IN THE WESTMINSTER MAGISTRATES' COURT

BETWEEN:

GOVERNMENT OF THE UNITED STATES OF AMERICA

Requesting State

-and-

JULIAN ASSANGE

Defendant

Defence Reply on Political Offence Protection

---

1. Introduction

1.1. These submissions briefly reply to the prosecution skeleton argument on "Political Offence" and the Treaty point.

1.2. The prosecution rely upon the decision of the Divisional Court in the case of ***Norris*** at paragraphs 15 – 19. They also suggest that the "Political Offence" exception has been abolished; and even that the defence has conceded that much.

1.3. But in fact we submit that the prosecution's reliance upon ***Norris*** is misconceived, and that it is an oversimplification to state that the political offence exception has been abolished. Where, as here, the modern Anglo-US Treaty that is the basis of this particular extradition request expressly preserves the protection from extradition for a "Political Offence", it is an abuse of process to seek extradition for a self-evidently political offence. The US state that has itself expressly agreed that "extradition shall not be granted" for a "Political Offence", cannot then properly seek extradition for precisely such an offence. The Court should treat such an application as an abuse of process.

1.4. The defence submissions in reply can be briefly summarised as follows: -

i. The Anglo-US Extradition Treaty 2003 is a recent treaty, ratified in 2007. Article 4 (1) of the Treaty enshrines and re-states the political offence exception by stating that *"extradition shall not be granted if the offence for which extradition is requested is a political offence".*

ii. The protection in question is still one of extensive application. It is a prominent and important feature in US extradition treaties including all the US treaties with Western democracies. (see Appendix to Julia Jansson's book on "*Terrorism, Criminal Law and Politics*" in Political Offences Authorities Tab E42). The same basic protection is enshrined in Article 3 of the Interpol Convention (see Political Offences Authorities Tab A3). It still continues to have widespread application throughout the world.

iii. The specific protections set out in Part 2 of the UK 2003 Act and in particular section 81 cannot reasonably be read to exclude any additional protection where such additional protection is contained in the particular Treaty on which the application for extradition is founded. At the very least this additional protection can be invoked by reliance on the abuse jurisdiction. It becomes an abuse to disregard such a treaty protection because a state which seeks extradition in reliance on its bilateral treaty with the UK should be expected by the Court to honour the fundamental protections guaranteed in the Treaty by which it has bound itself.

iv. The decision in *Norris* is distinguishable on the following grounds:-

a. Firstly, the context was completely different. It concerned a challenge to the designation by the Secretary of State under section 84(7) of the US as a Part 2 requesting state that did not need to provide a *prima facie* case.

b. Secondly, the decision in *Norris* did not relate to a protection contained in a treaty that **post-dated** the 2003 Act, as is the case here, but to the 1972 Anglo-US Treaty which **pre-dated** the 2003 Act and which the Court found to have been superseded by the provisions of the 2003 Treaty (which dispensed with the *prima facie* case requirement). As the Court in *Norris* stated at para 52:- "*the 2003 treaty represents a diminution of the rights of the citizens of both countries*". But despite that diminution the 2003 Treaty, ratified in 2007, expressly maintains the protection from extradition for political offences.

c. Thirdly, there was no reliance in the *Norris* case on the abuse of process jurisdiction. This is fundamental since Mr Assange primarily invokes the abuse jurisdiction to resist extradition for what are undoubtedly **"political offences".** All the leading textbooks and authorities recognise espionage to be a primary or pure political offence; and there can be little doubt that the CFAA offence here is also itself a pure political offence. Carey Shenkman, in his expert report, makes it clear that the relevant offence under subsection 1030(a)(1) of the CFAA is identical to section 793 of the Espionage Act. (see Core Bundle tab 4 p. 38).

1.5. In what follows we will briefly develop some of these points.

2. The Fundamental Nature of the Prohibition on Extradition for Political Offences

2.1. The prohibition on extradition for political offences has venerable historic importance. It is one of the most fundamental protections recognised in international and extradition law. It features in Article 3a of the United Nations Model Treaty on Extradition. It features in Article 3 of the Interpol Convention. It is enshrined in the substantive law of numerous Western democracies including Canada, Argentina, Belgium, Spain, Italy, and Germany. It is one of the most universally accepted rules of international law governing extradition.

2.2. **The prohibition on extradition for political offences is contained within nearly all US extradition treaties**. Some of the first treaties to contain the

political offences exception were signed by the US[1], dating as far back as 1856. More recently, the US signed an extradition treaty with Kosovo in 2016. Article 3.1 of this treaty contains, in materially similar terms to the 117 other US extradition treaties, that: "*Extradition shall not be granted if the offense for which extradition is requested is a political offense*". Following the increase in violent terrorist extremism, the prohibition has been limited to non-violent political acts. For example, murder, taking hostages, and using explosive devices to cause bodily harm or property damage (or the conspiracy to do so) have all been excluded from the political offences exception. **Nonetheless**, **purely political acts remain covered by the prohibition.** And a leading authority on this subject, Julia Jansson, has described Mr Assange's actions in publishing the WikiLeaks documents as "***clearly and purely political in character*"**[2].

2.3. Where such a prohibition is deliberately and expressly contained in a modern extradition treaty, it would be a violation of the international rule of law to simply disregard it as the prosecution invite this court to do.

3. The 2003 Extradition Act does not remove the duty to have regard to the provisions of the treaty

3.1. There is nothing in the 2003 Act to prohibit reliance upon the express provisions of this Treaty protecting against extradition for political offences. And it is significant that this treaty was ratified after the 2003 Act came into force.

3.2. At the very least:-

i. There is nothing in the 2003 Act to exclude reliance on the abuse of process protection invoked here where extradition would be in direct conflict with the express provisions of the treaty that forms the whole bedrock of the extradition request.

[1] Ecuador International Extradition Treaty with the United States, 28 June 1872; Convention between the United States of America and the Austro-Hungarian Monarchy relating to Extradition for the Mutual Delivery of Criminals, Fugitives from Justice, in Certain Cases, 3 July 1856.

[2] Jansson, J., 2019. *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition.* Routledge, p201

ii. Section 81 need not be interpreted to remove the protection from extradition for a political offence in a case where that express protection is contained in the treaty. It may simply make express provision for the minimum statutory safeguards set out in section 81.

3.3. In case after case the courts have stressed the importance of respecting treaty obligations as a cardinal principle that guides the whole extradition process and the way that the courts should approach it.

3.4. Thus as Laws LJ observed in *R (Bermingham and others) v Director of Serious Fraud Office* [2007] QB 77 at para 118 a proposed extradition must be "properly constituted according to the domestic law of the sending state **and the relevant bilateral treaty**".

3.5. Later at paragraph 127 Laws LJ refers to Lord Bingham's reference to "**the great desirability of honouring extradition treaties**". But this is not a one-way street. There is as much value in not allowing extradition where the treaty prohibits it as in permitting it to go ahead when the conditions have been met.

3.6. Laws LJ went on to cite the words of Hale LJ (as she then was) in *R (Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 in paragraph 40 where she also mentioned the strong public interest in respecting "**treaties involving mutually agreed and reciprocal commitments**".

3.7. Therefore, it is not self-evident, nor is it accepted, that the 2003 Act removed the need for the court to respect the prohibition on extradition for political offences where that time-honoured protection is expressly retained in the bilateral treaty that governs the particular extradition, as is the case here.

4. The Decision in *Norris*

4.1. The decision in *Norris* on which the US principally relies is readily distinguishable on the grounds set out above and developed below.

4.2. **Firstly,** the context in *Norris* was completely different. It concerned a challenge to the designation by the Secretary of State under section 84(7) of the US as a Part 2 requesting state that did not need to provide a *prima facie* case even

though such a requirement was retained in the 1972 Treaty. In that case there was express provision in the 2003 Act for the Secretary of State to remove the requirement of a *prima facie* case. Here, by contrast, there is no express provision in the 2003 Act to dispense with the requirement not to extradite for a political offence where the treaty continues to require it, and where it would be an abuse of process to disregard this fundamental human rights protection in the case of an extradition request founded on a treaty that retains the protection.

4.3. **Secondly**, the decision in *Norris* did not relate to a protection contained in a treaty that **post-dated** the 2003 Act as is the case here, but to the 1972 Anglo-US Treaty which pre-dated the 2003 Act.

4.4. **Thirdly**, there was no reliance in the *Norris* case on the abuse jurisdiction. This is fundamental since Mr Assange primarily invokes the abuse jurisdiction to resist extradition for what are undoubtedly **"political offences".** All the leading textbooks and authorities recognise espionage to be a primary or pure political offence; and there can be little doubt that the CFAA offence here is also a pure political offence.

5. Reliance on the Abuse of Process Jurisdiction

5.1. The abuse of process jurisdiction can be invoked where extradition or a prosecution resulting therefrom would involve a violation of the principles of public international law: see ***R v Mullen*** [2000] QB 520.

5.2. It can also be invoked in circumstances where there has been a breach of an international human rights convention.

5.3. **The prosecution's simplistic rejection of any reliance on the requesting state's duties under public international law as of relevance even to the abuse jurisdiction is oversimplistic.** It ignores the fact that the abuse of process jurisdiction is there to protect against the disregard of the rule of law, of which international law itself forms a part. Thus in a number of cases the courts have found that international treaties can create rights and impose duties in such a way as to justify the court's rejection of any general executive power simply to disregard the human rights and protections created by such treaties:-

i. In ***R v Mullen*** (*Abuse authorities, tab 7)* pp535E and 537G the abuse jurisdiction was successfully invoked, partly because the Divisional Court found that a deportation bypassed proper extradition procedures because the behaviour of the British authorities involved them "acting in breach of public international law" (page 535 E).

ii. In ***Thomas v Baptiste*** [2000] 2 A.C. 1 (*Police Offence authorities, tab 26*) the Privy Council found that the due process clause of the Trinidad Constitution "invokes the concept of the rule of law itself". They further found that the treaty invoked in that case, the Inter-American Convention on Human Rights did confer the right to complete the process of petition to the Inter-American Commission and Court even though that right was the product of an "unincorporated treaty" and not of any provision of domestic law.

iii. In ***Neville Lewis v Att. Gen. Jamaica*** [2001] 2 AC 50 (*Political Offences authorities, tab 14*) at pages 84G – 85C the Privy Council followed their earlier decision in *Thomas v Baptiste*. They held that the constitutional concept of "the protection of law" extended to protect a prisoner's right to petition the Inter-American Commission of Human Rights, even though that was the product of a treaty protection. That was despite the extensive reliance by the Jamaican state on the very authorities cited by the prosecution in this case to establish that treaty law cannot confer any rights in domestic law. Moreover the court implicitly questioned the assumption that a "ratified but unincorporated treaty only creates obligations for the state under international law" when Lord Slynn stated at page 84H:- "**even assuming** that that (principle) applies to international treaties dealing with human rights."

Conclusion

5.4. For all these reasons it is submitted that it would be an abuse of process to extradite Mr Assange in reliance on the very treaty which governs the legality of his extradition whilst disregarding a major protection contained in that treaty, namely the protection against extradition for a political offence. To do so would effectively violate the rule of law and render any extradition both arbitrary and inconsistent with Article 5 of the European Convention on Human

Rights. For that reason extradition would also be barred under section 87 of 2003 Act, which undoubtedly is an express provision of domestic law.

EDWARD FITZGERALD QC
MARK SUMMERS QC
FLORENCE IVESON

21 February 2020