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Your Man in the Public Gallery – Assange Hearing Day Four

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Global Research, March 01, 2020
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Region: Europe, USA
Theme: Law and Justice

Please try this experiment for me.

Try asking this question out loud, in a tone of intellectual interest and engagement: "Are you suggesting that the two have the same effect?"

Now try asking this question out loud, in a tone of hostility and incredulity bordering on sarcasm: "Are you suggesting that the two have the same effect?"

Firstly, congratulations on your acting skills; you take direction very well. Secondly, is it not fascinating how precisely the same words can convey the opposite meaning dependent on modulation of stress, pitch, and volume?

Yesterday the prosecution continued its argument that the provision in the 2007 UK/US Extradition Treaty that bars extradition for political offences is a dead letter, and that Julian Assange's objectives are not political in any event. James Lewis QC for the prosecution spoke for about an hour, and Edward Fitzgerald QC replied for the defence for about the same time. During Lewis's presentation, he was interrupted by Judge Baraitser precisely once. During Fitzgerald's reply, Baraitser interjected seventeen times.

In the transcript, those interruptions will not look unreasonable:

> "Could you clarify that for me Mr Fitzgerald…"
>
> "So how do you cope with Mr Lewis's point that…"
>
> "But surely that's a circular argument…"
>
> "But it's not incorporated, is it?…"

All these and the other dozen interruptions were designed to appear to show the judge attempting to clarify the defence's argument in a spirit of intellectual testing. But if you heard the tone of Baraitser's voice, saw her body language and facial expressions, it was anything but.

The false picture a transcript might give is exacerbated by the courtly Fitzgerald's continually replying to each obvious harassment with "Thank you Madam, that is very helpful", which again if you were there, plainly meant the opposite. But what a transcript will helpfully nevertheless show was the bully pulpit of Baraitser's tactic in interrupting Fitzgerald again and again and again, belittling his points and very deliberately indeed

preventing him from getting into the flow of his argument. The contrast in every way with her treatment of Lewis could not be more pronounced.

So now to report the legal arguments themselves.

James Lewis for the prosecution, continuing his arguments from the day before, said that Parliament had not included a bar on extradition for political offences in the 2003 Act. It could therefore not be reintroduced into law by a treaty. “To introduce a Political Offences bar by the back door would be to subvert the intention of Parliament.”

Lewis also argued that these were not political offences. The definition of a political offence was in the UK limited to behaviour intended “to overturn or change a government or induce it to change its policy.” Furthermore the aim must be to change government or policy in the short term, not the indeterminate future.

Lewis stated that further the term “political offence” could only be applied to offences committed within the territory where it was attempted to make the change. So to be classified as political offences, Assange would have had to commit them within the territory of the USA, but he did not.

If Baraitser did decide the bar on political offences applied, the court would have to determine the meaning of “political offence” in the UK/US Extradition Treaty and construe the meaning of paragraphs 4.1 and 4.2 of the Treaty. To construe the terms of an international treaty was beyond the powers of the court.

Lewis perorated that the conduct of Julian Assange cannot possibly be classified as a political offence. “It is impossible to place Julian Assange in the position of a political refugee”. The activity in which Wikileaks was engaged was not in its proper meaning political opposition to the US Administration or an attempt to overthrow that administration. Therefore the offence was not political.

For the defence Edward Fitzgerald replied that the 2003 Extradition Act was an enabling act under which treaties could operate. Parliament had been concerned to remove any threat of abuse of the political offence bar to cover terrorist acts of violence against innocent civilians. But there remained a clear protection, accepted worldwide, for peaceful political dissent. This was reflected in the Extradition Treaty on the basis of which the court was acting.

Baraitser interrupted that the UK/US Extradition Treaty was not incorporated into English Law.

Fitzgerald replied that the entire extradition request is on the basis of the treaty. It is an abuse of process for the authorities to rely on the treaty for the application but then to claim that its provisions do not apply.

> “On the face of it, it is a very bizarre argument that a treaty which gives rise to the extradition, on which the extradition is founded, can be disregarded in its provisions. It is on the face of it absurd.” Edward Fitzgerald QC for the Defence

Fitzgerald added that English Courts construe treaties all the time. He gave examples.

Fitzgerald went on that the defence did not accept that treason, espionage and sedition were not regarded as political offences in England. But even if one did accept Lewis's too narrow definition of political offence, Assange's behaviour still met the test. What on earth could be the motive of publishing evidence of government war crimes and corruption, other than to change the policy of the government? Indeed, the evidence would prove that Wikileaks had effectively changed the policy of the US government, particularly on Iraq.

Baraitser interjected that to expose government wrongdoing was not the same thing as to try to change government policy. Fitzgerald asked her, finally in some exasperation after umpteen interruptions, what other point could there be in exposing government wrongdoing other than to induce a change in government policy?

That concluded opening arguments for the prosecution and defence.

My Personal Commentary

Let me put this as neutrally as possible. If you could fairly state that Lewis's argument was much more logical, rational and intuitive than Fitzgerald's, you could understand why Lewis did not need an interruption while Fitzgerald had to be continually interrupted for "clarification". But in fact it was Lewis who was making out the case that the provisions of the very treaty under which the extradition is being made, do not in fact apply, a logical step which I suggest the man on the Clapham omnibus might reason to need rather more testing than Fitzgerald's assertion to the contrary. Baraitser's comparative harassment of Fitzgerald when he had the prosecution on the ropes was straight out of the Stalin show trial playbook.

The defence did not mention it, and I do not know if it features in their written arguments, but I thought Lewis's point that these could not be political offences, because Julian Assange was not in the USA when he committed them, was breathtakingly dishonest. The USA claims universal jurisdiction. Assange is being charged with crimes of publishing committed while he was outside the USA. The USA claims the right to charge anyone of any nationality, anywhere in the world, who harms US interests. They also in addition here claim that as the materials could be seen on the internet in the USA, there was an offence in the USA. At the same time to claim this could not be a political offence as the crime was committed outside the USA is, as Edward Fitzgerald might say, on the face of it absurd. Which curiously Baraitser did not pick up on.

Lewis's argument that the Treaty does not have any standing in English law is not something he just made up. Nigel Farage did not materialise from nowhere. There is in truth a long tradition in English law that even a treaty signed and ratified with some bloody Johnny Foreigner country, can in no way bind an English court. Lewis could and did spout reams and reams of judgements from old beetroot faced judges holding forth to say exactly that in the House of Lords, before going off to shoot grouse and spank the footman's son. Lewis was especially fond of the Tin Council case.

There is of course a contrary and more enlightened tradition, and a number of judgements that say the exact opposite, mostly more recent. This is why there was so much repetitive argument as each side piled up more and more volumes of "authorities" on their side of the case.

The difficulty for Lewis – and for Baraitser – is that this case is not analogous to me buying a

Mars bar and then going to court because an International Treaty on Mars Bars says mine is too small.

Rather the 2003 Extradition Act is an Enabling Act on which extradition treaties then depend. You can't thus extradite under the 2003 Act without the Treaty. So the Extradition Treaty of 2007 in a very real sense becomes an executive instrument legally required to authorise the extradition. For the executing authorities to breach the terms of the necessary executive instrument under which they are acting, simply has to be an abuse of process. So the Extradition Treaty owing to its type and its necessity for legal action, is in fact incorporated in English Law by the Extradition Act of 2003 on which it depends.

The Extradition Treaty is a necessary precondition of the extradition, whereas a Mars Bar Treaty is not a necessary precondition to buying the Mars Bar.

That is as plain as I can put it. I do hope that is comprehensible.

It is of course difficult for Lewis that on the same day the Court of Appeal was ruling against the construction of the Heathrow Third Runway, partly because of its incompatibility with the Paris Agreement of 2016, despite the latter not being fully incorporated into English law by the Climate Change Act of 2008.

Vital Personal Experience

It is intensely embarrassing for the Foreign and Commonwealth Office (FCO) when an English court repudiates the application of a treaty the UK has ratified with one or more foreign states. For that reason, in the modern world, very serious procedures and precautions have been put into place to make certain that this cannot happen. Therefore the prosecution's argument that all the provisions of the UK/US Extradition Treaty of 2007 are not able to be implemented under the Extradition Act of 2003, ought to be impossible.

I need to explain I have myself negotiated and overseen the entry into force of treaties within the FCO. The last one in which I personally tied the ribbon and applied the sealing wax (literally) was the Anglo-Belgian Continental Shelf Treaty of 1991, but I was involved in negotiating others and the system I am going to describe was still in place when I left the FCO as an Ambassador in 2005, and I believe is unchanged today (and remember the Extradition Act was 2003 and the US/UK Extradition Treaty ratified 2007, so my knowledge is not outdated). Departmental nomenclatures change from time to time and so does structural organisation. But the offices and functions I will describe remain, even if names may be different.

All international treaties have a two stage process. First they are signed to show the government agrees to the treaty. Then, after a delay, they are ratified. This second stage takes place when the government has enabled the legislation and other required agency to implement the treaty. This is the answer to Lewis's observation about the roles of the executive and legislature. The ratification stage only takes place after any required legislative action. That is the whole point.

This is how it happens in the FCO. Officials negotiate the extradition treaty. It is signed for the UK. The signed treaty then gets returned to FCO Legal Advisers, Nationality and Treaty Department, Consular Department, North American Department and others and is sent on to Treasury/Cabinet Office Solicitors and to Home Office, Parliament and to any other

Government Department whose area is impacted by the individual treaty.

The Treaty is extensively vetted to check that it can be fully implemented in all the jurisdictions of the UK. If it cannot, then amendments to the law have to be made so that it can. These amendments can be made by Act of Parliament or more generally by secondary legislation using powers conferred on the Secretary of State by an act. If there is already an Act of Parliament under which the Treaty can be implemented, then no enabling legislation needs to be passed. International Agreements are not all individually incorporated into English or Scottish laws by specific new legislation.

This is a very careful step by step process, carried out by lawyers and officials in the FCO, Treasury, Cabinet Office, Home Office, Parliament and elsewhere. Each will in parallel look at every clause of the Treaty and check that it can be applied. All changes needed to give effect to the treaty then have to be made – amending legislation, and necessary administrative steps. Only when all hurdles have been cleared, including legislation, and Parliamentary officials, Treasury, Cabinet Office, Home Office and FCO all certify that the Treaty is capable of having effect in the UK, will the FCO Legal Advisers give the go ahead for the Treaty to be ratified. You absolutely cannot ratify the treaty before FCO Legal Advisers have given this clearance.

This is a serious process. That is why the US/UK Extradition Treaty was signed in 2003 and ratified in 2007. That is not an abnormal delay.

So I know for certain that ALL the relevant British Government legal departments MUST have agreed that Article 4.1 of the UK/US Extradition Treaty was capable of being given effect under the 2003 Extradition Act. That certification has to have happened or the Treaty could never have been ratified.

It follows of necessity that the UK Government, in seeking to argue now that Article 4.1 is incompatible with the 2003 Act, is knowingly lying. There could not be a more gross abuse of process.

I have been keen for the hearing on this particular point to conclude so that I could give you the benefit of my experience. I shall rest there for now, but later today hope to post further on yesterday's row in court over releasing Julian from the anti-terrorist armoured dock.

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