Purgatorial Torments: Assange and the UK High Court

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What is it about British justice that has a certain rankness to it, notably when it comes to dealing with political charges? The record is not good, and the ongoing sadistic carnival that is the prosecution (and persecution) of Julian Assange continues to provide meat for the table.

Those supporting the WikiLeaks publisher, who faces extradition to the United States even as he remains scandalously confined and refused bail in Belmarsh Prison, had hoped for a clear decision from the UK High Court on March 26. Either they would reject leave to appeal the totality of his case, thereby setting the wheels of extradition into motion, or permit a full review, which would provide some relief. Instead, they got a recipe for purgatorial prolongation, a tormenting midway that grants the US government a possibility to make amends in seeking their quarry.

A sinking sense of repetition was evident. In December 2021, the High Court overturned the decision of the District Court Justice Vanessa Baraitser to bar extradition on the weight of certain assurances provided by the US government. Her judgment had been brutal to Assange in all respects but one: that extradition would imperil his life in the US penal system, largely due to his demonstrated suicidal ideation and inadequate facilities to cope with that risk.

With a school child's gullibility – or a lawyer's biting cynicism – the High Court judges accepted assurances from the Department of Justice (DOJ) that Assange would not face the crushing conditions of detention in the notorious ADX Florence facility or suffer the gagging restrictions euphemised as Special Administrative Measures. He would also receive the appropriate medical care that would alleviate his suicide risk and face the prospect of serving the balance of any sentence back in Australia. The refusal to look behind the mutability and fickle nature of such undertakings merely passed the judges by. The March

26 judgment is much in keeping with that tradition.

The grounds for Assange's team numbered nine in total entailing two parts. Some of these should be familiar to even the most generally acquainted reader. The first part, comprising seven grounds, argues that the decision to send the case to the Home Secretary was wrong for: ignoring the bar to extradition under the UK-US Extradition Treaty for political offences, for which Assange is being sought for; that his prosecution is for political opinions; that the extradition is incompatible with article 7 of the European Convention on Human Rights (ECHR) noting that there should be no punishment without law; that the process is incompatible with article 10 of the ECHR protecting freedom of expression; that prejudice at trial would follow by reason of his non-US nationality; that the right to a fair trial, protected by article 6 of the ECHR, was not guaranteed; and that the extradition is incompatible with articles 2 and 3 of the ECHR (right to life, and prohibiting inhuman and degrading treatment).

The second part of the application challenged the UK Home Secretary's decision to approve the extradition, which should have been barred by the treaty between the UK and US, and on the grounds that there was "inadequate specialty/death penalty protection."

In this gaggle of imposing, even damning arguments, the High Court was only moved by three arguments, leaving much of Baraitser's reasons untouched. Assange's legal team had established an arguable case that sending the case to the Home Secretary was wrong as he might be prejudiced at trial by reason of his nationality. Following from that "but only as a consequence of that", extradition would be incompatible with free speech protections under article 10 of the ECHR. An arguable case against the Home Secretary's decision could also be made as it was barred by inadequate specialty/death penalty protection.

What had taken place was a dramatic and savage pruning of a wholesome challenge to a political persecution garishly dressed in legal drag. On the issue of whether Assange was being prosecuted for his political opinions, the Court was happy to accept the woeful finding by Baraitser that he had not. The judge was "entitled to reach that conclusion on the evidence before her, and on the unchallenged sworn evidence of the prosecutor (which refutes the applicant's case)." While accepting the view that Assange "acted out of political conviction", the extradition was not being made "on account of his political views." Again, we see the judiciary avoid the facts staring at it: that the exposure of war crimes, atrocities, torture and various misdeeds of state are supposedly not political at all.

Baraitser's assessment on the US *Espionage Act of 1917*, that cruel exemplar of war time that has become peacetime's greater suppressor of leakers and whistleblowers, was also spared necessary laceration. The point missed in both her judgement and the latest High Court ruling is a seeming inability to accept that the Act is designed to *circumvent* constitutional protections, a point made from the outset by the brave Wisconsin Senator Robert M. La Follette.

On the issue of whether Assange would be denied due process in that he could not foresee being prosecuted for publishing classified documents in 2010, the view that US courts are "alive to the issues of vagueness and overbreadth in relation" to the Act misses the point. It hardly assures Assange that he would not be subject "to a real risk of a flagrant denial" of rights protected by article 7 of the ECHR, let alone the equivalent Fifth Amendment of the US Constitution.

The matter of Assange being denied a fair trial should have been obvious, evidenced by such prejudicial remarks by senior officials (that's you Mike Pompeo) on his presumed guilt, tainted evidence, a potentially biased jury pool, and coercive plea bargaining. He could or would also be sentenced for conduct he had not been charged with "based on evidence he will not see and which may have been unlawfully obtained." Instead, Baraitser's negative finding was spared its deserved flaying.

> "We, like the judge, consider the article 6 objections raised by the applicants have no arguable merit, from which it follows that it is not arguable that his extradition would give rise to a flagrant denial of his fair trial rights."

Of enormous, distorting significance was the refusal by the High Court to accept "fresh evidence" such as the Yahoo News article from September 2021 outlining the views of intelligence officials on the possible kidnapping and even assassination of Assange. To this could be added a statement from US attorney Joshua Dratel who pertinently argued that designating WikiLeaks a "non-state hostile intelligence service" was intended "to place [the applicant] outside any cognizable legal framework that might protect them from the US actions based on purported 'national security' imperatives".

A signed witness statement also confirmed that UC Global, the Spanish security firm charged by the CIA to conduct surveillance of Assange in the Ecuadorian embassy in London, had means to provide important information for "options on how to assassinate" Assange.

Instead of considering the material placed before them as validating a threat to Assange's right to life, or the prospect of inhuman or degrading treatment or punishment, the High Court justices speculated what Baraitser *would* have done if she had seen it. Imaginatively, if inexplicably, the judges accepted her finding that the conduct by the CIA and UC Global regarding the Ecuadorian embassy had no link with the extradition proceedings. With jaw dropping incredulity, the judges reasoned that the murderous, brutal rationale for dealing with Assange contemplated by the US intelligence services "is removed if the applicant is extradited." In a fit of true Orwellian reasoning, Assange's safety would be guaranteed the moment he was placed in the custody of his would-be abductors and murderers.

The High Court was also generous enough to do the homework for the US government by reiterating the position taken by their brother judges in the 2021 decision. Concerns about Assange's mistreatment would be alleviated by granting "assurances (that the applicant is permitted to rely on the First Amendment, that the applicant is not prejudiced at trial (including sentence) by reason of his nationality, that he is afforded the same First Amendment protection as a United States citizen, and that the death penalty not be imposed)." Such a request is absurd for presuming, not only that the prosecutors can be held to their word, but that a US court would feel inclined to accept the application of the First Amendment, let alone abide by requested sentencing requirements.

The US government has been given till April 16 to file assurances addressing the three grounds, with further written submissions in response to be filed by April 30 by Assange's team, and May 14 by the Home Secretary. Another leave of appeal will be entertained on May 20. If the DOJ does not provide any assurances, then leave to appeal will be granted. The accretions of obscenity in the Assange saga are set to continue.

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Featured image: Supporters of Wikileaks founder Julian Assange protest outside Westminster Magistrates' Court in London, during his continuing extradition hearing. Picture date: Wednesday April 20, 2022. Picture: PA Wire

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