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Your Man in the Public Gallery – The Assange Hearing Day 3

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Global Research, February 28, 2020
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Region: Europe, USA
Theme: Law and Justice

In yesterday's proceedings in court, the prosecution adopted arguments so stark and apparently unreasonable I have been fretting on how to write them up in a way that does not seem like caricature or unfair exaggeration on my part. What has been happening in this court has long moved beyond caricature. All I can do is give you my personal assurance that what I recount actually is what happened.

As usual, I shall deal with procedural matters and Julian's treatment first, before getting in to a clear account of the legal arguments made.

Vanessa Baraitser is under a clear instruction to mimic concern by asking, near the end of every session just before we break anyway, if Julian is feeling well and whether he would like a break. She then routinely ignores his response. Yesterday he replied at some length he could not hear properly in his glass box and could not communicate with his lawyers (at some point yesterday they had started preventing him passing notes to his counsel, which I learn was the background to the aggressive prevention of his shaking Garzon's hand goodbye).

Baraitser insisted he might only be heard through his counsel, which given he was prevented from instructing them was a bit rich. This being pointed out, we had a ten minute adjournment while Julian and his counsel were allowed to talk down in the cells – presumably where they could be more conveniently bugged yet again.

On return, Edward Fitzgerald made a formal application for Julian to be allowed to sit beside his lawyers in the court. Julian was "a gentle, intellectual man" and not a terrorist. Baraitser replied that releasing Assange from the dock into the body of the court would mean he was released from custody. To achieve that would require an application for bail.

Again, the prosecution counsel James Lewis intervened on the side of the defence to try to make Julian's treatment less extreme. He was not, he suggested diffidently, quite sure that it was correct that it required bail for Julian to be in the body of the court, or that being in the body of the court accompanied by security officers meant that a prisoner was no longer in custody. Prisoners, even the most dangerous of terrorists, gave evidence from the witness box in the body of the court nest to the lawyers and magistrate. In the High Court prisoners frequently sat with their lawyers in extradition hearings, in extreme cases of violent criminals handcuffed to a security officer.

Baraitser replied that Assange might pose a danger to the public. It was a question of health and safety. How did Fitzgerald and Lewis think that she had the ability to carry out the necessary risk assessment? It would have to be up to Group 4 to decide if this was possible.

Yes, she really did say that. Group 4 would have to decide.

Baraitser started to throw out jargon like a Dalek when it spins out of control. “Risk assessment” and “health and safety” featured a lot. She started to resemble something worse than a Dalek, a particularly stupid local government officer of a very low grade. “No jurisdiction” – “Up to Group 4”. Recovering slightly, she stated firmly that delivery to custody can only mean delivery to the dock of the court, nowhere else in the room. If the defence wanted him in the courtroom where he could hear proceedings better, they could only apply for bail and his release from custody in general. She then peered at both barristers in the hope this would have sat them down, but both were still on their feet.

In his diffident manner (which I confess is growing on me) Lewis said “the prosecution is neutral on this request, of course but, err, I really don’t think that’s right”. He looked at her like a kindly uncle whose favourite niece has just started drinking tequila from the bottle at a family party.

Baraitser concluded the matter by stating that the Defence should submit written arguments by 10am tomorrow on this point, and she would then hold a separate hearing into the question of Julian’s position in the court.

The day had begun with a very angry Magistrate Baraitser addressing the public gallery. Yesterday, she said, a photo had been taken inside the courtroom. It was a criminal offence to take or attempt to take photographs inside the courtroom. Vanessa Baraitser looked at this point very keen to lock someone up. She also seemed in her anger to be making the unfounded assumption that whoever took the photo from the public gallery on Tuesday was still there on Wednesday; I suspect not. Being angry at the public at random must be very stressful for her. I suspect she shouts a lot on trains.

Ms Baraitser is not fond of photography – she appears to be the only public figure in Western Europe with no photo on the internet. Indeed the average proprietor of a rural car wash has left more evidence of their existence and life history on the internet than Vanessa Baraitser. Which is no crime on her part, but I suspect the expunging is not achieved without considerable effort. Somebody suggested to me she might be a hologram, but I think not. Holograms have more empathy.

I was amused by the criminal offence of *attempting to take* photos in the courtroom. How incompetent would you need to be to attempt to take a photo and fail to do so? And if no photo was taken, how do they prove you were attempting to take one, as opposed to texting your mum? I suppose “attempting to take a photo” is a crime that could catch somebody arriving with a large SLR, tripod and several mounted lighting boxes, but none of those appeared to have made it into the public gallery.

Baraitser did not state whether it was a criminal offence to publish a photograph taken in a courtroom (or indeed to attempt to publish a photograph taken in a courtroom). I suspect it is. Anyway Le Grand Soir has published a translation of my report yesterday, and there you can see a photo of Julian in his bulletproof glass anti-terrorist cage. Not, I hasten to add, taken by me.

We now come to the consideration of yesterday’s legal arguments on the extradition request itself. Fortunately, these are basically fairly simple to summarise, because although we had five hours of legal disquisition, it largely consisted of both sides competing in citing

scores of “authorities”, e.g. dead judges, to endorse their point of view, and thus repeating the same points continually with little value from exegesis of the innumerable quotes.

As prefigured yesterday by magistrate Baraitser, the prosecution is arguing that Article 4.1 of the UK/US extradition treaty has no force in law.

ARTICLE 4

Political and Military Offenses

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purposes of this Treaty, the following offenses shall not be considered political offenses:

(a) an offense for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;

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(b) a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family;

(c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm;

(d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage;

(e) placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(g) an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses.

3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated. In the United States, the executive branch is the competent authority for the purposes of this Article.

4. The competent authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. In the United States, the executive branch is the competent authority for the purposes of this Article.

The UK and US Governments say that the court enforces domestic law, not international law,

and therefore the treaty has no standing. This argument has been made to the court in written form to which I do not have access. But from discussion in court it was plain that the prosecution argue that the Extradition Act of 2003, under which the court is operating, makes no exception for political offences. All previous Extradition Acts had excluded extradition for political offences, so it must be the intention of the sovereign parliament that political offenders can now be extradited.

Opening his argument, Edward Fitzgerald QC argued that the Extradition Act of 2003 alone is not enough to make an actual extradition. The extradition requires two things in place; the general Extradition Act and the Extradition Treaty with the country or countries concerned. "No Treaty, No Extradition" was an unbreakable rule. The Treaty was the very basis of the request. So to say that the extradition was not governed by the terms of the very treaty under which it was made, was to create a legal absurdity and thus an abuse of process. He cited examples of judgements made by the House of Lords and Privy Council where treaty rights were deemed enforceable despite the lack of incorporation into domestic legislation, particularly in order to stop people being extradited to potential execution from British colonies.

Fitzgerald pointed out that while the Extradition Act of 2003 did not contain a bar on extraditions for political offences, it did not state there could not be such a bar in extradition treaties. And the extradition treaty of 2007 was ratified after the 2003 extradition act.

At this stage Baraitser interrupted that it was plain the intention of parliament was that there could be extradition for political offences. Otherwise they would not have removed the bar in previous legislation. Fitzgerald declined to agree, saying the Act did not say extradition for political offences could not be banned by the treaty enabling extradition.

Fitzgerald then continued to say that international jurisprudence had accepted for a century or more that you did not extradite political offenders. No political extradition was in the European Convention on Extradition, the Model United Nations Extradition Treaty and the Interpol Convention on Extradition. It was in every single one of the United States' extradition treaties with other countries, and had been for over a century, at the insistence of the United States. For both the UK and US Governments to say it did not apply was astonishing and would set a terrible precedent that would endanger dissidents and potential political prisoners from China, Russia and regimes all over the world who had escaped to third countries.

Fitzgerald stated that all major authorities agreed there were two types of political offence. The pure political offence and the relative political offence. A "pure" political offence was defined as treason, espionage or sedition. A "relative" political offence was an act which was normally criminal, like assault or vandalism, conducted with a political motive. Every one of the charges against Assange was a "pure" political offence. All but one were espionage charges, and the computer misuse charge had been compared by the prosecution to breach of the official secrets act to meet the dual criminality test. The overriding accusation that Assange was seeking to harm the political and military interests of the United States was in the very definition of a political offence in all the authorities.

In reply Lewis stated that a treaty could not be binding in English law unless specifically incorporated in English law by Parliament. This was a necessary democratic defence. Treaties were made by the executive which could not make law. This went to the sovereignty of Parliament. Lewis quoted many judgements stating that international treaties

signed and ratified by the UK could not be enforced in British courts. “It may come as a surprise to other countries that their treaties with the British government can have no legal force” he joked.

Lewis said there was no abuse of process here and thus no rights were invoked under the European Convention. It was just the normal operation of the law that the treaty provision on no extradition for political offences had no legal standing.

Lewis said that the US government disputes that Assange’s offences are political. In the UK/Australia/US there was a different definition of political offence to the rest of the world. We viewed the “pure” political offences of treason, espionage and sedition as not political offences. Only “relative” political offences – ordinary crimes committed with a political motive – were viewed as political offences in our tradition. In this tradition, the definition of “political” was also limited to supporting a contending political party in a state. Lewis will continue with this argument tomorrow.

That concludes my account of proceedings. I have some important commentary to make on this and will try to do another posting later today. Now rushing to court.

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