AUSCRIPT
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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
27th FEBRUARY 2020, 10.23-15.25

JUDGE BARAITSER: Thank you, good morning. We will just wait for Mr Assange to come in. Please sit down, Mr Assange. Mr Lewis.

MR LEWIS: Madam, over the overnight adjournment we had the opportunity just to reflect on the very last point I was putting to you, madam, on my learned friend's Article 5 submission.

JUDGE BARAITSER: Yes. Mr Fitzgerald, do you want us to pause for a moment whilst instructions are taken so that your client can follow everything that is happening?

MR FITZGERALD: Are we ready?

MS PEIRCE: It is simply that if the court was suggesting earphones, that he, Mr Assange, does not know about it, so.

MR FITZGERALD: Oh, I see. Oh, thank you ---

JUDGE BARAITSER: Shall we just pause.

MR FITZGERALD: --- madam. If we could just have a moment.

JUDGE BARAITSER: Yes, of course.

MR FITZGERALD: I understand Mr Assange is grateful and will try working with those headphones.

JUDGE BARAITSER: Have they been handed to him?

COURT OFFICIAL: (Inaudible) are saying does he want the one that works, but he said no.

MR FITZGERALD: Oh, I am so sorry, I misunderstood. In that ---

JUDGE BARAITSER: Is there a reason why he does not want to use them?

MR FITZGERALD: It is just that, as I understand it, he was not expecting that and so ---

JUDGE BARAITSER: Would he like some time to see whether they help him to hear?

MR FITZGERALD: Yes. Yes, madam, if we could make an experiment, perhaps in your absence.

JUDGE BARAITSER: Yes. Five minutes or so.

MR FITZGERALD: Yes, thank you very much.

(Short adjournment)

(The court reconvened at 10.39)

JUDGE BARAITSER: Thank you.

MR FITZGERALD: Yes. Madam, I think the short answer is that the jury is out on whether they improve or do not improve, but Mr Assange is grateful and is going to try and see how we get on. The problem seems to be actually with us counsel straying from the microphone causes most of the problems.

JUDGE BARAITSER: I understand this amplifies ambient sound and is not dependent upon the use of the microphone.

MR FITZGERALD: Well, in any event, we are going to give it a try and see whether it improves things.

JUDGE BARAITSER: Thank you. Mr Lewis.

MR LEWIS: Madam. So as I was saying, just to recap on our answer to Mr Fitzgerald's submission on Article 5 of the Convention and, of course, I was reminded that Mr Fitzgerald also put his Article 5 argument on the basis that the proceedings will be arbitrary as they are an abuse of process.

So we do say we come back to the same point. In circumstances where Parliament has removed a bar to extradition, it cannot be an abuse of process that the bar is not available. It is as simple as that. As I have already stated before, to introduce political offence exception by the back door would be to subvert the intention of Parliament to remove it by the front door. And the Extradition Act 2003 does not permit this court to take into account what it wants to determine and when determining whether extradition should take place.

As you know, madam, it prescribes the questions that the court must ask itself in coming to the conclusion of whether extradition should be granted. We do say Parliament, having ruled out the political offence exception, as part of section 79 and 81, that this court does not have the power to reintroduce it by another means.

Can I then just resume to where we were. We were just on the case of *Cheng*, dealing with the definition of a political offence. *Cheng* is in volume 1, tab 6, of the political offence authorities.

JUDGE BARAITSER: Thank you. I have it.

MR LEWIS: And, madam, *Cheng* is seen as one of the two seminal authorities on political offence, along with *T and the Immigration Commissioner*. So if we are looking at *Cheng*, can I first draw your attention to the speech of Lord Hodson at page 941 and pick it up at E.

It talks about, just above E, "An offence named in the list of crimes contained in Schedule 1 to the Act." And, madam you will be aware that under the 1870 Act and Schedule 1 to the 1989 Act, extradition was governed by a list of crimes, not the fact that the crime carried more than 12 months' imprisonment.

So where we see references to a list, it is whether or not the crime was in the list. So for instance, there were always problems – conspiracy to defraud, for instance, was not in the list and that could never be charged as an extradition offence.

What he says then, at E, "They are normal crimes; not crimes such as treason or sedition, which might well be of a political character." And I emphasise the words, "might well" because it is not the bright line that my learned friend seeks to make in saying if it is what he determines is a pure political offence, is automatically a political offence.

There may be a presumption in offences such as sedition, treason or espionage, but that is not the end of the matter, as we shall see from the authorities and the authors on this matter. So he is not putting it as a definitive bright line.

And if we go over the page, in the speech of Lord Hodson, at page 942, picking it up just above E: "His argument must, I think, be based on the undoubted fact that the words, 'of a political character' have so far defied precise definition."

As Viscount Radcliffe said in *Schtraks*:

> "Generally speaking, the court's reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range. This is seen in the very full consideration that was given to the question in *Castioni*."

I pass onto the passage at 591 in the same speech, which reads:

> "In my opinion, the idea that lies behind the phrase, 'offence of a political character' is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of a country.
>
> "The analogy of political in this context is with political in such phrases as, 'political refugee,' 'political asylum,' 'political prisoner.' It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary – what I mean – its common or international aspect. I respectfully agree with his expression of opinion and, in effect, said so in my speech in the same case."

So that is how one attempts to define what is a political offence. It is a difficult matter and, therefore, it is again away from this bright line that my learned friend seems to put forward. So well, anything, simply because it is called espionage, it is automatically, without moral, a political offence. In our respectful submission, it is not in English jurisprudence.

If we turn to the speech of Lord Diplock, which begins at page 943. And he says, at G: "Crimes which were, on the face of them, political, offences such as treason and such as treason were not included." What he means there, madam, is they were not included in the list. So you did not have to actually deal with them. Because they were never in the list, the issue of whether or not they were political offences did not come up. Because the list, in fact, originally, I think, only contained 28 offences and it was very narrow.

We go over the page. Again, in the speech of Lord Diplock, at page 944, he makes the point, between F and G:

> "It comprises ordinary serious crimes in English law but, like the earlier treaties, included none on which the face of it is a political character as respects the requisitioning state."

So again, although there might be a presumption when dealing with crime such as sedition or treason, that, in itself, and the classification, in itself, is not sufficient for the English courts.

If we drop down towards the end of page 944. Lord Diplock said:

> "My Lords, the noun that is qualified by the adjectival phrase, 'of a political character' is 'offence.' One must, therefore, consider what are the juristic elements in an offence, particularly one which is an extradition crime to which the epithet political can apply. I would accept it applies it to the mental element; the state of mind of the accused, whether he did the act, constitutes the physical element of the offence with which he is charged."

So this leads into – one always has to look at the purpose of the crime in determining whether or not it is a political offence. And between B and C:

> "If the accused had robbed a bank in order to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing a government of the country, his object will be sufficiently immediate to justify the epithet political, for politics are about government.
>
> "Political is descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or adducing it to change its policy or escaping from its territory the better to do so."

So it is those words which are often echoed, madam, as that is the purpose. The object of carrying out the crime must have been overthrowing or changing the government or adducing it to change a policy.

And no doubt any act done with any of those objects would be a political act, whether or not it was done within the territory of the government against whom is was aimed. But the question is not simply whether it was a political qua act but whether it is political qua offence. And if we drop down into F, just above the second perforation:

> "I would hold that, prima facie, an act committed in a foreign state, was not an offence of a political character unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed or induce it to change its policy, or enable him to escape from the jurisdiction of a government whose political policies the offender disproved of (inaudible) are not altered so long as he was there."

So pausing there, one has to equate what Mr Assange is alleged to have done against whether or not that was the only purpose by him was to change the government in America or induce America to change its policy, both of which, we say, it is not and, therefore, will not fall within the definition of political offence in any event. And if we drop down to H, at 945:

> "This prima facie view of the meaning of the expression, 'offence of a political character' derived from a consideration of the juristic nature of the criminal offences, in my view, confirmed by consideration of the purposes for which Parliament, in 1870, imposed its restriction upon the surrender of fugitive criminals."

If we go over the page and then pick it up between A and B, about halfway through the top paragraph:

> "It, therefore, cannot be supposed that the purpose of Parliament in imposing a restriction was to provide complete immunity for offences committed for political motives, directed against the government of a foreign state, wherever those offences happened to be committed. The immunity intended to be provided was, at most, a qualified immunity, depending on where the offence was committed."

If we then move to the next case. In fact, it may be helpful just to pick up Lord Simon in his speech in *Cheng*. Actually, I think my learned friend has already read that, so I will not trespass on the court's patience by going over it.

So we see how trenchant the definition is set out in *Cheng* and those requirements for changing the government or changing the policy are essential for the purpose of committing the offence.

If we then go on to T, which is in volume 1, at tab 12, there is a very extensive consideration of all the previous authorities by the House of Lords. And if I can just take you into the speech of Lord Mustill, with whom the other members of the appellate committee agreed, which begins at page 752, at H.

MR FITZGERALD: Did you say *T*?

MR LEWIS: I did say *T*.

MR FITZGERALD: Yes. I thought you said that.

MR LEWIS: It is *T*. I am awfully sorry.

MR FITZGERALD: Which tab do I find ---

MR LEWIS: It is tab 12 of volume 1. It is just called *T v Home Secretary*. So, Madam, we look at the way in which Lord Mustill starts, and this is at page 752. Do you have that?

JUDGE BARAITSER: Yes, I do. Thank you.

MR LEWIS: Good.

> "My Lords, During the 19th century those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats. Now, much has changed."

If we go over the page, just below B on 753, Lord Mustill says – this is halfway through the first paragraph:

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

Well, pausing there, Madam. Thankfully, on our submission, the courts do not have to do that because the political offence exception has been removed. If we then move a little further in *T*, and go to page 761, still within the speech of Lord Mustill, he deals with, at D:

> "The result was a broad division, 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. This endured for a century with little strain. Conceptually, it defied the commentators, but for so long as the only societies where in practice these questions were determined subscribed to the same broad principles of liberal democracy, there were few instances where the demand for extradition came close enough to the line to call for accurate judicial analysis."

And if we go onto page 764, we see a recitation of the authorities, two categories of decision. Lord Mustill says – this is at D:

> "I have been unable to deduce from the cases and the literature any theory which accounts for all the decisions and dicta. It does however appear that the authorities may be arranged in two groups. First, those which look to the connection between the motive and political content of the crime and the criminal act itself; and second those where attention is directed to the nature and degree of the offence. These categories are not exclusive, and indeed one can see both strands of reasoning in the passages quoted from the judgment of the Court of Appeal in the present case.
> Context and motive:
> This group includes all the English cases. It establishes one general proposition, and a number of qualifications. The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the "incidence" theory. The essence of this is that there must be a political struggle either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle. Two cases in this House are in point."

And it goes on to deal with *Schtraks* and *Cheng*. So if we pause there for a moment, Madam, to bring that to life: it cannot possibly said, in this particular case, on the way in which the

case is put against Mr Assange, that there is a political struggle in existence or in contemplation between the American Government and opposing factions and that the commission of the offence was an incident of that struggle. It just does not come within a million miles of that type of definition. What Lord Mustill has done is quote from *Cheng*, which we have already looked at and at B, on page 765, he points out that this principle underlies the major English decisions on extradition law and he relies then on *re Meunier*, and he talks of *Kolczynski* and *Castioni*.

If we drop down to page 766 – sorry, 765 at the bottom, at H:

> "Nevertheless, the logic of the decision obviously demands that there cannot be a political crime in the absence of a struggle for power of which the crime is an element."

So again, that could not possibly occur in the instant case. And if we go over the page to 766, at H – aspects which must be taken into account. Namely, there must be a causal link and an absence of remoteness between the political situation of which the refugee forms part and the crime which he has committed. This conception draws its authority, if not its origin, from a passage in the speech of Lord Diplock in Cheng, which we have already looked at.

If we go to page 768, still in the speech of Lord Mustill, who is doing a review of the authorities, and pick it up between E and F:

> "So also with "remoteness". I can see that even where the actor has no motive other than to further his cause, the chain of events between the act and the achievement of the political goal may be so long that the two are disconnected."

Next paragraph:

> "In short, to say that the political aim must cause the crime, or that the crime must not be too remote from the aim, does no more than assert that the crime must be really political in nature to fall within the exception."

So, Madam, we see that from those two important House of Lords cases, there is an English definition of what is a political offence and it is not purely dependent upon there is a bright line demarcation on the name or the classification of the events. If we know, and just for a moment picking up on what Lord Mustill has said – was how difficult the concept was and how dated it was in the modern society – is reflected first in its removal from the 1989 Act,

which we had previously missed but the industry of my juniors has found – an EU regulation which removed, so far as the European Union states are concerned, the political offence exception and it removed it from section 6 of the 1989 Act in February 2002, prior to the removal, we say, in 2003, for all countries. Madam, can I just hand this up to you, this regulation.

JUDGE BARAITSER: So this is the regulation enforceable in this jurisdiction?

MR LEWIS: Yes. Yes. It is not actually an EU regulation. I am corrected. It is a statutory instrument based upon the EU regulation. It therefore is part of the law of England and Wales, by virtue of it being a statutory instrument and Madam, you see that because it is statutory instrument 2002, number 419. It is quite complicated, I am afraid, but if I can just show you the very relevant part: if we pick it up in the middle of the page, where the statutory instrument says:

> "And whereas the Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union (referred to in these Regulations as the 1996 Convention) the terms of which are set out in Schedule 5 to these Regulations, was opened for signature and was signed by the United Kingdom on that date."

So the United Kingdom signed up to what we will describe as the 1996 convention. Madam, if we then go, in this document, to page 20 – internally paginated, in the top right-hand corner – you will see a number of articles set out, which are of the 1996 Convention, and Madam, do you see, if we drop down to Article 5, Political Offences.

JUDGE BARAITSER: Yes.

MR LEWIS: And what it says is 1, for the purpose of applying this convention, no offence may be regarded by the requested member state as a political offence, as an offence connected with a political offence or offences inspired by political motives. So – and in 2, there is an opportunity to set out a reservation relating to any terrorist offences, which the United Kingdom did not in fact sign up for. So what we have is, insofar as the EU countries are concerned, is a positive removal or renunciation of the political offence exception, completely. And that was brought in to effect, we can see, if we go in this document to page 46 in the explanatory notes to the statutory instrument, and it is the last paragraph on page 46. Again, it is not that easy to immediately understand. It says:

> "Paragraph 2 of Schedule 9 excludes countries that are parties to the 1996 Convention from the effect of section 24 of the Act, which provides that no offence to which section 1 of the Suppression of Terrorism Act 1978 applies is to be regarded as a political offence and no proceedings in respect of an offence to which that section applies shall be regarded as a criminal matter of a political character or as criminal proceedings of a political character."

Then, importantly:

> "This is because pursuant to the 1996 Convention the United Kingdom will not treat any offence as an offence of a political character. Accordingly there has also been an amendment to section 6 of the Act which is explained below."

And if we go onto page 48, top right-hand corner, the penultimate page of the statutory instrument in the explanatory notes, you will see, halfway down the page, dealing with the 1996 Convention – it says, in the middle of the page:

> "Paragraph 10 of Schedule 1A amends section 6 of the Act. Paragraph 10(2) omits section 6(1)(a) of the Act."

That is the 1989 Extradition Act.

> "This is because the United Kingdom will not for the purposes of the 1996 Convention treat offences as offences of a political character."

So just to understand the legislative history, the 1970 Act had the political offence exception in it. The 1989 Act replicated that. However, when the statutory instrument came into force in 2002, it amended by removing the political offence exception in relation to European Countries.

MR FITZGERALD: European Union. Not European countries.

MR LEWIS: European Union. Absolutely.

MR FITZGERALD: Not Russia, for example.

MR LEWIS: Correct. In relation to European Union countries. And then, on the prosecution case – and I think accepted by because, as we will look at their skeleton

argument. The defence case, the 2003 Act, when it came into force, which repealed the 1989 Act, removed the political offence exception. If I can just ---

JUDGE BARAITSER: For both part 1 and part 2?

MR LEWIS: For all parts. So if I can just show you, at paragraph 6.2 of my learned friend's first written argument, which is tab 2 of the submissions bundle. "It is common ground", and I am reading from my learned friend's argument at paragraph 6.2, page 25, "the Extradition Act 2003 removed political offence as a bar to extradition with reference to the international trend under which the political offence had disappeared from most modern extradition treaties, *Nicholls and Knowles*". "In the Extradition Act 2003, Parliament took this process to its conclusion by removing entirely the political offence exception to extradition for both category 1 and category 2 countries".

So, madam, we say it is clear beyond argument that there was the strongest Parliamentary intention to remove the political offence exception. It, first of all, did so by the statutory instrument because of the EU countries and then in the 2003 Act it did that for all category 1 and category 2 territories. That is entirely consistent with, when one reads the outmoded and outdated reasoning for originally having a political offence exception in the 1870 Act which Lord Mustill has explained.

There is a very helpful case, *Santhirarajah*, which my learned friend challenged me yesterday to look at. It is in volume 2, tab 22. It is a decision of the High Court of Australia. Can I just ask, madam, you to turn to that up

JUDGE BARAITSER: Sorry, volume 2 of the political offences bundle?

MR LEWIS: It is the political offence authorities.

JUDGE BARAITSER: Volume 2?

MR LEWIS: Volume 2, tab 22.

JUDGE BARAITSER: 22, thank you. Yes.

MR LEWIS: Madam, it is, in fact, a decision of the Federal Court of Australia. It was whether or not the Attorney General, who occupied a similar position to the Secretary of State under our 1989 Act, when making a final decision on the surrender made the correct decision in relation to political offences.

To see in context the submissions, if we go to page 521, the top right-hand corner of the reports, paragraph 110, we see the "Submissions of the applicant". The submission is almost identical to that which my learned friend put forward before this court where he said, "The [appellant]'s argument commenced by noting the accepted distinction between pure political offences and relative political offences. 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 constitutions of the state, the state ... Relative political offences, in contrast, are common crimes which acquire their political character from the political purpose sought to be achieved".

If we go over to page 523, paragraph 122, we see the opposing submissions which are more akin to the submissions I am putting forward but not exactly the same to you, madam. You will see there, "Submissions of the Attorney General", "Mr Robinson SC, who appeared ... as counsel for the Attorney-General argued that in order to constitute a pure political offence the offence must: (a) be directed against the political order - to subject or overthrow the government ... (b) have a sufficiently close and direct link between the crime and the alleged political purpose; and (c) be in relation to the requesting state".

Now if you drop down to paragraph 124, "As to elements (a) and (b) referred to in paragraph 122 above, the written submissions filed by the Attorney-General relied on the conclusion of Lord Lloyd in *T* ...". We have just looked at *T* and they have, effectively, adopted that position. So, again, there is not what could be described as a bright line, because if we go over to page 525 where the court having set out the opposing submissions turns to consideration and analysis of the matter, at paragraph 132 North J said, "The test proposed by each of the parties to determine whether the offences are political offences greatly oversimplified the task by selecting a particular approach from the authorities without any stated reason for excluding the variety of the other competing approaches".

So the court is, effectively, saying you cannot just do it in a way the submissions are put by either party. It is more complex than that. At 133, "The following discussion starts by collecting the many judicial views which hold that there is no all-embracing definition of the expression political offence". And at 134, "It is a recurring theme in all the significant authorities that there is no bright line test for determining whether an offence is a political offence".

Just pausing there, madam, that is precisely what we say that you cannot have, as my learned friend would have it, a bright line test simply by the classification of the offence. One has to look at the purpose and other factors which are set out in the cases of *Cheng* and *T*. If we then go to paragraph 148, which is on page 528, North J does a full review of the UK and Australian authorities. Importantly, at 148 what he says is, "A review of the major UK and Australian authorities on the meaning of the expression political offence bears out the observations just referred to that the courts have not found a defining characteristic or set

of characteristics which identify those offences which are political offences".

Of course, he has gone through very many cases. At paragraph 240 he sets out what is the contemporary meaning in his opinion of political offence, "The foregoing discussion reveals that the courts have acknowledged that it is not possible to provide an all-embracing definition of the expression political offence. The jurisprudence in the UK, Australia, US and Canada and the European countries referred to is a collection of pragmatic responses to the facts of each case influenced by the changing circumstances of the political environment". So, madam, it is a complicated issue.

JUDGE BARAITSER: And all of this relates to pure political offence?

MR LEWIS: Sorry?

JUDGE BARAITSER: All of this discussion relates to pure political offence rather than relative?

MR LEWIS: Not quite, madam. It relates to political offence and, therefore, the separation which my learned friend urges, because some countries defined have pure and relative, simply does not apply. That is the wrong way of approaching it. The right way of approaching it is using the criteria set out in *Cheng* and *T*. What you cannot do is simply say, "We are going to give it this characterisation of being a pure political offence and, therefore, deal with it simply by its characterisation or its name". Extradition is based upon conduct. It is not any more based upon the names of offences. That is the approach.

We can see that perhaps in relief if we go to the case of *Ashcroft*. It is in the same bundle. It is an American case. It is at tab 17. This is a decision, which I want to refer you to the case of *Eain v Wilkes* in the Seventh Circuit [1981]. Before I go to that, our submission, madam, is that it is far too simplistic to simply say something can be categorised as pure or relative. That is not the approach. That approach would lead into error. One has to look at it in the way in which it is being approached in the United Kingdom legislation. If we pick it up on page 5, bottom right-hand corner, in the left-hand column, what the court says is as follows, it is at the very bottom, "The extradition Treaty with Mexico". Do you see that?

JUDGE BARAITSER: Yes, I do, thank you.

MR LEWIS: "Provided that". And perhaps this is important, "The present treaty shall not be applied in any manner to any crime or offence of a purely political character. Although the treaty referred to offences which were of purely political character, the Supreme Court of the United States applied an analysis which is applicable to relative political offences".

Now, madam, that is precisely what we would urge in this case and precisely what

was done in the cases of *Cheng* and in *T*. One does not simply decide it by saying that this is, given the classification, pure. One has to decide it by the incidence test. As you can see there at the top of the second column on the same page, "The court referred to the character of the foray, the mode of attack, the persons killed or captured, the kind of property taken or destroyed, as support for the commissioners' holding that the crimes in issue were not a movement in a political role".

The court then refers to *Eain v Wilkes*, a decision of the seventh circuit, Court of Appeal, "It is a modern case in which the Seventh Circuit examined the political exception in an extradition case. In *Eain v Wilkes*, the court examined an extradition treaty, which like the case at hand, contained judicial extradition treaty language excepting for the treaty crimes that are of a political character. The Seventh Circuit acknowledged that for an act to constitute a political offence excepted from extradition under such a treaty, two basic determinations must be made. One, if there was a violent political disturbance in the requesting country during the time the alleged acts occurred and, secondly, the acts charged against the person whose extradition is sought were recognisably incidental to the political disturbance. Whether or not an offence is a political offence is to be determined by the circumstances attending the alleged crime not by the motives of those who subsequently are in charge of the prosecution".

So, madam, one sees a coincidence of approach both by the American authorities and by the United Kingdom authorities. With that, and bearing in mind there simply is no definition and there is no bright line, one would then have to, if you were permitted to carry out the exercise that my learned friend urges upon you by reference to the Treaty, to make various determinations under the Treaty. I wonder if we could just turn that up. If we look at the Treaty, it is in tab 1 of the political offence authorities, tab A1.

JUDGE BARAITSER: Is that volume 1?

MR LEWIS: In volume 1, I am sorry, madam, yes.

JUDGE BARAITSER: Yes, I have it, thank you.

MR LEWIS: And one can see the difficulties which immediately arise for the court if you were to accede to my learned friend's submission. One, the court would have to look at and try and interpret Article 4(1) of an unincorporated treaty, because 4(1) says, "Extradition shall not be granted if the offence for which extradition is requested is a political offence".

So we have to determine what, as a matter of construction, the high contracting parties meant when they described political offence in Article 4(1). Moreover, one can see that Article 4(1) only applies to the requested state, namely in this case the United Kingdom, as it

is the requested state who decides whether or not to extradite. So extradition shall not be granted. So it is nothing to do, in those circumstances, with the American side. It is the United Kingdom. If one were able to look at that, obviously our primary submission is, you cannot.

Moreover, the treaty does not have the list system. It adopts the more modern approach of defining an extradition crime, by conduct which would carry more than 12 months' imprisonment. If we go back to article 2(1) on page 3 of that document – the treaty:

> "An offence shall be an extraditable offence if the conduct on which the offence is based is punishable under laws in both states, by deprivation of liberty for a period of one year or more, or by more severe penalty."

So on its face it is now every offence. So there are no automatic exclusions such as treason or sedition, because we are no longer using a list. So prima facie it applies to every offence. If one is then using article 4(2) as an aid to construction of article 4(1), one has to see that (1), as there set out in article 4(2) is matters which are exempting political offences, regardless of the nomenclature or the classification. So again, as a canon of construction, one cannot say that political offence in article 4(1) should in any shape or form be subdivided, as my learned friend might subdivide it, into some categorisation of pure political offences which automatically engage and other political offences which do not automatically engage. The proper approach on a matter of construction, if you were allowed to construe political offence under article 4(1), is to adopt the approach that their Lordships have taken in *Cheng* and *T* and which has been otherwise consistently followed.

So, Madam, one sees the difficulty in that because there is no easy way of dealing with it. Now, if I am just to make good why you say there is no easy way of dealing with it, having set out what certainly are the defining criteria – potentially defining criteria of a political offence – one will have to see how that fits in with the conduct alleged against Mr Assange, and if we pick that up at our written skeleton argument on this matter, which is at tab 3 of the submissions bundle, are just attempts to bring to life the fact that the conduct alleged against Mr Assange cannot possibly amount to conduct which would fall within a definition, from the United Kingdom perspective, of a political offence. It is no good relying on France or other international countries which may have an emphasis on and a definition of, in their own municipal legislation, of a pure extradition offence.

So if we pick it up in our written argument, at paragraph 35, we summarise those matters which I have already set out for you, Madam, from *T v Secretary of State*. At 35:

> "T explained the jurisprudential basis upon which a political offence might be demonstrated. It could arise where a political struggle was either in existence or in contemplation between the government and one or more opposing factions within the State where the offence is committed and the commission of the offence was an incident to that struggle."

We summarise there, and it is the same sort of summary that was picked up in the Australian case, and is set out apart from *Cheng*. And at 36:

> "A crime was a political crime if it was committed for a political purpose, with the object of overthrowing or subverting or changing the government of a State or inducing it to change its policy and there is a sufficiently close and direct link between the crime and the alleged purpose."

At 786 in *T*. That an offence could be described as inherently political was not definitive. I have not taken you to that but, if necessary, Simon Brown simply says – he accepts that if a sovereign is killed for a purely private purpose, that may not amount to a political offence or a character. It is there, set out at 679. Equally, he did not accept any offence committed with a view to inducing a change in government policy was ipso facto to be regarded as a political offence. And then we set out, again, where the inscriptions are. And at paragraph 40:

> "It is important to note that, as set out in the opening note on behalf of the government and in the affidavit in support, the gravamen of the allegations against Mr Assange are not his leaking of materials to the press, but rather his actions in publishing the cables and activity reports, absent redaction, thus putting named individuals at risk."

And as *Schtraks* says, the United States Government is not after the accused for reasons other than the enforcement of the Criminal Law, following its usual course, and if that be right, it can never be a political offence. And as we say in 41 and 42, drawing back from the allegations and looking at the position more generally, it is impossible to place it or the accused in an analogous position to a political refugee. The court does not need to resolve these issues, but they demonstrate that any bare assertion that WikiLeaks was

engaged in a struggle with the US Government was in opposition to it, or seeking to bring about policy change, would need to be examined far more closely. And finally, as we say there, they do not however arise for determination as entirely academic here, because of the jurisdictional position which we set out as our primary submission.

Madam, I think that concludes my answer to my learned friend's submissions. Can I just check with those beside me to make sure I have not missed anything? Madam, unless you have any questions, that will be our answer.

JUDGE BARAITSER: Thank you very much, indeed. Mr Fitzgerald, how do you propose to proceed from here?

MR FITZGERALD: Madam, I do have a short note based on what my learned friend said yesterday. I will obviously have to reply to what he said today. Would it be an appropriate moment to take a five-minute break and then ---

JUDGE BARAITSER: I am very happy, if that is what you would like.

MR FITZGERALD: Yes. Shall I hand it up to you and my learned ---

JUDGE BARAITSER: People are waving because they cannot hear you because you are not using the microphone.

MR FITZGERALD: Oh, I am so sorry. Madam, if we could postpone until after the break but, in the meantime, I do have some written submissions responding to what my learned friend said yesterday, if you would kindly let me hand that up and I will obviously provide my learned friend a copy.

JUDGE BARAITSER: Do you want to do that at quarter to 12?

MR FITZGERALD: Yes, thank.

JUDGE BARAITSER: Or do you want to do that now?

MR FITZGERALD: Shall I pass you the ---

JUDGE BARAITSER: Do you want to hand – please.

MR FITZGERALD: --- the note in the meantime.

JUDGE BARAITSER: Thank you.

MR FITZGERALD: Yes.

JUDGE BARAITSER: Thank you. Quarter to 12 then, please. Thank you

(Short adjournment)

JUDGE BARAITSER: Thank you. Could we have Mr Assange in, please.

MR FITZGERALD: Madam, I hope you have the note that I have prepared and if I can just take the court through the key points.

JUDGE BARAITSER: We are just waiting for Mr Assange, Mr Fitzgerald.

MR FITZGERALD: Oh, I am so sorry.

JUDGE BARAITSER: Thank you very much. Mr Assange is now in the dock. Mr Fitzgerald.

MR FITZGERALD: Madam, I have prepared the note and if I can take you through the key points there in response to what my learned friend said yesterday and then deal with the points he has made today by reference to other notes. Madam, the basic position in relation to the 2003 Act is that it is our submission that the 2003 Act does not rule out reliance on a treaty protection against extradition for a political offence.

As you yourself observed, madam, there is a distinction between the express provisions of section 84(7) in respect of the prima facie test and the silence of the 2003 Act in relation to the political offence exception. I think my learned friend fairly accepted that there was a distinction between the two. That affords, we say, a sound basis to distinguish the decision in *Norris* from the facts of this case. Section 84(7) reflects a positive decision by Parliament to dispense with the prima facie test in respect of any part 2 territory which is then designated for the purposes of that subsection.

We know, for example, that America has - I think even Russia has - been designated under part 2 as a country that need not provide a prima facie case. That is in accordance with a positive decision by Parliament that, provided there is a designation, the prima facie test goes. An act of designation, in those circumstances, can do away with the prima facie test in accordance with Parliament's intent. By contrast, there is simply statutory silence on the issue of the political offence exception. That reflects no positive decision to dispense with it in all circumstances.

My learned friend has shown the history that clearly is a history that as between EU countries on the doctrine that no EU country would try someone for a political offence it has been removed. Madam, I would prefer not to use the word "abolition". One usually abolishes something which is odious such as slavery or capital punishment. One removes a protection which is a benign thing and so I think to talk about abolition is simply incorrect. It is true that Parliament has removed an express provision prohibiting extradition for political offences. It is true that that was present in earlier statutes, in the 1870 Act as my learned friend has just shown and in the 1989 Act.

Then, in the 1989 Act it is right to say that we need to read in that it was attenuated by the regulations my learned friend has shown so that it did not apply to EU countries. It did apply to other European countries. But it is possible to make sense of the removal of the former express provision for the political offence exception without, at the same time,

excluding the argument advanced here in reliance on the abuse jurisdiction and the alternative argument based on Article 5.

Madam, we say one can make sense of it in this way. By removing the express statutory provision for non-extradition for political offences, Parliament went no further than to ensure that it is not mandatory in every case; in other words, it is not something that in every case the court has to go through, that exercise, is this a political offence? Therefore, it is not a mandatory universal stage that the court has to go through. By removing it in that sense, it does not mean that what has been done is to remove all possible reliance on this important and fundamental protection where the protection can be derived from some other source such as the treaty that governs extradition to a particular country. Madam, I will deal with it.

My learned friend says that it is outdated. It is a funny thing to describe as outdated something which is recognised by the UN Model Treaty, that is recognised in every single US treaty, that is recognised in the Interpol statute, that is recognised in the London Agreement between Commonwealth countries, to say then, "oh, it is outdated". What was outdated was the failure to provide exceptions for violent or terrorist offences. But that has been done now. That was what was outdated, to say just because you throw a bomb in the course of an uprising at some totally innocent bystander that that is not a crime. But that has been dealt with. The *Castioni* problem has been dealt with.

But, in respect of non-violent offences, there is a clear and general approach in the UN Model Treaty, the Interpol statute, the London Agreement for Commonwealth countries and every single US treaty. So to describe that protection for political offences of a non-violent nature as out of date is a gross extravagance of language. The mere fact that the European Union acts on the basis that no European Union country will prosecute for a political offence, that doctrine, that theory does not actually detract from that general and generally accepted protection.

Indeed, it was a complete misdescription to say it has been removed in Europe. In any other Council of Europe country such as Russia it can still apply. Thus, where the treaty governing extradition to a particular country expressly provides that extradition should not be requested or permitted in respect of political offences, the treaty provision, we say, cannot be said to be of no legal relevance. Madam, I am just putting it as at 1.4. On the contrary, we say that the treaty protection is significant in at least two ways. Firstly, since the Treaty is the very basis on which extradition can be sought and granted, we would say ---

JUDGE BARAITSER: Just on that point, what do you say about Mr Lewis's point that in the

1989 Act the Treaty was, in fact, incorporated by orders of council, but that was removed in the 2003 Act?

MR FITZGERALD: The Treaty ---

JUDGE BARAITSER: So the Treaty is no longer the basis for the extradition, as it previously was.

MR FITZGERALD: Oh, you mean the Treaty was incorporated before?

JUDGE BARAITSER: Yes.

MR FITZGERALD: Well, madam, I accept that is a matter of significance but, before that, under the 1989 Act and the 1870 Act, you had to. Sorry, under the 1870 Act, the judge had to consider compliance with the Treaty.

JUDGE BARAITSER: Yes.

MR FITZGERALD: And then in the 1989 Act it was said, well, that is for the executive in the case of *Sinclair*. I accept that the Treaty is no longer incorporated into the statute. But, madam, what we say is that the Treaty is not of no legal significance because it is not incorporated into the statute. It is of different legal significance but ---

JUDGE BARAITSER: So whereas before it had significant legal importance, now it has a very different status since the 2003 Act?

MR FITZGERALD: Madam, I totally accept that. I accept that it is not incorporated into the statute itself, but to say that the Treaty, which is the very foundation of the application or the request, is of no legal significance is, in our respectful submission, going far too far.

Can I just explain why we say that. In (i) at 1.4, because the Treaty is the very basis on which extradition can be sought and granted we say that a request that violates the basic protection in the Treaty can be said to be an abuse of process and, putting it in other words, to accede to such a request where it is in the Treaty would be an abuse of process. It would be abuse.

In Roman I at 1.4, because the treaty is the very basis on which extradition can be sought and granted, we say that a request that violates the basic protection in the treaty can be said to be an abuse of process and, putting it in other words, to acceded to such a request where it is in the treaty would be an abuse of process. It would be abuse.

And we say it is a manipulation of the process for the requesting state to rely on the terms of a treaty when it, at the same time, proposes to violate a fundamental protection in that treaty, as is the case here. And you already have seen *Kashamu* and *Fuller*, saying that it is for the courts to protect against such manipulation, no longer for the executive.

But secondly, madam, and this is our second point: "Any detention, pursuant to the extradition quest must" – and I am quoting really from *Kashamu*, which was quoting from Lord Hope in the case of Evans – "must not only be lawful by reference to English domestic law" – so that can never, of itself, be sufficient – "but also be such as complies with the general requirements of the convention and is not open to criticism for arbitrariness."

Now, my learned friend, I think, was saying it could not be contrary to the basic requirements of the convention because of the EU treaty. But there is no equivalence between the European Convention of Human Rights, which dates back to 1950 and enshrines the most fundamental principles, and the EU. We are still members of the Convention of European Rights and we have been since 1950, even though we cease to be members of the EU.

JUDGE BARAITSER: But those are protected under the Extradition Act in any event. But those rights are protected – section 87 – in any event.

MR FITZGERALD: Exactly, madam, I am very grateful. That is exactly our point, is that the Article 5 right is protected in domestic law and we do have the House of Lords telling us exactly what Article 5 means in this context and then Lord Justice Rose applying what Article 5 means to the extradition context.

And he does not say, "If it complies with the statute, full stop, go home and send the person off," he says, "No, it has got to comply with the general requirements of the convention as well and not to be open to criticism for arbitrariness," otherwise it is incompatible of Article 5 and we are entitled, as you helpfully pointed out to me.

That is in section 87. We are not appealing to some international treaty alone; we are appealing to section 87 of a domestic statue which says that you have got to have regard to the Human Rights Convention.

JUDGE BARAITSER: But is your argument not circular? Because to have regard to the Human Rights Convention, you are asking me to have regard to Article 5. Article 5, as interpreted, indicates that detention cannot be unlawful, contrary to the convention or arbitrary.

MR FITZGERALD: Yes.

JUDGE BARAITSER: So it goes round in a circle.

MR FITZGERALD: Well, no, because my learned friend's argument is, provided it complies with the statute which has removed political offences, that is it.

JUDGE BARAITSER: Well, he is saying it is not unlawful under English domestic law because the treaty is not incorporated. It is compliant with the Human Rights Convention,

and it has to be – that is an argument you can make in due course under the Extradition Act – and is not arbitrary because there is an Extradition Act to ensure that it is not.

MR FITZGERALD: Well, that is the whole point about the non-arbitrariness and compliance of the convention point, is that you do not stop at saying it accords with primary legislation; you can go on to say, "Does that legislation, of itself, provide the sufficient guarantees?" And where there is a treaty which provides an additional protection, we would say it would be arbitrary to disregard the protections of the treaty.

JUDGE BARAITSER: So you are relying on the third, the arbitrariness of it ---

MR FITZGERALD: Yes.

JUDGE BARAITSER: --- in your argument, not the first two.

MR FITZGERALD: Well, madam, I do also say that it is inconsistent with the principles of the convention but ---

JUDGE BARAITSER: But is that an abuse argument or is that something you can substantively argue under section 87?

MR FITZGERALD: I see. Well, I say both, madam.

JUDGE BARAITSER: But they overlap entirely.

MR FITZGERALD: They do. I accept they do overlap.

JUDGE BARAITSER: So are you relying on the arbitrariness in the abuse context?

MR FITZGERALD: I am, yes.

JUDGE BARAITSER: All right.

MR FITZGERALD: And, indeed, that was why *Kashamu* found that the abuse jurisdiction had to be there because otherwise we would not comply with Article 5. I mean, that was the reasoning.

JUDGE BARAITSER: Yes. And you are saying it is arbitrary simply because it does not comply with the provision of a treaty.

MR FITZGERALD: Yes, exactly. They are relying on the treaty, on the one hand, it is the substratum of their application, and on the other hand they are inviting us to disregard it. That is the argument.

JUDGE BARAITSER: Just to be clear about the distinction between your Article 5 argument and your abuse of process argument.

MR FITZGERALD: Yes.

JUDGE BARAITSER: The abuse of process argument is founded upon a failure to comply with a provision of the treaty.

MR FITZGERALD: Yes, I accept.

JUDGE BARAITSER: So they overlap ---
MR FITZGERALD: Yes, they do. I accept.
JUDGE BARAITSER: --- as well.
MR FITZGERALD: Yes.
JUDGE BARAITSER: It all comes down to whether or not the treaty provides a right which there is any expectation of being enforced.
MR FITZGERALD: Yes, exactly. Madam, just stepping back for a moment. We are in a pretty strange Alice in Wonderland world where one says, "Yes, there is this treaty, which our country solemnly entered into with the US, governing extraditions sought by the US by the UK; yes, it does provide a political offence protection but it has got nothing to do with the lawfulness of extradition or the lawfulness of detention pursuant…"

On the face of it, it is a very bizarre argument that my learned friend is advancing, that a treaty which controls and gives rise to the request has got nothing to do with the lawfulness of the request or its pursuit or any order for detention. It just does not make any sense.

JUDGE BARAITSER: But his answer to you is, of course, that that treaty was signed by the executive authorities, not by Parliament, and that is why it has no force in law.
MR FITZGERALD: Yes. And, madam, my answer to that is it may not have domestic law force but, as I sought to show you yesterday, there are authorities which recognise that the existence of a convention conferring rights or a treaty conferring rights need not be disregarded when deciding whether detention is in violation of due process rights, protection of the law rights and, we would say, prescribed by law rights under Article 5 and under abuse. Madam, that ---
JUDGE BARAITSER: I just wanted to make sure that I had understood your position and I do, I think.
MR FITZGERALD: I am very grateful, madam. That is precisely the point that I am seeking to advance.

The second point that my learned friend made – and we have headlined it at 2 – is he said that the 2003 Act was a comprehensive code; ie, if it is not in the 2003 Act, it does not exist. He submitted it is a comprehensive code but already, just after the 17 years that we have been working with it, it has been shown to be far from comprehensive. Its provisions have had to be supplemented by the recognition of additional safeguards that are not expressly provided for in the Act.

And, madam, I know you know the history: *Birmingham* and *Tollman* say you have to read something in, the extra *Tollman* abuse, the *Birmingham* abuse protection, and *Fuller* talks about if it is pursued for a collateral process, then it is an abuse of process.

Then there is the *Zakrzewski* abuse, a new protection, again read into the Act, and a series of stages laid down by Lord Sumption in *Zakrzewski*. If it was a comprehensive code, you would not need Lord Sumption to say, "Zakrzewski abuse has these four pre-conditions". That did not come from the Act. It is nowhere in the Act. It came from the breast of the judge himself, saying it would be an abuse if they were allowed to get away with a total misstatement of the facts, as we say they have attempted to do here, suggesting things which are contradicted by their own evidence in a military court and suggesting things which can be easily falsified, and then to say, "Well, you have got no protection because there is nothing in the Act."

The answer is quite plain from the English Supreme Court that there is remedy. It does not come from the words of the Act; it comes from implying things in, in order to achieve justice.

The same is true with the doctrine of diplomatic immunity. That is not in the Act. There is nothing about diplomatic immunity in the Act but it is read in as a principle of public international law. It may be controversial with recent cases – I am not going to go into the details of that – but it has been read in, in the German case which we have cited and we can provide that.

So we say it is a non sequitur to contend, as Mr Lewis does, that by removing the political offence exception, Parliament necessarily intended to exclude any reliance on the general international law protection from extradition for political offences in any circumstances, even where the treaty expressly provides the protection.

Parliament, of course, can never envisage all the circumstances or all the situations that will arise but it must be deemed to allow for the operation of the abuse of process jurisdiction and the protections of the Human Rights Act, including Article 5. And, indeed, it so by section 87.

So in the same way, madam, we have illustrated this in the reply on abuse of process which is at tab 7, paragraphs 13 to 14. And without reading it all out, can I just – section 11(3c) of the 1989 Act expressly provided that extradition could be refused if it was sought in bad faith.

Now, they removed that specific statutory protection. But the courts have never suggested that by removing that, they removed the protection from a bad faith application. Nobody could even suggest that.

And it is clear that Parliament left the courts exercising the abuse of process jurisdiction and indeed acting under section 87 to make good any deficiency that resulted from the removal of that express or specific provision.

So we say nobody could say that Parliament, by removing that old express 11(3c) protection had abolished all protection against bad faith extraditions and to do so would involve interpreting Parliament's intent as without express statutory words removing a fundamental human rights protection.

Madam, my learned friend said that the abuse of process jurisdiction is very narrow. We say it protects against extradition requests, vitiated by collateral motives – it is not that narrow – it protects against manipulation or any violation of public international law. See the *Mullen* case which we have cited in the abuse application. So madam, we say that those points of my learned friend are without substance.

If we turn to our point four, my learned friend says that if we are right, then the court would be forced to interpret the treaty and he said there were insuperable problems to the court interpreting the treaty itself. But, in fact, in former times, that is precisely what the House of Lords recognised had to be done in respect of requests under the 1870 Act. We have set it out in footnote 23 and in the *Sotiriadis* case they said whichever protection is the greater, the Act or the treaty. So they were interpreting ---

JUDGE BARAITSER: They were. But again, I go back to the point. Is that not because those treaties were incorporated?

MR FITZGERALD: I accept that, madam. Of course, I accept there was that distinction. The only point I would make is, if there was something inherently impossible about the task of a court in England interpreting a treaty, then it would be a good point. But since they were doing it under the 1870 Act – look at Fothergill v Monarch Airlines. They were interpreting a treaty. And so it is not as if – and look at what we do with the European Convention of Human Rights. The courts interpret the provisions of a treaty.

So we say yes, of course, they do it because it has been domesticated, but it shows that it is not impossible for a court to interpret the terms of a treaty. So to his, "You could not possibly force a court to interpret a treaty," the answer is, "Yes, you can; courts have done it in many different respects and in many different context." And, indeed, whenever they interpret the words of the statute to give effect to the treaty if at all possible. The court is

then, "Look, well, what does the treaty mean, if I am going to allow inference by interpretation of primary legislation?" So it is a simple point, but we simply say that the idea that oh, my gosh, the court could not possible be required to interpret what a treaty means is falsified by centuries of the courts doing exactly that, and counsel for Mr Assange – that is to say, ourselves – we have not, Madam, placed any reliance on the doctrine of legitimate expectation. That is now how we put our case. So to the extent that my learned friend relied on *Arranz*, that is not a point that we advance. We advance it on the broader basis of the protection of law and the protection again non-arbitrariness.

Madam, that concludes those points. I now turn to the treaty protection, but could I just make this point? We do say that the treaty protection is part of an extensive treaty protection. Can I just give you two references in that regard: I think the *Jansson* article you have now got is at tab 42, and you will see, at the back of that *Jansson* article, there is the schedule of all the US treaties indicating that they all contain what is called the POE – there is a POE: Political Offence Exception in them, and that is in the appendix. Do you have that?

JUDGE BARAITSER: I am trying to ---

MR FITZGERALD: It is at the ---

JUDGE BARAITSER: You said 42?

MR FITZGERALD: So volume 3, tab 42.

JUDGE BARAITSER: Volume 3. Now, I know that was missing from my previous one, but it was handed up to me and I am trying to recall ---

MR FITZGERALD: Yeah. We handed it up this morning, I ---

JUDGE BARAITSER: Was it this morning?

MR FITZGERALD: Yes. The *Jansson* – I think we have got a further copy if necessary.

JUDGE BARAITSER: Well, do not need any more copies than I actually need. When it was handed up this morning, do you know what happened to it?

COURT OFFICIAL: Which one is it?

MR FITZGERALD: It is the *Jansson* – extract from the Jansson book, Terrorism ---

COURT OFFICIAL: But which bundle is it in?

MR FITZGERALD: What?

COURT OFFICIAL: Which bundle is it in?

JUDGE BARAITSER: Well, it was volume 3.

MR FITZGERALD: It should go into tab 42 in bundle 3.

JUDGE BARAITSER: It is in fact – I do recall my bundle ended at 41.

MR FITZGERALD: I see. Well, can we then just ---

JUDGE BARAITSER: But you then rectified it, but I cannot recall now in what format you rectified it.

MR FITZGERALD: Can we just hand it up to ---

COURT OFFICIAL: It was just incorporated into the bundle, so ---

JUDGE BARAITSER: Was it? Let us find volume 3 and see if we can find it. Thank you. It has been incorporated. That is very helpful.

MR FITZGERALD: I am grateful, Madam. So if you look – she deals with the WikiLeaks case itself and says that it is an example of a pure political offence. That is at page 201, and we obviously rely on that, but she also, in her appendix, which should be the next document after page 201, analyses all the US treaties and indicates that they all contain the political offence exception. So this is a very general application, and the other point is – I showed you the UN Model Treaty yesterday. At tab 46, there is the commentary ---

JUDGE BARAITSER: So do you want me to stay with tab 42 or put it to one side?

MR FITZGERALD: No. I am so sorry. That is it.

JUDGE BARAITSER: Right. So tab 46 now you are talking about?

MR FITZGERALD: Tab 46, Madam, yes.

JUDGE BARAITSER: And now I do run out again. Tab 43 is my last ---

MR FITZGERALD: That is in – it should be in a little additional bundle. The blue bundle.

JUDGE BARAITSER: I have the blue bundle.

MR FITZGERALD: The blue bundle. Yes. So, Madam, it is in that blue bundle and it is the – you have the UN Draft Treaty which contains mandatory – mandatory – grounds for refusal (a) if the offence is an offence of a political nature and then, at tab 46, you have got the revised manual on it, and can I just give you the references? What those references make clear is that there is a general acceptance in the world community that if it is a non-violent offence of a political nature, then that is a proper basis for refusing extradition. You can see that at paragraph 41, under the heading "Purpose".

> "Subparagraph (a) provides protection against extradition for certain criminal activities undertaken in a political context that are regarded by the requested State of offences of a political nature. Extradition for a non-violent, pure political offence, such as prohibited criminal slander by a political opponent or banned political activity might embroil the requested State in the domestic politics of the State requesting extradition where today's dissidents may be tomorrow's governing class. Values

> of political tolerance and free speech may make a government reluctant to grant extradition for such offences. The community of nations has generally accepted without undue complaint a refusal to extradite for such non-violent purely military or political offences, pursuant to treaty or domestic legislation."

In other words, it is referring to the practice of the community of nations to accept that if it is non-violent and political, there is a fundamental principle against extradition. And, Madam – so that is the point we make in relation to my learned friend saying this is out of date and limited. We say the particular course taken on the presumption that no one would seek extradition for a political offence in EU countries is not a guide to the general principle of law that we invoke.

And then, Madam, my learned friend then made certain submissions about the political offence protection. He stated that the US and UK understand the protection from extradition for political offences to cover only protection from extradition for relative political offences. We say in reply, all the leading cases – including *Schtraks* and *Cheng*, which he relies on – expressly mention the protection from extradition for pure political offences. The reason they did not, in those cases, go into detailed analysis of that protection was because pure political offences were not in the list. So they did not have to, but they always said that there is that protection against extradition for pure political offences, as a matter of international law. And *Bassuni*, the leading US authority on extradition expressly talks of protection from extradition for purely political offences and again, the Australian cases talk about that.

Now, we say that the mere fact that the emphasis has been on the more controversial, relative political cases in the caselaw is because they are not seeking extradition for pure political offences at all. So you did not need to analyse the situation. It was simply self-evident and stated in *Schtraks* and *Cheng*. In any event, we submit there can be no doubt that the alleged conduct of Mr Assange satisfies the test for a pure political offence and, Madam, we did not just say because it alleges espionage, that is it. We did make the point that their own definition in the indictment meets the test of a pure political offence and that that is the first ground on which we rely, but we also analysed the substance of the allegation, and the substance of the allegation against Mr Assange, as we have set out the skeleton argument, is of an offence against the government itself and all the cases say that that is why pure political offences are exempted, because they are offences against the government itself. Madam, we also say that in any event, even if we adopt the relative political offence test ---

JUDGE BARAITSER: Just before you move on: *Cheng*, from my memory, having just been shown it, does not say that. It talks about political struggle. Did you accept that – *Chang* as the definition?

MR FITZGERALD: Yes. Sorry. Are talking about relative political offences?

JUDGE BARAITSER: Well, Mr Lewis would have me not categorise them as relative or pure, but it was political offences in general.

MR FITZGERALD: Right. Well, what it says in *Cheng* is that it – I will take you to the passage, because we have set it out in our skeleton.

JUDGE BARAITSER: Well, Mr Lewis already did, earlier this morning.

MR FITZGERALD: Well, it is "or induce a change of government policy." "Or induce a change of government policy."

JUDGE BARAITSER: Yes.

MR FITZGERALD: Indeed, the whole point that we respectfully made was that, if one looks at *Schtraks*, at *Cheng* and at *Provato*, one by one, all of them expressly say that it includes seeking to induce a change of government policy.

JUDGE BARAITSER: Yes.

MR FITZGERALD: And indeed, *Provato* says, looking back at *Schtraks* and *Cheng*, that that is now quite settkled, that it does not have to be in the course of an uprising, it does not have to be in the course of a struggle between two contesting parties for control of the state. It can extend to seeking to induce a change of government policy. Otherwise, it would not have even been a debate in *Schtraks*.

JUDGE BARAITSER: And why do you say the allegations against Mr Assange are seeking to induce a change of government policy rather than expose government wrongdoing?

MR FITZGERALD: Well, because the two are intimately connected, we respectfully submit. Why was he seeking to expose the Rules of Engagement. I mean, that is one of the things he is alleged to have unlawfully received and published them. They are referred to in the indictment, whatever my learned friend says. The indictment isn't just counts 15 to 17. The Rules of Engagement were published to show that war crimes were being committed that breached their own Rules of Engagements. The Guantanamo detainee files were published to show that there were abuses of human rights and torture being done in the name of the war on terror. It is the very definition of seeking to induce a government to change its policy and if there is any doubt about that, one can see that in Professor Rogers analysis at tab 40, he sets out that this was to change government policy. It is at 8C. Paragraph 8C and paragraph 11, he sets out.

What other purpose could there be to publishing the Rules of Engagement as well as the Apache strike? For them to show that the war was being waged in a way that conflicted with fundamental human rights. What other point could there be to the Guantanamo detainee files than to induce a change of government policy in respect of Guantanamo. And the same goes for the revelations about civilian deaths in the Iraq war. Again, to induce a change in policy and moreover, what Professor Rogers says is he did not just seek to induce a change. He did - WikiLeaks did effect a change because it was one of the reasons why policy was changed. And why there was a withdrawal.

And so madam, also, we will in due course say that the US have frequently said that WikiLeaks, I quote, "opposes US policy in Afghanistan. So we say, and madam I accept that in relation to the relative political crime that the court look sat the indictment - at what they are saying in the indictment - but also looks at the whole picture. We say that it is self-evident that this is a relative political offence in the sense accepted in *Schtraks*, in *Cheng* and in *Provato*, of seeking to induce a change in government policy. So madam, those really are the submissions I make in response to my learned friend unless I am ---

JUDGE BARAITSER: No. You have been very helpful. Thank you Mr Fitzgerald. Now, is there anything else that arises? Mr Summers.

MR SUMMERS: Yes. You invited us yesterday to deal with the issue of your jurisdiction in relation to Mr Assange's placement in the dock.

JUDGE BARAITSER: Yes.

MR SUMMERS: We have provided you with an outline of where your jurisdiction lies and it is something to which I would like to turn.

JUDGE BARAITSER: Yes.

MR SUMMERS: What it needs to be accompanied with, however, is a bundle of materials to which we refer. That, for logistical reasons, is at court but is not yet before you. May I invite you to pause now and resume at 2 o'clock and we can deal with that particular issue, please.

JUDGE BARAITSER: Yes. Now, the remaining issue was anonymity. Has agreement been reached in relation to the two witness ---

MR FITZGERALD: Madam, I think fruitful discussions are continuing. I look at my learned friend and see a smile which is always pleasant but, madam, I hope that we will be able to come up with a proposal which will resolve the problem. If not, of course, we may have to invite the court to give a ruling but ---

JUDGE BARAITSER: Will that be by 2 o'clock, the agreement, if there is to be one?

MR FITZGERALD: Because we may have to discuss such things as confidentiality rings

and all that, it may take some time.

JUDGE BARAITSER: I assumed anonymity was one of the issues that was going to be dealt with this week.

MR FITZGERALD: Well, madam, if necessary, we can deal with it, but if you do not need to give a ruling because we can, between the parties, achieve a resolution of it, I would have thought perhaps it would be - well, I would respectfully suggest that it might be wiser to see if we can agree something and only if we cannot invite you to give a ruling.

JUDGE BARAITSER: How long do you think that will take?

MR FITZGERALD: Can I just indicate what the problem may be. We have the Spanish court saying that their anonymous names should not be called. Of course, *Schtraks* and *B* say you can have anonymous evidence but it would go to the weight of the evidence, so it would be admissible. But the question is whether, in fact, in order that the court has the full assistance of the evidence, it would be better if my learned friend has the opportunity to test that evidence.

As I understand it, my learned friend may also be considering the question of whether it is necessary to test the evidence. Given all those imponderables, I regret that we cannot deal with it this week, but I would respectfully suggest that if we had a whole day's argument on the extent of *Schtraks* and *B* and natural justice and all that and, in fact, then two weeks later we could have reached a satisfactory resolution.

JUDGE BARAITSER: Let me just ask Mr Lewis his views. Do you agree that there is a good prospect of agreement on this issue?

MR LEWIS: We have effectively made an agreement in principle. I am happy to tell the court what that is, subject to my learned friend's agreement. We would be content if the names of the witnesses was communicated confidentially to the prosecution and to the court but just simply not made public. That is often the course of procedure which is taken and, if necessary, the court can always make a section 11 Contempt of Court Act order for any matter which has been withheld from the public. It is very common in matters to deal with it in that way and it seems to us to be quite simple: as long as we know they are but we will not publish it and, madam, you know who they are.

JUDGE BARAITSER: And would they give evidence without screens?

MR LEWIS: We have not crossed that bridge, but I do not think it is anything we would particularly take a strong view against or on.

JUDGE BARAITSER: So ---

MR LEWIS: In fact, madam, I mean - no, I will say no more than that.

JUDGE BARAITSER: So restrictions in relation to reporting their names; restrictions in relation to anyone other than the prosecution, the defence and court knowing their names; anonymity in the sense that they may or may not have screens, and no more than that.

MR LEWIS: Madam, that is right. Because, technically, if we know their names they are not anonymous. So it is not an anonymity application. It is simply a non-publication application which is very straightforward and very common.

MR FITZGERALD: Madam, we may have to consider the question of screens. Obviously, you as the fact-finder would need to see them. The only other issue is how wide the definition of the prosecution goes and I know my learned friend will take a helpful and cooperative view on that and it may be that we can reach agreement. But there are some circumstances - for example, it was done in the Chagos Islands case - where there is a confidentiality ring that does not extend to the whole state, as it were.

Obviously, we would be concerned about disclosure beyond responsible persons in the prosecution - and, of course, my learned friend or his colleagues are, of course, beyond impeachment - but the question is how far in the US State the revelations would go. That is something which we would welcome the opportunity to discuss with my learned friend and see if we can reach agreement that is acceptable to everybody.

JUDGE BARAITSER: Since there is a slightly longer lunch break than usual, can I ask for you to agree directions going forward. Even if I do not insist on a timetable this week, I do insist on directions ---

MR FITZGERALD: Yes.

JUDGE BARAITSER: --- and it is easier for the court if they are agreed between two of you.

MR FITZGERALD: Yes, yes.

JUDGE BARAITSER: I wonder if you can arrange for that.

MR FITZGERALD: Madam, we will.

JUDGE BARAITSER: Thank you. 2 o'clock then, please.

(Luncheon adjournment)

(Court resumed at 14.06)

JUDGE BARAITSER: Yes. Thank you very much. Yes, Mr Summers?

MR SUMMERS: Thank you. Madam, before I begin, can I firstly thank the court for attempting to help ameliorate the problems that we are now going to discuss, through the offer of headphones?

Unfortunately, they do not help. When we are all talking into the microphones, Mr Assange can hear anyway. When we are not, it is difficult for him to hear. And with the

headphones on, his ears are covered and the headphones are feeding ambient noise into his ears, such as typing and the like, without what he needs to hear coming through the headphones. So we are grateful, madam, but it is not the solution.

Madam, secure docks, such as we have in this court, have been the subject of reports, review and commentary for some time. They are a recent advent in the English courts; 20 years ago, they did not exist, but they are now everywhere.

Madam, you have in the short volume of materials that we have provided to you, at tab 9, a report from 2005 concerning the problems, so far as a fair trial is concerned, of this phenomenon. You have, about three pages in, madam, the executive summary to this report. They are common. They only began in the late 1970s and arrived in the form that we now all see them, in about 2000. There is no statutory requirement for them. Human rights bodies, such as Justice, are concerned that they impact on the right to a fair trial. They can impinge on a defendant's ability to participate effectively. Other jurisdictions have got rid of them for that very reason, including in the USA.

Now, madam, there are a number of problems with secure docks in general. I do not intend to go through them in any great detail; but in a trial, and this is not a trial, they convey messages to a jury which can impact not only on a defendant's dignity, but on the presumption of innocence.

But the weight of this report is that they can affect effective participation in the proceedings; and that is what we are concerned with here, madam; and in particular, they can impinge on and prevent proper communication in a confidential way with legal representatives.

Now madam, we have now been in this court for four days, and Mr Assange has dealt with those four days stoically. But it is undeniable, so far as this side of the court is concerned, that there are problems with what is going on in these proceedings. They are cumulative problems. They arise from a number of factors.

Firstly, they arise because Mr Assange is a vulnerable person. You are aware of the psychiatric evidence in this case. He carries those burdens. Secondly, this case, on any view, is litigating issues of magnitude. One need only look at the volume of materials in this case to begin to understand that. Thirdly, these, unlike domestic proceedings, are proceedings in which we bear the burden. And lastly, they are all being conducted, madam, in this physical building with its practical issues.

Now, to state those practical issues. The dock in this court sits behind the lawyers; we cannot see Mr Assange. We cannot see when he wants to communicate with us. You can.

But it is happenstance if we notice that he wishes to communicate with us. There is a physical barrier between us and him.

JUDGE BARAITSER: Can I just ask. Those on the back row, who are they? Are they members of the legal defence team?

MR SUMMERS: Yes.

JUDGE BARAITSER: I know you say who they are, in fact, but are they members of your team?

MR SUMMERS: Yes.

JUDGE BARAITSER: So the proximity of those people and Mr Assange is quite close.

MR SUMMERS: It is reasonably close. But one cannot lean back and have a conversation. There is a passageway between them and the dock.

JUDGE BARAITSER: Yes, there is. But you may not have observed this, Mr Summers, but I have certainly observed Mr Assange attracting the attention of those on the back row; and quite easily and quite readily.

MR SUMMERS: Well, I am grateful for that. What they cannot do is pass notes in to him; that is one of the rules of this particular courtroom.

JUDGE BARAITSER: That is interesting, and it might be something that can be resolved by a conversation with the supervisor of Serco who I understand is the company contracted to deal with those imprisoned in the court, rather than in the prison. So it may be that Serco, the supervisor, can be asked in relation to documents coming in, for example, from Mr Assange to read them and to hand them back, before he is taken downstairs to a cell.

MR SUMMERS: Well ---

JUDGE BARAITSER: So there are practical ways around some of the issues that you have raised.

MR SUMMERS: I am grateful for that. So far, madam, you have declined to engage yourself with issues such as this, so I am conveying to you now the problem that we are now faced with. The ability to speak confidentially through those glass slats is difficult.

JUDGE BARAITSER: Yes.

MR SUMMERS: Those conversations, because of the layout of this court, have to happen in proximity to prison guards, representatives of the US government and in the presence of microphones. Now, I pause to simply make this observation: that the presence of the microphones in that legal discussion is a matter of some concern, both to Mr Assange and to his lawyers, given the evidence you have in this case about secret recordings.

JUDGE BARAITSER: Mr Summers, have I ever stopped any request for you to go

downstairs and take instructions from your client or, in fact, as today, not agreed to start late to enable you to take as many instructions as fully as you might wish to?

MR SUMMERS: Madam, I do not want there to be a misunderstanding. This is not a criticism of how you are conducting this case.

JUDGE BARAITSER: Oh no. I mean, going forward. Going forward.

MR SUMMERS: But going forward, we have borne these issues for this week, largely because these are legal arguments. When we return in May, there is going to be evidence heard in which Mr Assange is centrally placed to assist us. His instructions are going to be frequent.

JUDGE BARAITSER: Yes, Mr Summers.

MR SUMMERS: Much more than today.

JUDGE BARAITSER: One measure to assist with that is to enable as many and as frequent breaks as are asked for, for you to go downstairs to speak to your client. If a three week hearing becomes a six week hearing, as a result, to ensure fairness to your client, then of course that is a measure available to this court to deal with that problem.

MR SUMMERS: It may be that I am not properly conveying the enormity of Mr Assange's inability so far to communicate with us on an ongoing basis during the currency of these proceedings; and equally I fear I am not properly conveying what is going to be necessary in an evidential hearing, where live evidence is being called. The idea that we will stop every three minutes, rise, all tramp downstairs into the cells to hear what Mr Assange says about that particular piece of evidence and then all tramp up 20 minutes later and reconvene for another two minutes evidence, certainly is not one that I have ever heard mooted before.

JUDGE BARAITSER: Well, Mr Summers, there is a combination, is there not, of frequent breaks and written communications.

MR SUMMERS: That is ---

JUDGE BARAITSER: And of course, this is something that can be kept under review during the course of the hearing to see how it works.

MR SUMMERS: Well, that is, with respect ---

JUDGE BARAITSER: But there are other proper measures that can be taken to deal with the objections that you have raised so far.

MR SUMMERS: And that is what I am going to come on to. Well, not with the physical layout of this building.

JUDGE BARAITSER: So that is a good example, Mr Summers. Mr Assange has just stood up. Ms Peirce has just gone over to the dock to take his instructions. This is how the system

is working and if that needs to be in private, then I am very happy to rise.
MR SUMMERS: But it is not in private, madam.
JUDGE BARAITSER: And for them to go downstairs.
MR SUMMERS: It is overheard by microphones and it can be overheard by those representing the US government.
JUDGE BARAITSER: No, you misheard me. I said: if it needs to be in private, then it can be done downstairs; or I can clear the court. There are a number of ways which do not require your client coming out of a secure dock to sit in the well of the court to meet the real concerns that you have. I understand they are real concerns and fairness, as you rightly point out, is at the heart of this, to deal with cases justly and fairly. But there are other measures than bringing him out of the dock, the secure dock, that can meet those concerns. I will let you speak. I will try not to interrupt again.
MR SUMMERS: Madam, can I take you to what Strasbourg has to say about glass boxes such as this, and the hearings with which we have been involved for the past four days? And may I say at the very outset that this authority does not concern either a vulnerable defendant, one on medication who is struggling to follow the proceedings, or one who can sometimes, if we all happen to be close enough to the microphone, follow what is being heard.

Madam, in *Belousov* at tab 6, paragraph 74, a trial in Russia in which defendants were participating, and I use the word loosely, in a trial before the Moscow City Court in what is called a glass cabin; bulletproof glass, as here. The walls of the cabin had slots allowing documents to be passed, as here, between the defendants and their counsel. It was equipped with microphones, as here. Of course, this was not a case where there were general issues with eavesdropping on privileged conversations.

The layout there, paragraph 74, as here, makes it difficult for counsel to consult during the course of the hearing. Paragraph 76 was the next courtroom into which that case moved; less cramped conditions, two glass cabins of a similar nature. And madam, the European Court found that those glass cabins, insofar as they were cramped and they had ten people stuffed into one of them, violated Article 3. But importantly for our purposes, both of those courtrooms, and the circumstances that we have described, were bound to violate Article 6. And I say that because this postdated the Justice Report which raised these very concerns.

Madam, do you have paragraph 146 before you? The court here is concerned with a hearing in which the principal complaint now is hindering participation in the hearing and hampering contact with legal advisers; and that is what we say has occurred here. And whilst

of course we understand that the court wishes to assist us ameliorate the problems with which we are faced at the moment, none of those are going to remove it.

Madam, the court noted at 146 that glass cabins there, as here, were permanent court installations. They were, just for your note, intended to be an improvement on what had preceded them in Russia, which was metal cages. 147, the first room, the fact that the glass cabin violated Article 3 also led to an Article 6 violation in its own right. 148, however, through, madam, and onwards, concerns the second room which was held to be Article 3 compliant.

"The court reiterated [149] that a measure of confinement may have an impact on the exercise of an accused's right to participate effectively in the proceedings and to receive practical and effective legal assistance."

Madam, that is the complaint we make.

"The right to communicate with a lawyer without risk of being overheard by a third party is one of the basic requirements of a fair trial."

And however, madam, one attempts to ameliorate what is happening in this court, communication through the dock during the course of the hearing is one that attracts an ability to be overheard by third parties.

The only solution, madam, that we have discussed this afternoon that could conceivably avoid that is breaking the course of this hearing every three minutes to disappear for 20 minutes downstairs to hear what Mr Assange might want to say about that.

JUDGE BARAITSER: I have to say, Mr Summers, that is an exaggeration; breaking every three minutes for 20 minutes.

MR SUMMERS: Sorry?

JUDGE BARAITSER: I would have to say that was an exaggeration, breaking every three minutes for 20 minutes.

MR SUMMERS: Well, we will see. But I do not know whether you have been down to the cells in this building or attempted to get into them.

JUDGE BARAITSER: No, I have not.

MR SUMMERS: Or gone through the security procedures.

Madam, the court, 150, was of course mindful of security issues. But given the importance attached to the rights of the defence, any measures restricting participation in the proceedings or imposing limitations on them can only be imposed insofar as necessary and is proportionate.

And then at 151 through to 153, the court explains why the set-up, that is

indistinguishable from the set-up that we have in this room, was a violation of Article 6. The applicant was separated from the rest of the room by glass, a physical barrier, which to some extent reduced their direct involvement in the hearing; and made it impossible for him to have confidential exchanges with his legal counsel to whom he could only speak through a microphone and in close proximity to police guards. It was not equipped to handle the passing of documents.

Madam, in short, and one can read paragraphs 142 and 143, the European Court regarded that set-up as entirely incompatible with the principles of a fair hearing.

And your jurisdiction, of course, by section 77 of the Extradition Act, is precisely the same as would pertain in a trial.

Madam, we remind you of Mr Assange's particular vulnerability. We are particularly concerned with the evidence hearing that must begin in May, and the steps that we invite you to take to ameliorate that are ones that we believe would not interfere with the proper flowing of the evidence in this case. It is as much in our interests as it is the court's for the evidence in May to flow properly. If it is interrupted in the way that we fear it is going to be, then not only will Mr Assange's ability to participate in the hearing be an issue, but his ability to have his evidence presented before you in a coherent and proper manner will be in jeopardy as well.

The solution that we invite you to undertake is one that is, to put it bluntly, familiar to most of the rest of the world. In Ireland, defendants sit with their counsel in any criminal case; in the Netherlands, in America. It is an issue that is discussed in detail at pages 8 through 11 of the Justice Report. And the practice around the world is, generally speaking, that defendants sit alongside their lawyers in court.

Now, madam, you asked us yesterday to explore two questions with you. The first was whether this necessitated an application for bail. I think you expressed the view yesterday that only those in the dock are in custody and I may have misunderstood, but I thought when Mr Lewis suggested that may be wrong, you disagreed. In fact, Mr Lewis was entirely right.

JUDGE BARAITSER: No, that is surrendering to the dock; surrendering to the dock in a Crown Court.

MR SUMMERS: Well, that is also wrong. The law, as it has been certainly for the last nine years, is as per evidence; surrendering to the dock is one method in the Crown Court of surrendering yourself to custody. The commencement of the hearing is another matter. And the distinction is important and ---

JUDGE BARAITSER: Just to be clear, Mr Summers. That is what was being mooted

yesterday. We were talking about surrendering to the dock, just so that you are clear about what the discussion was yesterday.

MR SUMMERS: I heard the discussion, madam, and I heard discussion that proceeded along the lines that that was the only way in which somebody could be in custody in a Crown Court.

JUDGE BARAITSER: The initial point of departure was about surrendering to the custody of the dock. Mr Lewis thought perhaps you could surrender by speaking to an usher at the door. I was not certain about this, but my view was that you needed to surrender to the dock, in order to surrender yourself in the first instance. It did not follow from that, in relation to the hearing, what the position of the defendant was. And that is what I asked you to investigate and you indeed have.

MR SUMMERS: We have investigated, madam. So far as the legal position is concerned, it is clear. Somebody can be in custody in this room, without being in that glass cabin. It is frequently the case that those in the custody of the court are not in the dock itself. Madam, the authorities on this are legion and now mercifully clear: that one surrenders to the custody of the court either by entering the dock or by the commencement of a hearing. And the latter option exists as a matter of principle.

JUDGE BARAITSER: If it helps you, having read your helpful skeleton this morning, I entirely accept that.

MR SUMMERS: Well, I am grateful. My point is this: that the reason that the situation is flexible in that way is to cater for precisely this type of situation. The court in *Evans* understood and recognised that, particularly for vulnerable defendants whose participation is compromised, the ability to sit in the well of the court is an important one; and it is thus, at paragraph 27 of *Evans*, that the Court of Appeal made clear that for vulnerable defendants, there is no requirement at all necessarily to enter the dock. And of course, you are aware that one can be in custody, even if one is wandering around out of the concourse or enjoying the delights of the court canteen. We feel like we are all in prison; but some people genuinely are.

Madam, my point is this: that the concept of being in custody is a loose one; and defendants frequently are in the well of the court, whilst being in custody. The issue, of course, is whether they are being properly supervised by prison officials. Certainly we have long experience of defendants either sitting in the well of the court, in the way that I am proposing should happen, or entering the witness box for weeks on end, in this very courtroom.

Madam, so far as your jurisdiction to take the steps ---

JUDGE BARAITSER: Again, that was something I did ask for your advice on, and I have read your skeleton and I entirely accept I do have the jurisdiction, if that helps you.

MR SUMMERS: Madam, not only do you have the jurisdiction, but it is "the normal course" for vulnerable defendants, according to the criminal practice directions. And madam, so far as the higher courts are concerned, can I just direct your attention briefly, please, to *Evans*, tab 3, at paragraphs 21 to 23, where the Court of Appeal discusses examples of cases proceeding in the Crown Court, without the defendant being in the usual place in the dock, flanked by custody officers. They apparently come readily to mind to Hughes LJ, as he then was. Hughes LJ makes the point that they are expressly contemplated by the criminal practice direction. 22, similar arrangements ---

JUDGE BARAITSER: Can you just pause.

MR SUMMERS: Similar arrangements ---

JUDGE BARAITSER: Can you just pause for a moment. I have not read *Evans*, but can you just confirm that these examples relate to defendants who are in custody, who have been remanded into custody?

MR SUMMERS: Yes, yes, of course.

JUDGE BARAITSER: Yes.

MR SUMMERS: Similar arrangements are infrequently, but not all that rarely, made for defendants who are, for example, very infirm or very elderly or need physically to be separated by someone by whom they would otherwise have to sit in a dock. And then there are short hearings where being in the dock is entirely unnecessary at all.

My point is this: that what we are asking for in this case is not only brought about by the situation in which we find ourselves, and whilst we appreciate the court's offer of assistance, we find it difficult to understand how it is practically going to be resolved otherwise. But what we are asking for is regarded by the criminal practice direction and the courts as not unusual.

Madam, if I am right about the lack of any necessity here for bail to be invoked, because bail is a completely blunt instrument in this particular situation and it would remove all ability to cater for security arrangements or the like, but what is being proposed is a far more nuanced and reasonable and proportionate response to the situation we face.

But if I am right about bail being unnecessary, the concept of custody being entirely sufficiently flexible to cater for what is being proposed and if I am right about your jurisdiction, then the next question, madam, is: it can happen. So far as we understand it, the

prison authorities can make it achievable. So far as we understand it, the US government do not object to what we propose. In the circumstances, in the interests of the overriding objective, in the interests of this particular case and the difficulties, the unusual difficulties it presents, and in the interests of justice, we invite you, madam, to adopt the course that is contemplated in the practice directions, in the authorities and to permit Mr Assange to sit with us and enjoy free, uninterrupted, un-overheard conversations with his lawyers about the evidence that he will see unfolding in May.

Now can I make it expressly clear, finally, because you raised this as well yesterday, that what we are seeking is not exceptional treatment or different treatment from anyone else in extradition proceedings. What we are seeking is exactly the same as would be sought for any vulnerable defendant with this defendant's psychiatric burdens, litigating issues of this magnitude in extradition proceedings where the burden is on him to make out his case in this building with all its practical difficulties which inhibit confidential discussions with lawyers during the case.

JUDGE BARAITSER: Now, Mr Summers, Ms Peirce is just taking instructions from Mr Assange and she is handing you her instructions that she has just taken.

MR FITZGERALD: Yes, madam. We cannot have an evidential hearing that carries on like this ---

DEFENDANT: That's exactly the problem ---

JUDGE BARAITSER: Sorry, Mr Assange.

DEFENDANT: That's exactly the problem.

JUDGE BARAITSER: We have spoken about this before.

DEFENDANT: You can see it. You can see when I am worried about something, that is exactly the problem. I can't get clarification.

JUDGE BARAITSER: When someone is well-represented, as I have said to you twice before this week as you are, with two QCs representing you ---

DEFENDANT: I'm not able to guide the representation.

JUDGE BARAITSER: --- then it is generally the case that it is those that represent you that speak on your behalf. That is the situation as was yesterday and on Monday and that remains the case today. If you have something to say, please communicate it through your lawyers.

DEFENDANT: That's the problem. I can't speak to my lawyers.

MR SUMMERS: If I could speak to him, of course, I would, but the problem, madam, is that I did not see this happen. I am addressing you and I do not understand that Mr Assange wants me to stop and wants to speak to me, I carry on. And the fact, madam, that that type of

thing occurs in circumstances where it would be entirely open to you to permit him to sit with us and talk confidentially with us and in circumstances where the very act of asking to speak to us indicates to others that there is a point to be had at that point of the evidence, and in circumstances where it all can be overheard, is entirely unsatisfactory, entirely unnecessary, madam.

We invite you to implement a system that is well-recognised in this country, is universal elsewhere in the globe, and would permit him confidential, discreet access to his lawyers for instruction-taking and providing that does not interrupt the processes of the court or the evidence that is going to be heard in due course. All of this, madam, is entirely unnecessary. There is a system that can be put in place. The court can accommodate it. The US Government do not object to it. There is a system that can be put in place, madam, in which that kind of discussion and instruction and notes provided can happen without interfering with the smooth running of the court.

We invite you, madam, in the exercise of your unquestionable jurisdiction to do so, to take those steps to enable Mr Assange to participate properly in these proceedings, rather than in the way that we witness as these proceedings continue. Madam, can I assist further.

JUDGE BARAITSER: Thank you. Mr Lewis, I note your neutrality and I am sure there is no need for you to have any input into this particular part of the hearing, but do you agree with that?

MR LEWIS: Yes, madam.

JUDGE BARAITSER: Thank you.

MR SUMMERS: Madam, can I add before I sit down that we have, as I imagine you would expect us to, discussed the practical arrangements that would be necessary with the prison staff and we are confident that there are arrangements that are proportionate and unobtrusive that can be put in place and we invite you to hear them and to hear them from the prison staff.

JUDGE BARAITSER: When you say "prison", do you mean HMP prison?

MR SUMMERS: I mean the custody staff who have conduct of the security in this court.

JUDGE BARAITSER: Do you realise they are not prison officers, they are Serco officers?

MR SUMMERS: If there is a difference, madam, I ---

JUDGE BARAITSER: There is a difference.

MR SUMMERS: They are the people who would be providing you with the answer to the enquiry I ask you to make.

JUDGE BARAITSER: Well, thank you very much. As Mr Summers has rightly pointed out, Mr Assange, this court has an overriding objective, which is that it must deal with cases

justly. This includes dealing with the prosecution and the defence fairly and recognising your rights, the rights of the defendant, to a fair trial and to Article 6 rights. Mr Summers in his skeleton argument which he produced this morning identified six matters which he submits cumulatively lead to you at times being unable, in Mr Summers's words, to participate to the extent that you and your legal team require.

Regarding his first point, the physical layout of the court and the distance this places between you and your legal team; well, as has been pointed out, your legal team includes those sitting in the back row of these benches and it is quite apparent to me during the course of the last four days that you have had no difficulty at all in attracting the attention of those that sit on your legal team and communicating with them via notes and that, as a result of your communication, Ms Peirce and other members of the team have spoken to you at your request.

In relation to poor acoustics and the proximity to audible protests outside this court; well, up until now I have kept that situation under review. There have been disturbances during the course of the past four days outside court. I have asked you to raise your hand if there was at any time a time when you could not hear everything that had been said. On several occasions that is exactly what you did and that part of the proceedings were repeated for your benefit to make sure that you did hear every part of the hearing.

I also asked counsel to indicate if the noise in any way affected their presentation of the case and they have not said that it has. You have been provided with headphones or a headphone system which I am told amplifies the ambient sound. Mr Summers says it did not help. You have declined to use those headphones, but you have not made any indication other than the several occasions which I have referred to a moment ago to indicate that you could not hear each and every part of these proceedings.

If there comes a time when you cannot hear, I have already asked you to indicate and no doubt you will. This court routinely accommodates defendants in custody who follow the proceedings from the secure dock. If you are unable to hear me, then I have no doubt that you will let me know and measures perhaps can be put in place to ensure that you can.

Regarding three aspects of the six, they can perhaps be taken together: restrictions on passing notes, limitations on legal visits outside this courtroom and the presence of others in the courtroom who are impacting on the ability of your lawyers to have private conversations with you. Well, there are measures which are proportionate which can be taken to ensure that you have proper and adequate access to your lawyers. I have already indicated the types of measures I have in mind. On request of your lawyers, I am very happy to start the

proceedings later than usual to enable them to take your instructions at the beginning of the day.

During the course of the proceedings, every hour if need be, I am very happy for your lawyers to go and speak to you in private in the cells of the court in order to take your instructions and provide any legal advice that you need to. If that results in the proceedings extending from the current three weeks for which they are listed to a much longer period, then I am more than happy to accommodate that.

Regarding your what is described as precarious psychiatric vulnerability, I have not been told of any particular aspect of your condition that requires you to leave the secure dock and to sit next to your legal team. There is no need, on the information that I have currently before me, to take that measure. In my view, there are sensible, appropriate and proportionate measures that can, and if necessary will, be taken to ensure that you fully participate in your hearing. I will keep these measures under review as the case progresses to ensure that this hearing is both fair and compliant with your Article 6 rights.

So I refuse the application to take the measure to allow you to come out of the dock and sit in the well of the court, but there are other measures that will be taken on application by your lawyers to ensure that your hearing is fair and in accordance with Article 6. Is there anything else I need to deal with this afternoon?

MR FITZGERALD: Madam, you did invite us to prepare draft directions ---

JUDGE BARAITSER: Yes, I did.

MR FITZGERALD: --- dealing with the question of how we would dispose with the problem of the anonymous witnesses. We have prepared, in consultation with the prosecution, a short direction ---

JUDGE BARAITSER: What I wanted was draft directions in relation to when the timetable would be available.

MR FITZGERALD: Well ---

JUDGE BARAITSER: You did not want it to be rushed and I understood that.

MR FITZGERALD: Yes, well ---

JUDGE BARAITSER: But I need to know when it is going to be available.

MR FITZGERALD: What we were proposing, madam, is this, that on the last Friday in March I think is the date that all the evidence will have been served by the prosecution.

JUDGE BARAITSER: Yes.

MR FITZGERALD: We will have had time to respond that. We would respectfully suggest that it might be appropriate to have a case management hearing. For that hearing, we would

obviously see if we can provide a provisional witness list for the court and then discuss that. That is because it suits the prosecution, whose psychiatric witnesses will not have reported until I think towards the end of March. Late in March, in any event.

I think that the date that we would jointly propose for a case management review, at which obviously we would attempt to provide you with a provisional witness list and then seek your directions on that, would be, is it the last Friday I think. I am so sorry, I am seeming to be obsessed with Friday, it is Monday 30 March that is the date. The Friday is the date on which we will come back for review, by which we will have submitted - Friday, fortnight is the day by which we will have submitted the proposal.

JUDGE BARAITSER: When is a sensible date for the case management hearing, do you think?

MR FITZGERALD: Monday 30 March.

JUDGE BARAITSER: Monday 30 March.

MR FITZGERALD: Yes, madam, Monday 30 March is the date for the case management hearing. The date by which we hope to have provided you, or we accept we should provide you, with an agreed proposal as to the solution to the problem of the anonymous witnesses would be Friday fortnight. That is tomorrow fortnight.

JUDGE BARAITSER: Do you have a date?

MR FITZGERALD: It is 13 March, madam.

JUDGE BARAITSER: Right.

MR FITZGERALD: Madam, then if either we cannot agree or you consider that the proposal that we put forward is inappropriate, what we respectfully suggest is that there be a review with allowance for two hours' argument.

JUDGE BARAITSER: So perhaps that can take place on 30 March.

MR FITZGERALD: Yes, that might be convenient to do everything at the same time, yes. Madam, that is the proposal which allows, firstly, the prosecution to get in their evidence in response, us to consider it and, hopefully, for us to provide a provisional witness batting order, if I can call it that. Then in relation to the anonymous witnesses, we are very much hoping that we can reach a resolution agreeable to both sides.

JUDGE BARAITSER: Can you just confirm by 30 March not only will the prosecution have provided all of their evidence but you will have responded?

MR FITZGERALD: Yes, that day we will have responded.

JUDGE BARAITSER: So are you looking for a two hour time slot on 30 March in any event?

MR FITZGERALD: In any event, two hours and, madam, I suppose it might be safer to ---
JUDGE BARAITSER: All right. Can I just ask the defence to make sure that you have the availability of the witnesses by that date.
MR FITZGERALD: Yes, would you give us just five minutes to make sure, because it was the suggestion by the CPS that 30 March would be the convenient date that prompted us to put forward that date but I will just make sure that we are all available. If you would just give us five minutes, madam, I think we can ---
JUDGE BARAITSER: Yes, Mr Erland, whilst that is happening can you also make sure there is court time available.
COURT OFFICIAL: There is not, madam.
JUDGE BARAITSER: There is not.
COURT OFFICIAL: No. And, also, do you have your diary?
JUDGE BARAITSER: I do. I wonder, Mr Erland, if you could put your heads together with counsel and come up with a date that is convenient to everybody.
COURT OFFICIAL: OK, madam, but the first two hours is going to be 23 April.
JUDGE BARAITSER: OK. Well, have a chat with counsel and see if you can come to an arrangement.
COURT OFFICIAL: Do you want to rise?
JUDGE BARAITSER: Yes, five minutes. I will come back in five minutes. I will come back just to fix a date.
MR FITZGERALD: Madam ---
JUDGE BARAITSER: Something else? If you arrange it with the court because they cannot do 30 March.
MR FITZGERALD: Oh, right, OK, well ---
JUDGE BARAITSER: I will leave you for five minutes.
MR FITZGERALD: --- it may be it will have to be a little bit later then, yes.
JUDGE BARAITSER: I will come back in five minutes.

(Short adjournment)

(The court reconvened at 15.05)

JUDGE BARAITSER: All right. So I just need to fix two dates then. One will be the call-over date. I am just going to check my diary. Yes, 25th. 25 March, over the video link?
COURT OFFICIAL: 10 o'clock?
JUDGE BARAITSER: 10 o'clock at Westminster. And then 7 April is mooted? Let us have a look. Yes. Yes. 7 April. Again, where will that be?

COURT OFFICIAL: That will be Westminster or (inaudible)
JUDGE BARAITSER: Thank you. Do you know which courthouse – court room?
COURT OFFICIAL: We are not sure yet. We will be making space for it, effectively.
JUDGE BARAITSER: Thank you. Now, Mr Fitzgerald, will your client agree to be produced – as in, you are not making an application that that is over the video link on 7 April, are you?
MR FITZGERALD: To be produced by video?
JUDGE BARAITSER: No, to be produced in person, because it is going to be two hours. Probably not appropriate for the video link. I just wanted to put you on notice of that.
MR FITZGERALD: Yes. Madam, yes. Madam, can we let the court know on that?
JUDGE BARAITSER: Well, not really. Two hours generally is too long for the video link.
MR FITZGERALD: All right.
JUDGE BARAITSER: I just wanted to raise it so you were aware of the position. Is there anything you want to say now about it? I appreciate the travel from Belmarsh is not ideal.
MR FITZGERALD: Madam, could we just have one moment to tell Mr Assange?
JUDGE BARAITSER: Yes. I will just wait here patiently.
MR FITZGERALD: So the court's provisional view is that 7 April, because it may be a lengthy hearing, it would be appropriate for Mr Assange to attend. Madam, we will respectfully request that he be able to attend by video on the 7th.
JUDGE BARAITSER: So the practical difficulties with that is there is only one court room at Westminster which accommodates video links and that is court 3. That is the extradition remand list. In order to take two hours or possibly longer out of the extradition remand list could cause real logistical problems for the court.
MR FITZGERALD: Madam, could we set aside the two hours in the afternoon, in that case?
JUDGE BARAITSER: Is there any difficulty with that for the court list? 2 o'clock start then, on 7 April?
MR FITZGERALD: And by video. By video, then.
JUDGE BARAITSER: It does not make any difference. Video links go throughout the day in court 3.
MR FITZGERALD: I see. OK. No, no – so if it – he will attend by video link but it will be on the afternoon on the 7th?
JUDGE BARAITSER: It does not assist, because the normal video links – the remands that happen throughout the day – will take place in both the morning and the afternoon. By taking two hours out of the day, you are preventing ordinary cases being heard.

MR FITZGERALD: OK. So, Madam, just so that I understand – our respectful application is that he attend by video link. Is the court saying that he has to be there in person?

JUDGE BARAITSER: Well, I certainly have no strong views one way or the other. My concern is the impact it has on other court users.

MR FITZGERALD: I understand.

JUDGE BARAITSER: I am going to ask the legal advisor in case there is anything that can be done about it.

MR FITZGERALD: I am just thinking, Madam – the reason for the two hours is we are assuming there will be legal arguments and disagreement. There may not be. In which case, it may be quite appropriate to dispose of it with a short video hearing. The problem I think that you are aware of, Madam, is that if Mr Assange is brought, sometimes he has five hours going around the houses in every different court and locked in the ---

JUDGE BARAITSER: Do you recall there was strong objection to the case being moved here and that was one of the reasons that the case was moved here, to make the travel arrangements more convenient to Mr Assange?

MR FITZGERALD: Well, Madam, we are here. It is just a question of what we do with this one day. Could we fix it for – is there any possibility of the review being here?

JUDGE BARAITSER: That is a matter for Woolwich.

MR FITZGERALD: Well, shall we – Madam, could we just adjourn for a moment and see if that is feasible?

JUDGE BARAITSER: What we can do is, in any event, there will be a call-over over the video link at Westminster on 25 March.

MR FITZGERALD: We could review the position then.

JUDGE BARAITSER: We can. The only hesitation I have is we may then lose court time if we wait that long. Do you want to make inquiries about Woolwich and see where that takes us?

MR FITZGERALD: Thank you.

JUDGE BARAITSER: I will rise then again, until that is done.

MR FITZGERALD: Thank you. Thank you, Madam. Thank you.

(Short adjournment at 15.11)

(The court reconvened at 15.23)

JUDGE BARAITSER: Mr Fitzgerald, it looks as though we can accommodate at Woolwich on 7 April.

MR FITZGERALD: Thank you very much. Thank you, madam.

JUDGE BARAITSER: Is that convenient to everybody else? The prosecution?
MR LEWIS: I do not think I will be here, madam, but ---
JUDGE BARAITSER: All right.
MR LEWIS: --- (Inaudible) either Ms Dobbin or Mr Smith.
JUDGE BARAITSER: And they will be in a position to deal with any case management and anonymity issues?
MR LEWIS: Yes.
JUDGE BARAITSER: Lovely. So 7 April, here at Woolwich, and that will be at 10 o'clock. And otherwise, it is 25 March over the video link at Westminster, and that is at 10 o'clock. Everyone agree with that?
MR FITZGERALD: Thank you, madam, yes. I may not be able to make 7 March but my learned friend is going to come along.
JUDGE BARAITSER: Lovely. Good.

No need to stand up, Mr Assange. You have heard those two dates. I will just clarify them for the avoidance of any doubt. As you know, every 28 days, you have to be before the court. It is called a call over date, an administrative hearing. The next one of those will be over the video link on 25 March from Westminster Magistrates' Court at 10 o'clock in the morning.

Thereafter, there needs to be a case management hearing to make sure that the rest of this hearing is effective and runs efficiently. So that case management hearing will take place on 7 April, here at Woolwich Crown Court, sitting as Belmarsh Magistrates' Court, again 10 o'clock in the morning, and you will be physically produced on that occasion for that hearing. I think that is everything.
MR FITZGERALD: Thank you very much.
JUDGE BARAITSER: Thank you very much, everybody.

ADJOURNED AT 15.25

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