you are asking for no release on bail but him remaining in custody but to sit in the well of the court.

MR FITZGERALD: Yes.

JUDGE BARAITSER: You might consider that I am unable to weigh the factors which are relevant to that kind of assessment because I will not be aware of what they are.

MR FITZGERALD: Well, madam, we will obviously consider the points you have made. As my learned friend indicated, when people give evidence obviously the court works out a procedure whereby even those alleged to be highly dangerous terrorists go and stand in the witness box and give their evidence and I think that there would then be security at the door, but can we consider that overnight and make the application tomorrow if we go into tomorrow.

JUDGE BARAITSER: OK, all right. Now do you recall where you were? We had just turned, I think ---

MR LEWIS: I can, madam. But I was helpfully reminded by Ms Dobbin that if we just pop back to the case of *Brind*, which is tab 32 in volume 3.

JUDGE BARAITSER: Yes.

MR LEWIS: I am sorry, pop back to *Lyons*, which is tab 36 in volume 3. I just simply make the forensic point because it is not mentioned further in the body of the judgment as far as we can make out that Mr Emerson who appeared on behalf of Mr Jack Lyons in that, referred to *Thomas v Baptiste*. We see that in the argument at page 982 at C and D. So it cannot be said that the case of *Lyons* was decided per incuriam of the position in *Baptiste*.

JUDGE BARAITSER: Page 982?

MR LEWIS: 982, madam, yes, between C and D.

JUDGE BARAITSER: Yes, Mr Emerson refers to *Baptiste*, yes, C.

MR LEWIS: So it is certainly not per incuriam. Could I then ask you to go to volume 2 of

the political offence authorities. If we start at tab 23, which is the case of *Arranz* which is an extradition case.

JUDGE BARAITSER: Yes.

MR LEWIS: Madam, the last one we dealt with, it is mentioned in our skeleton argument but it was the mutual assistance case where Burnett LJ, as he then was, echoed the position. If you need the reference for that, I will not ask you to turn it up but the reference for that, *Akarcay*, which was volume 3, tab 38, at paragraph 21 and he adopts the familiar position in *Rayner* and that is a mutual legal assistance case. If we turn to tab 23 in volume 2, we have the case of *Arranz* and a very similar argument that is being made before you was made by Mr Summers in respect of another unincorporated treaty.

If we pick it up at paragraph 67 in this case, which as I say is an extradition case, and the President and Leggatt J give the judgment, picking up at the bottom of the page, paragraph 62,

> "A difficulty with the argument that article 31 provides Mr Troitiño with an immunity which we have not considered so far is that article 31 is a provision of an international treaty which forms part of international law and not of UK law. It is a basic principle of UK construction law that a treaty to which the UK is a party does not and cannot change domestic law or confer rights on individuals without the intervention of Parliament: see *Rayner* and *Miller* ---"

Miller is the more recent case, involving Gina Miller, who judicially reviewed the government.

68: Mr Summers sought to overcome this difficulty in two ways. The first was to argue that a ratification of an international treaty may create a legitimate expectation of compliance with it. In support of this argument, he cited a dictum of Lord Woolf, in *Ahmed*, and the decision in *Adimi*. At the time when the applicants in *Adimi* entered the UK and were prosecuted, Article 31 had not been incorporated into UK Domestic Law.

69: Despite this authority, we are not able to accept that an unincorporated treaty provision is capable without more founding a legitimate expectation which is enforceable in English Law. If that were the case, it is hard to see why, for example, the European Convention on Human Rights did not give rise to a directly enforceable right in UK Law without the need to enact the Human Rights Act, yet an argument that the convention, as an international treaty, could have any effect in domestic law, otherwise and for its incorporation

through the mechanism of the Human Rights Act was given short shrift by the House of Lords in Lyons, where Lord Hoffmann described it as a fallacy. The point that a treaty cannot, without more, give rise to an enforceable, legitimate expectation is made in relation to the Refugee Convention in *Remma* – a case not cited to us in argument by Lord Justice Law. In the same case, Simon Brown expressly recognised the views expressed in *Adimi* in reliance on the dictum of Lord Woolf in *Ahmed* are to be regarded as best superficial, and the conclusion I reach there, with regard to a legitimate expectation of asylum seekers, to the benefit of Article 31, is suspect.

So we would say there is nothing to distinguish the applicant's submission in the present case in relation to Article 4 of the Extradition Treaty between the United Kingdom, and Article 31 of that treaty both being unincorporated treaties. So it produced no rights. Madam, if we then look at *Ashwal*, which is 1 and 2 at 20. My learned friend did not rely on it, so I will not turn to that. So we do say that the English Domestic Law is all one-way. Unless a treaty has been incorporated into English Law, this court cannot interpret it or give effect to it and on rights are derived from it. It is a principle of parliamentary sovereignty. If it were otherwise, the government could legislate simply by enacting a treaty and it has always been our dualist approach, from a constitutional point of view, that parliament is supreme and only parliament can legislate – not the government. Therefore, no rights or legislation are put into force simply because the government signs a treaty if it is not incorporated into English Law by active parliament. It is as simple as that.

And unlike the case of *Sinclair*, my learned friend referred to the case of *Cheng*, and he said, well, the treaty is the heart of it. But of course, one must bear in mind that both *Cheng* and *Sinclair* obviously had to rely on the treaty because under the 1870 Act and indeed the 1989 Act, in schedule 1, treaties were incorporated. The mechanism by which the 1870 Act applied was to incorporate the treaty by ordering counsel. And so there was an express incorporation. Madam, we have not bothered to put the 1870 Act before you. We can do so, but we have set out the relevant provision in our written argument. If you turn to tab 3 of the submission bundles, where the prosecution's skeleton argument goes and turn to footnote 2 on page 6. So this section 2 of the 1870 Act, and it was repeated in schedule 1 of the 1989 Act.

> "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals ---"

Ie a treaty has been – the arrangement there is another word for a treaty.

> "--- Her Majesty may, by order in counsel, direct that this Act shall apply in a case of such foreign state. Her Majesty may, by the same or any subsequent order, limit the operation of the order and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, qualifications as may be deemed expedient."

And then:

> "Every such order shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement."

So what happened, Madam, under the old system was that the government would negotiate a treaty. In place was the 1870 Act or (inaudible) on the 1989 Act, and it allowed an order in counsel to be made – a statutory instrument. The statutory instrument scheduled the treaty. So what happened was, with section 2 of the 1870 Act, allowed the order to say that the Act should be read subject to the treaty. So it was incorporated, and in that way, the treaty became the heart of the matter because, as Lord Diplock said in *Nielsen*, the 1870 Act was simply machinery which allowed, when treaties have been negotiated, to be put into force once Her Majesty, by order in counsel, had incorporated them into domestic law.

So all the positions – so when we look at the older cases, one has to bear in mind when they are talking about the treaty, it was specifically incorporated. The 2003 Act took a radically different approach and is, as it were, treaty-free.

JUDGE BARAITSER: It makes no reference to the treaty anywhere in the Act?

MR LEWIS: None whatsoever. I will show you that in *Norris*, in a moment, Madam. So the treaty has no force whatsoever. It may be slightly surprising to other foreign states, but so far as English Domestic Law is concerned, the treaty is irrelevant.

JUDGE BARAITSER: And therefore, the treaty is merely an agreement between governments setting out its hoped-for position between the two contracting states and nothing more, you say, than that?

MR LEWIS: Correct. And that is specifically, if we just have a look at *Norris*. That is in volume 2, tab 18. So, Madam, you understand the background. The 2003 Act allowed the

aggregation of the prima facie evidence requirement. Completely separately, the 1972 Anglo-American treaty was replaced with the 2003 treaty. However, that did not come into force until 2007. So there were provisions within the treaty which was in force at the time, such as a requirement under Article 9 of that 1972 treaty to provide a prima facie case. So it is completely in conflict, as it were, with the 2003 Act. So we have the treaty saying we have to provide a prima facie case, and the Act saying no you do not. If we ---

JUDGE BARAITSER: Was the Act silent or there was a positive statement that no prima facie case was required? Is it similar to the current position in relation to political offence, or is there a more positive statement?

MR LEWIS: It is slightly different, in that section 84 of the 2003 Act states that if there is a statutory instrument issued by the Secretary of State in relation to the part 2 country/territory concerned, there is no real requirement to comply with section 84, and section 84 sets out the requirement that a prima facie case need be provided. So it does not specifically contradict it. It says – we can look at it if one needs to, but in essence, it says, "Where there is a statutory instrument in place citing a country as being a part 2 extradition partner, one doesn't go to the rest of section 84. One goes to section 87 in the scheme."

JUDGE BARAITSER: Right.

MR LEWIS: But if we look at *Norris*, it has got some very helpful comments. If we pick it up at paragraph 21, it sets out, in perhaps more coherent terms than I have already explained to the court, what the situation was with the treaty. So it is just paragraph 21:

> "On 31st March 2003 the Treaty on Extradition between the Government of the United States of America and the Government of the United Kingdom was signed by both governments. It is subject to ratification."

And then we drop down about eight lines in paragraph 21:

> "Once the 2003 Treaty is ratified, the 1972 Treaty, as amended will cease to have effect, but until then the treaties in force are the 1972 Treaty, as amended by the 1985 Supplemental."

Paragraph 22: "Article IX of the 1972 Treaty is at the heart of the complaint by Mr Alun Jones QC on behalf of the claimant." And that sets out the requirement for prima facie case. "Mr Jones contends that the provisions of Article IX were ignored."

Now, he puts the argument in a different way, but really it is the very same argument that has been put in this court before you. In that case, he was saying because that is a term of the treaty, the Secretary of State acted ultra vires in designating it as a country which did not have to have prima facie evidence. So the attack was on the designation, but the ratio is almost the same, because there was a treaty provision which was not given effect in the 2003 Act. So the treaty provision there was the prima facie case but it was omitted from the 2003 Act. So it is important to look at the end – the last part of the final sentence in paragraph 22. We will just pick it up:

> "Notwithstanding the unequivocal language of the 1972 Treaty, none was offered. Although he considered a large amount of evidential material explaining the allegations against the claimant, District Judge Evans did not apply Article IX."

So in exactly the same situation, on all fours with you, Madam, we would say you will not apply Article 4 of the treaty and, in that case, District Judge Evans did not apply Article 9 of the treaty. Then the history of the Extradition Act is set out, and at the end of 24, when he deals with Nielsen, Scott Baker LJ says:

> "In my view, it is clear that where there is any conflict between them, the terms of an extradition treaty must give way to the relevant legislation."

And at 25, which has already been read to you, so I will not read it again – the 2003 Act created a new regime. And if we go to paragraph 27, you will see the final paragraph in 27 – the heart of the matter. "Critically, therefore, in such cases – "American cases under the 2003 Act. " – the judge may not enquire whether there is sufficient evidence against the individual which requires an answer. This process is inconsistent with Article IX of the 1972 treaty."

So, putting that in the context of this case, we would say the Judge may not enquire whether there was a political offence exception against the individual and that process is inconsistent with Article 4 of the 2003 treaty. But it is the same constitutional principle.

And in the analysis which begins at paragraph 37, it is worth noting ---

JUDGE BARAITSER: Just going back one, the 2003 Act made a positive Act provision to allow the abrogation of the prima facie case. So, the difference between this case and the

Norris case is that the 2003 Act is silent about the provision whereas in the *Norris* case it made a positive provision ---

MR LEWIS: Yes.

JUDGE BARAITSER: --- requiring that the prima facie case obligation is abrogated. Is that a fair summary of the difference?

MR LEWIS: I mean, that is right to this extent. Can I just check what section 84 says? Section 84, ---

(Counsel conferred)

MR LEWIS: --- it is 84 (7), it says, "If the Judge is required to proceed under this section" – which you would be – "and the category 2 territory to which the extradition is requested is designated for the purposes of this section by order, the Judge must not decide one which is prima facie and he must proceed under 87.

JUDGE BARAITSER: And is the order ---

MR LEWIS: So, to that extent there is ---

JUDGE BARAITSER: Is the order a statutory instrument?

MR LEWIS: Sorry?

JUDGE BARAITSER: The order is a statutory instrument.

MR LEWIS: The order is a statutory instrument.

JUDGE BARAITSER: So, that is a positive decision by parliament which is missing in the current case.

MR LEWIS: In fact, it is not a positive decision by parliament to that extent. It is a delegated ---

JUDGE BARAITSER: Yes.

MR LEWIS: It is delegated legislation.

JUDGE BARAITSER: But it is primary legislation.

MR LEWIS: The requirement – it is subject to a negative resolution by both Houses of Parliament which does not classify itself as legis – as primary legislation because it is simply laid before parliament for 30 days and unless anyone complains it then becomes a statutory instrument. It is delegated secondary legislation ---

JUDGE BARAITSER: Do you see why ---

MR LEWIS: --- but it is legislation.

JUDGE BARAITSER: Do you see why I am interested in the point?

MR LEWIS: Yes. No, I understand that and there is a distinction which I accept. But we say it is a distinction which does not matter.

JUDGE BARAITSER: Can you just say why you say it does not matter?
MR LEWIS: Because on all the previous authorities cited to you madam, it is quite clear that no right arises from the unincorporated treaty. And you cannot just put it in. Even though it would – I think as my learned friend would stage it in oral argument, if the 2003 Act said in terms you cannot rely on political offence exception, well that – he would then agree that there can be no argument.
JUDGE BARAITSER: Yes.
MR LEWIS: We say that although that is certainly implied as a matter of statutory construction because of the deliberate withdrawal of it, it is an implied position and it certainly was on a true construction parliament's intention to abrogate it. It is not expressly said in the Act, it is not in black and white, that the – as a matter of statutory construction does not matter because it is an essential implied position that one cannot rely on political offence exception because it was specifically removed. That is enough. It did not – parliament did not need to go further and put in a positive averment saying and in any event you cannot rely on it because they have taken it away and the right does not arise from the unincorporated treaty.

So – and just finally on that, picking up at 43 in *Norris*, the starting point for consideration of the present application for the 2003 Act, nothing in the 2003 Act suggests that designation under part 2 is dependent on a bilateral treaty between the United Kingdom and the requesting country. The extradition process created by parliament for United Kingdom citizens does not require reciprocity or mutuality. And that is important in our case because if Mr Fitzgerald is right and there is a lack of reciprocity or an imbalance caused by the treaty because in American law we accept being a monist system, the treaty has become law in America, one it was passed by the Senate and ratified by the President.

So, it is in law, but of course a political offence has no domestic efficacy at all. There is no such thing in ordinary domestic criminal law. You cannot say we are not prosecuting this terrorist because he tried to commit treason or committed espionage or did any other acts. All those are always justiciable in the domestic criminal system. There is no such thing as a political offence in ordinary English domestic law. It only arises on the international plain and in the context of extradition. It has no other founding because it would – because it cannot ever be said that if we could not prosecute members of the IRA here in Britain for sedition. There is no such thing as the political offence here. So, one has to be very careful about how one approaches it.

And finally, at 44 – and this goes back to our core point. The third sentence in, five lines down, "Mr Jones was unable to show any previous authority of the United Kingdom which suggests that the 1972 treaty standing alone created personal rights and falls within the rights of individual citizens."

So, if we just pause there, all I need to substitute is the 2003 treaty.

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

So, whichever way one looks at it, the treaty has not given any right whatsoever to Mr Assange which is enforceable by this court or by English law.

JUDGE BARAITSER: I do not think that is what the defence are saying, that he has an enforceable right.

MR LEWIS: They are trying to get it in by the back door by saying it is an abuse of process. It cannot be an abuse of process if we went back to Lord Oliver's comment at 512 (b) in *Rayner*, which is a full answer to the abuse, because otherwise what you are doing is you are creating enforceable rights from an incorporated treaty but you are doing it by the back door by saying, oh well, I will treat it as an abuse of process. Cannot possibly treat it as a legitimate expectation in these circumstances but will somehow say that it becomes either an abuse of process – and I will explain why it cannot – but that that in itself is a full answer. Because otherwise you are doing that which you are not entitled to do, ie, create a right using the guise of abuse of process.

And in any event, the abuse of process in this court is so narrow it could never deal with it. And I will show you in a moment. But we do say that it is just a full answer to the abuse. You cannot create that right by another means, a back door means, when you cannot get it through the front door. It is as simple as that. I mean, if we look at – just looking at abuse - I will come back to the parliament has expressly abrogated it in a moment by implication by the omission – but if we just look at the abuse, for two reasons.

The first reason it is not an abuse is it is the most basic constitutional reason. If you use abuse to incorporate what is in an unincorporated treaty, you have created rights which court after court says you cannot have. So, you cannot use that as a route. And it would expressly defeat parliament's intention that it is Sovereign in these matters. So, it allows the government by creating a treaty to create a right without parliament's permission. That is forbidden.

And secondly, one can see why it cannot possibly be an abuse of process in extradition proceedings because abuse of process in extradition proceedings is very, very narrow. If we just look at *Bermingham* for a moment, because that is the abuse of process jurisdiction. It is in volume 1, tab 19. And if we pick it up at paragraph 97 ---

JUDGE BARAITSER: Sorry, tab 19 is the *Tollman* abuse.

MR LEWIS: I am sorry. It is not in the political authorities, it is in the abuse authorities.

JUDGE BARAITSER: Ah.

MR LEWIS: Abuse authorities, volume 1, tab 19.

JUDGE BARAITSER: Yes.

MR LEWIS: Madam, may I just put a little bit more flesh on the bones before we go to abuse of process so you understand the context. It is probably – there were a trilogy of cases, I think my learned friend and I were in (inaudible), but there is a trilogy of cases under the 1870 and 1989 Act. They were – they started off with *Atkinson*, then *Sinclair*, and then *Schmidt*. The House of Lords on every occasion said there was no abuse of process whatsoever in extradition proceedings. Nothing.

And the reason they said that was because there was a discretion in the Secretary of State not to extradite someone if it was unjust or unfair. So, they said there was no – it is just a statutory scheme in the courts, there is no such thing – yes, there may be abuse of process in all our domestic proceedings, in all the other criminal matters, but there is not in extradition. When the 2003 Act comes along, they take away the Secretary of State's discretion but they put in another set of series of bars. Now, so what happened in *Bermingham* was they said well, there might be something which notwithstanding all the bars, there might just be some

residual that could be left which could be an abuse of process. But not the same abuse of process as is in ordinary domestic criminal proceedings. The abuse of process there is very settled; if you go on those line of cases from *Beckford* and others, the two limbs, unfair to try; cannot get a fair trial or unfair to try. That is not the position in extradition.

In extradition, Laws LJ sets it out and it is approved in *Tollman* and it is consistently approved in all the other cases. And if we pick it up at paragraph 93, you will see mentions of the case of *Atkinson*; actually, that is too old for Mr Fitzgerald and me to be in. I was certainly in *Schmidt*. I cannot remember if Mr Fitzgerald was. We see at 93, we have got *Atkinson*. 94, we have got *Schmidt*. 95, *Gilligan*. That was a separate one which dealt with backing up warrants in Ireland. And all of which said there was no such thing as abuse of process.

So what he then says, at 97:

> "I should not leave the point without considering the nature of the juridical exercise involved in concluding, as I would, that the judge conducting an extradition hearing under the 2003 Act possesses a jurisdiction to hold that the prosecutor is abusing the process of the court. Lord Reid, in the passage from the *Atkinson* case which I have cited, would, if necessary, have inferred the magistrate had a power to refuse to commit. Now it is plain the judge's functions under the 2003 Act and those of the magistrate under the predecessor legislation are, and were, wholly statutory.
>
> He therefore possesses no inherent powers, so there is no inherent jurisdiction in this court. But that is not to say that he may not enjoy an implied power. The implication arises from the express provisions of the statutory regime, which it is his responsibility to administer. It is justified by the imperative that the regime's integrity must not be usurped. When its integrity is protected by other powers, as in *Atkinson, Schmidt* and *Gilligan*, the implication is not justified."

So for instance, where the bars already cover, it is not justified, because that is already covered by those.

And where we pick it up is - I am sorry, madam. Just give me a moment. This is an unmarked copy and I thought I had marked mine up. We set it out in our written argument. Would you just give me one moment? I just want to give you the position.

It is set out in our skeleton. I will just get the reference. It is what Laws LJ says. It is in our skeleton on abuse, where we recite the correct approach. And it is paragraph 100. I think I have just got the wrong one. 99. For some reason, this is an unmarked copy and I do not

have the matter. Would you just give me one moment?

JUDGE BARAITSER: Yes.

MR LEWIS: Yes. Can I just show you in our written argument, because the quotation is there and it is easier to find. I was looking at it in the wrong place. If one went to tab 6 of the issues and paragraph 56.2, and we are looking at *Devani v Kenya*. We have set out the quote. Can I just read that out to you, madam: "Two conditions must be satisfied before this jurisdiction will be exercised." That is abuse of process: "First, that the authority has conducted itself in a way that has 'usurped' the statutory regime."

We have just seen that from Laws LJ in *Bermingham*:

> "And, second, that this usurpation of the statutory regime has resulted in the extradition being unfair and unjust to the requested person, either because he has been unfairly prejudiced in his challenge to extradition in this country or because he will be unfairly prejudiced in the proceedings in the requesting country if surrendered there."

So the usurpation - sorry. I have just read from our skeleton argument, 56.2.

MR FITZGERALD: Oh I see, yes.

MR LEWIS: So like all abuse, all manipulation of the proceedings, if we take a very simple example, often in summary offences; if the prosecutor manipulates the service of a summons to go past - he serves it a few days before the six months, but he has not made a decision to prosecute, he has manipulated the process, because he has taken away from the defendant the right to argue that the six months time limit has gone. It is just a manipulation of the proceedings. He has taken away a challenge which would otherwise be open to you. That is where the usurpation comes from. That is what the Divisional Court have said. Taking away a challenge which would otherwise be there. That is why the prosecutor is guilty of manipulating the process, usurping the extradition machinery in front of you.

And of course, here, that just cannot happen, because the challenge has been taken away by a rule of law; because the law says that the treaty is not incorporated. No-one has abused the system. No-one can get into abuse of process, to say the prosecutor has acted in bad faith, in order to take this away, because it does not exist as a matter of law in English domestic proceedings. So abuse of process just simply cannot arise.

JUDGE BARAITSER: Of course, it does arise in the Article 5 realm. We have seen that ---

MR LEWIS: I will deal with that. Article 5 is different. Article 5 ---

JUDGE BARAITSER: It is nevertheless an abuse of process argument within that article.

MR LEWIS: No, it is not. Article 5 is a separate argument. It is certainly not part of the abuse of process within extradition proceedings. It is self-standing, it can be a self-standing challenge. My learned friend has to make it differently. He has to make it by incorporating section 6 of the Human Rights Act, saying: the court cannot act in a way which is incompatible with the Convention right; and the Convention right under Article 5.1 is that detention should not be arbitrary.

But it is not arbitrary. It is nothing to do with - this is not an abuse point. So that is why he has separated them out. This is Article 5.1, I think (f) deals with extradition. The Article 5.1 point, it is said in *Evans* that you cannot act in an arbitrary way. But there is no arbitrary way here, because the statutory scheme is set out. There is no arbitrariness whatsoever, because you know where you are, because that is what the statutory scheme says. No rights are derived from the treaty. There is nothing arbitrary about that. That is just on a different plane, a contract between two governments which you have got no right to enforce, so there is nothing arbitrary. There cannot be arbitrariness, because the 2003 Act is a complete code for extradition. So he cannot get in under abuse and he cannot get in under 5.1. Can you just give me one moment?

Ms Dobbin helpfully points out, and I will do it now while it is in our minds. It would not be right to say that the right by Article 4, if we are calling it that way, the political offence exception has been abolished by omission. It is rather looking at it the other way. The Act prescribes what you can take into account. And is it an extradition offence; is there a bar to extradition? Et cetera. So that is the sole statutory basis. You cannot introduce other matters. And you cannot introduce it as an abuse of process, for one of the reasons I have just said, because it always has to be prejudice caused by the prosecution. And that is not the case in this extradition request.

And also Ms Dobbin helpfully points out that the Act talks of imperatives. So if I simply give you this, it is: if section 78 is made out, the court must go to 79, which are the bars. And then if they are not made out, the court must proceed under section 84; et cetera, et cetera. And you must proceed. So it sets out a way in which the court is obliged to deal with matters. And there is simply no room to incorporate some extraneous right from an unincorporated treaty, which Parliament has abolished.

So dealing with that, that was the point I was actually just next going to deal with, madam, whether Parliament has abrogated the political offence exception. I can probably do that from our written argument. If we go to tab 3, which is our argument in the defence submission bundles, and pick it up at paragraph 21. And at 21, we are just going through the

history of the matters. The political offence exception was provided for in section 3 of the 1870 Act and section 6.1(a), paragraph 1, of schedule 1 to the 89 Act. And it was in express terms.

The protection against extradition requests which were politically motivated, that is the selected prosecution, was provided for separately; so 6.1(c) of the 89 Act.

So there was political offence and then there was what I will loosely describe as the political discrimination clauses.

We then point out at 22 about the timings. It was signed in 2003, although we accept it did not come into force until 2007. But what happens is that the only provision which is re-enacted is the discrimination provision, which we now have in section 81. So we have it dealing with: if the request was made for a political purpose or he would be punished at his trial by reason of his political opinions. Those are the discrimination clauses which Parliament saw fit to leave in the 2003 Act, when it repealed the 1989 Act, but it removed the political offence exception which was there.

So we do say that there was - and we can say that Parliament has expressly abrogated the political offence exception, because it was there before; and then when they come along, they have taken it out. So they have specifically taken it out. So the Parliamentary intention was to remove it. And of course, any form of trying to get it in through the back door would be contrary to that Parliamentary intention to remove it.

Madam, we do say that that really is determinative of the issue, because there simply is no way it can be raised either, because it is an unincorporated treaty, as a right that Mr Assange has, because he just simply does not have it. And you cannot be incorporated into the very limited jurisdiction which arises in extradition cases, the *Bermingham*, *Kenya*, very limited usurpation by the prosecutor. It is not a general abuse. And it cannot fall within Article 5.1 of the Convention because it is not arbitrary, as there is a statutory scheme which sets out precisely how it happens.

Now, madam, the next step, which should not take me that long, but it is probably about half an hour or so, is to deal with the fact that, in any event, these are not political offences.

JUDGE BARAITSER: Do you want to deal with that today?

MR LEWIS: Madam, I could probably ---

JUDGE BARAITSER: It is a matter for you entirely.

MR LEWIS: I am in your hands. I am prepared and happy to deal with it.

JUDGE BARAITSER: So am I. I am always concerned about Mr Assange and whether he is able to concentrate. I do not know whether it is possible to take instructions or whether

that will only cause a problem.

Do you want to continue or break, Ms Peirce?

MR FITZGERALD: Madam, would you just give me a moment?

JUDGE BARAITSER: Yes, of course.

MR LEWIS: Well, madam, if Mr Fitzgerald is going to reply in any event tomorrow, it might be a ---

JUDGE BARAITSER: Shall we just see what he has to say, and then perhaps that might be the best way forward?

MR FITZGERALD: Madam, Mr Assange is prepared to soldier on and for my learned friend to finish.

MR LEWIS: Well, I am happy to.

JUDGE BARAITSER: Lovely. We will carry on, then. Thank you.

MR LEWIS: So madam, a lot has been said about pure political offences and relative, as if that was the way in which they have to be described.

JUDGE BARAITSER: Just keep an eye on the microphone, please.

MR LEWIS: A lot has been said by my learned friend, who tries to make a complete distinction between what he describes as pure political offences and relative political offences. That is not the approach the United Kingdom or the USA or Australia have ever taken. They have not divided it in that way. They have taken an approach to political offences being at odds with the government. So it is not simply the classification or the name of the offence which is determinative. That is why, when I began, I said that the United Kingdom, and in fact the USA - and I showed the authorities on that, it is in the bundle - and Australia have an autonomous definition of "political offence". Other countries do take - so certainly France, for instance, Mr Fitzgerald is right about *Shayler*. They simply said: "Well, it says Official Secrets Act. That is pure. We do not extradite for pure."

That is not the approach which has ever been taken in England or the United States. And of course, that would be very relevant to the proper interpretation of what a political offence is, within the meaning of the treaty; because one would have to see whether it fits.

Can I just explain that by reference to the article which we looked at? My learned friend made great store of it.

JUDGE BARAITSER: Just before you move on. So you say there is a difference in interpretation between the UK and the US about that phrase, and I wonder ---

MR LEWIS: And the rest of the world, basically.

JUDGE BARAITSER: I wonder if it is being suggested that it is interpreted according to the

UK interpretation of the phrase or the US interpretation or some other way.

MR LEWIS: It has to be, it has to be; and the UK interpretation is all one way. The UK interpretation is synonymous with what is otherwise described as the "relative political offence". I can show the court that, quite clearly. So that ---

JUDGE BARAITSER: I wonder if there was any agreement between the two executive governments when they signed the treaty about the meaning of "political offence".

MR LEWIS: Well, we would say that when they say "political offence", they mean - what it means in their law and our law. That would be the obvious position.

JUDGE BARAITSER: Is it the same for the two jurisdictions?

MR LEWIS: Yes.

JUDGE BARAITSER: I see.

MR LEWIS: But it is different in other countries. I will show you why it is exactly the same in America by one of the cases my learned friend has put in; and I will show you what it is in England. So if we look at the article which is volume 3, tab 40 of the political - just as a shorthand way of dealing with it. Consistent with what I have just explained to you, madam; if we pick it up in this article from the Virginia Law Review, page 1234, and the last four words on that page is:

"However, it will be later seen [going over the page] that British law does not make a distinction between pure and relative political offences." If we go on a few pages, you will see how it is dealt with at page 1240. It is described as the "incident test of Anglo-American law". The law of Great Britain. "The British Extradition Act of 1870 set the pattern for the standard treatment of relative political offences in Anglo-American law."

I will take you to some of the cases, because it makes it absolutely clear that the way in which both countries approach political offence is to see whether or not the motive or the purpose is being at odds with the government, seeking a change of the government. That is the whole essence of political offence. And you will see the United States have developed that law from the same genesis of the English law. If one goes to page 1244, when it deals with the laws of the United States: "Political offences are grounded in *Castioni*."

So what one has to be very careful of is simply giving it some label which just, in many ways, would not make sense. My learned friend says: well, this is what - so it does not matter what it is, if it is called that offence; we might call it something different in England, because we are a conduct-based extradition. We do not have to call it the same offence or whatever. They may call it a different name. We may call it one which would fall within his definition of "PO". It is the wrong approach. One has to look at it from the jurisprudence of the way

we have always adopted what is a political offence within English extradition law. That is the correct approach.

So if we start with *Castioni*. It is volume 1 of the political offence authorities, at tab 1. We have not actually looked at it. We have mentioned it. I think it is B1, actually, that it comes out in the volume. It begins at page 149. It is a 1890 case.

JUDGE BARAITSER: Volume 1, political offences; tab?

MR LEWIS: Tab 1.

JUDGE BARAITSER: Tab 1.

MR LEWIS: Political offences authorities. It is B1, in fact; because the first two are the treaty and the ---

JUDGE BARAITSER: Right. I have it. Thank you.

MR LEWIS: An article from INTERPOL. We will just pick it up from the head note, first of all. The first holding on page 149 held, "The offence for which the prisoner had committed was incidental to and formed part of political disturbances and, therefore, was an offence of a political character within the meaning of the statute." Just pausing there, of course, the words are not exactly the same; they are talking about an offence of a political character. The words in the Treaty are "political offence" and there is a slight distinction, we will see, when we get to *Schtraks* when they deal with what is a political character. "And the prisoner could not be surrendered but was entitled to be discharged". It was all about the murder in Switzerland of a political opponent.

If we go to page 157 in the judgment of Denman J, picking up in the middle of the page, "It seems to me it is a question of mixed law and fact, mainly indeed of fact, as to whether the facts are such as to bring the case within the restriction of section 3". So section 3 is the political offence exception and it is a matter of mixed law and fact whether it comes into that. So it is not just the classification of the offence.

If we then move on to 165, we have Hawkins J and we pick it up between the two perforations, the first main paragraph on page 165,

> "Now what is the meaning of a crime of a political character? I have thought over this matter very much indeed and I have thought whether any definition can be given of the political character of a crime - I mean to say in a language which is satisfactory. I found none at all."

` So, contrary to the very simplistic approach that my learned friend says, "Oh, well, we

can just have it, because of the classification, it is automatically a political offence", That would be contrary to the approach that Hawkins J has taken.

If we go over the page to 166, at the top, "I think, therefore, the expression in the Extradition Act," so he is not narrowing it all, "ought, unless some better interpretation can be suggested, to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed part of political disturbances." So that is what an offence of political character means.

If we go to the next tab, *Meunier*, an 1894 case, again picking it up from the head note, four lines up from the bottom, the meaning of section 3(1) of the Extradition Act 1870,

> "For it to constitute a political offence, there must be two or more parties in the state each seeking to impose the government of their own choice on the other, which was not the case with regard to anarchist crimes and therefore the prisoner was liable to extradition."

So we pick up from there that there must be two parties seeking to impose the government of their choice on the other.

If we go to *Schtraks*, which my learned friend looked at, which is at tab 4 of his bundle, it is right that they talk about pure offences, but if we pick it up say at 580 at the bottom of the page where he recites section 3, he talks about it being of a political character which is not quite the same as political offence. Go over the page at 581,

> "Now the interpretation of this subsection is not free from difficulty. Not only is the word 'political' capable of more than one interpretation but the two parts of the subsection do not fit well together."

Over the page at 582 at the very last line he is dealing with the historical position, but in *Schtraks* he says, this is the last line on page 582, "In reading the Act of 1870 one is entitled to look through the mid-Victorian spectacles." And a few lines down, about 10 lines down on page 583,

> "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 instrument to murder a man against whom he has a grudge, I would not think that could be called a political offence."

You will see that Simon Brown LJ says,

> "Well, supposing he did as a grudge kill the monarch and was charged with treason it still would not be 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 interesting to note - I think I have just made markings in another bundle. I will simply say it. The reference that Lord Hodson made in *Schtraks* was that on the face of it - and he used the words "on the face of it" - things like sedition and treason can be political offences, and Lord Radcliffe says "may". So the classification in itself is not determinative.

If we go to *Cheng*, which is usually seen as one of the seminal cases on political offences, that is tab 6 of this bundle. In fact, I am sorry, it is, in fact, *Cheng*. Those two comments that I wanted to make were in *Cheng*. If we go to 941 in *Cheng*. I am told Mr Assange is, I obviously ---

JUDGE BARAITSER: Is this a convenient place for you to stop, or not really?

MR LEWIS: I will stop.

JUDGE BARAITSER: Are you happy to? All right, so be it.

MR FITZGERALD: I am sorry, madam. I did just quietly tell my learned friend that I have received instructions that Mr Assange really has had enough for today.

JUDGE BARAITSER: I can see.

MR FITZGERALD: So if you would kindly adjourn at this stage.

JUDGE BARAITSER: I will do.

MR FITZGERALD: Thank you.

JUDGE BARAITSER: In terms of any applications in the morning it would be helpful if at 9.30 there is anything in writing that I receive it just before I come into court.

MR FITZGERALD: Yes.

JUDGE BARAITSER: If you are making applications, are you able to do that?

MR FITZGERALD: Yes, yes, madam ---

JUDGE BARAITSER: Alternatively, I could sit at 10.30 and you could produce them at 10.00. A matter for you.

MR FITZGERALD: Well, we would be grateful for that, yes.

JUDGE BARAITSER: We will do that then. We will sit at 10.30.

MR FITZGERALD: Because it is quite a business to get here and, actually, it is quite

difficult to see Mr Assange before the hearing.

JUDGE BARAITSER: If there is difficulty seeing him and you want time, please ask.

MR FITZGERALD: That is very kind, thank you.

JUDGE BARAITSER: So 10.30, we will sit and, hopefully, if there is anything in writing I will receive it at 10 o'clock.

MR FITZGERALD: Thank you.

JUDGE BARAITSER: Okay. All right, Mr Assange, you are very welcome to stay seated but I am adjourning the case until tomorrow morning. The court will sit at 10.30 in the morning to recommence the proceedings. Thank you.

ADJOURNED UNTIL 10.30 THURSDAY, 27th FEBRUARY 2019

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.