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Sinking Transparency at the Old Bailey: The Assange Extradition Hearing Resumes

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The fine circus that is British justice resumed at London's Central Criminal Court on September 7, with the continued extradition proceedings against Julian Assange. Judge Vanessa Baraitser was concerned that approximately 40 individuals had received remote video access they apparently should not have. "In error, the court sent out orders to others who had sought access. I remain concerned about my ability to maintain the integrity of the court if they are able to attend remotely."

Showing a continuing obsession with controlling her court as manorial property, Baraitser felt that having such individuals access the proceedings might lead to breaches (she did not specify which ones). "Once livestreaming takes place, the court cannot manage this breach even less when the person is outside the jurisdiction." Inadvertently, the judge had put her finger on the very heart of WikiLeaks and the terror it inspires in the establishment: an event or occurrence that is published, remotely; information, previously confined, escaping. "I want to make it clear that the public interest and allowing remote access is unlikely to meet the interests of justice tests." To wit, she needed new applications from the excluded observers. "For those who consider they still cannot travel to the UK to attend the hearing, then they need to apply again and I will consider it."

One of the organisations excluded by Baraitser's ruling was Amnesty International, a body that has sent fair trial monitors to observe the practices of regimes more authoritarian and less inclined to observe the rule of law. Marie Struthers stated it plainly, noting the initial rejection of the application for a physical spot last month, followed by the granting of six remote viewing slots, reduced to one, then, it transpired, none. "This is not normal." To have the organisation's "legal observer … find out this morning that he had not been granted even REMOTE access to the Assange proceedings is an outrage."

Rebecca Vincent, director of international campaigns of Reporters Without Borders suggested that allowing "so few trial monitors [and] journalists into today's hearing seemed more of a political decision rather than a logistical one." To such exclusions could also be added parliamentarians.

With assured opacity and a lack of transparency, the scene was set. What would Judge Baraitser come up with to restrict the scope of Assange's case against extradition to the US? One lay in controlling the presentation of witness statements. The defence suggested a full show, assisting witnesses in going through their statements in court. The public might be better informed of the issues.

Baraitser offered a novel reading: doing so would not assist the defence, the public or Assange "and would not be a fair." Another way of reading it would have been: no

justifications and podiums for the cause. James Lewis QC of the prosecution thought that the statements were adequate enough. It followed that they would be made public. "In my view," concluded Baraitser on that point, "there is no benefit whatsoever to allowing the witnesses give evidence in chief." Thirty minutes for orientation was more than adequate.

Defence counsel Mark Summers QC focused on the staggered nature of the US indictment against Assange, beginning initially as a single charge, ballooning into an enlarged indictment stuffed by allegations of espionage, followed by a second superseding indictment. "It is a curiosity that the US had, in previous hearings, been content for the hearings to go ahead in February and May, presumably knowing that this was coming." It was not initially clear what had changed, but by August 21, the material put before the court constituted a "potential standalone basis for criminality". Irrespective of whether the US rejected the existing allegations linked to Chelsea Manning, "Assange can be extradited and potentially convicted for this conduct on its own and this is a resounding and new development in this case."

One feature of the prosecution attacked by Summers was the mentioning of Assange's alleged "co-conspirators" linked to hacking incidents. As Kevin Gosztola reminds us, they had been subject of legal prosecutions in the US and UK a decade ago, while Sigurdur "Siggi" Thordarson was mentioned in a filing by the prosecution last year. It followed that material from that case, which involved conviction in Iceland for fraud, theft and impersonation of Assange, should have been included in the previous indictment. The defence also brought up those rich remarks by the Icelandic Interior Minister at the time, who "believed the investigation [of Thordarson by the FBI] was in order to 'frame Assange'."

Other co-conspirators mentioned were Hector Xavier Monsegur ("Sabu"), Jake Davis ("Topiary") and Ryan Ackroyd ("Kalya"), all making legal appearances in the Southwark Crown Court for their alleged hacking spree with LuzSec. The defence contended that, as they were all prosecuted in the UK despite "competing US indictments being issued during the currency of the UK case", Assange should have been prosecuted in the UK alongside such conspirators at the time. "The forum bar is obviously engaged."

The prosecution case, in short, had become a quite different creature to the beast it originally was. The indictment now claimed, for instance, that Assange and WikiLeaks had assisted former security contractor Edward Snowden to evade arrest. The prosecution had also brought the focus back on alleged nefarious cyber activity on Assange's part, thereby discrediting the need to publish material exposing, for instance, US war crimes. Targeting the hacker distracts from the more sinister implication of targeting a publisher.

"It would be extraordinary for this court to be beginning an extradition hearing in relation to allegations like that within weeks of their announcement," submitted Summers, "without warning and even more extraordinary to do so in circumstances where the defendant is in custody."

The stunning lack of fairness was emphasised. It was "impossible" for Assange's team to "deal with the allegations being put to him and in relation to material for which you have been provided no explanation for their late arrival." Inadequate time had been given and inadequate notice, on dealing with these new "separate criminal allegations". With that in mind, Summers submitted that the court excise the new allegations.

Obstacles to adequate preparation have never bothered the judge in this case. With her usual rusted stubbornness, Judge Baraitser put the blame down to the defence, essentially approving the conduct of the US Department of Justice. Excision could only be granted in instances of a bar outlined in statute or a case of abuse of process. But not even the forum bar seemed to sway her.

Failing in that application, Summers moved to the issue of an adjournment to January. It was not an application without risk, given Assange's conditions in Belmarsh prison. "We have not been able to answer the allegations which have only been made in the last few weeks. This has been made worse because of the conditions we are having to work under." No earlier application had been made for the very simple reason that Assange had not seen the new request, hobbled by poor access to documentation provided by his defence team via traditional postal means. "We have not had an opportunity to meet and consult with him." He still had not received "the revised opening note" with accompanying documentation that the DOJ was developing more than a narrative, but the basis for "standalone criminality capable of sustaining a conviction if accepted in its own right."

Judge Baraister initially offered a nibble of tokenistic interest. She acknowledged that the defence team had not seen Assange for some six months, and wondered if they had spoken to him by phone. Yes, came the reply, but these were incoherent episodes, consisting of two short conversations. He had "to take in information from us on – any view – complex documents and to make him aware of the issues and to take a decision on them." A 10 minute adjournment followed. Baraitser's decision: the defence should have applied previously to do so but did not; the defence, in not doing so, should have acted as if the proceedings would continue.

Peering through the ruins of a process that is becoming more political with each session was the testimony of Mark Feldstein of the University of Maryland, authority on history and journalism. Feldstein's point in defence of WikiLeaks is outlined in his statement: drawing exacting definitions of what journalism is or otherwise within the US Constitution makes little sense. "Assange … is protected by the First Amendment whether he qualifies as a journalist or not."

The testimony proceeded to develop such ideas. Thousands upon thousands of leaks of classified information had informed "the public about government decision making but they also evidence government dishonesty". Journalists made Pulitzer Prize winning careers in using material from such leaks, an activity protected by the First Amendment as "the public had a right to be informed." Charging publishers and news outlets was simply not done; authorities preferred to charge the source or whistleblowers. While history evinces cases of "presidential enemies" being sought, the line had always been drawn. Till now.

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