Assange Final Appeal – Your Man in the Public Gallery 85

February 21, 2024 in *Uncategorized* by *craig*

Source: https://www.craigmurray.org.uk/archives/2024/02/assange-final-appeal-your-man-in-the-public-gallery/

Reporting on Julian Assange's extradition hearings has become a vocation that has now stretched over five years. From the very first hearing, when Justice Snow called Assange "a narcissist" before Julian had said anything whatsoever other than to confirm his name, to the last, when Judge Swift had simply in 2.5 pages of glib double-spaced A4 dismissed a tightly worded 152-page appeal from some of the best lawyers on earth, it has been a travesty and charade marked by undisguised institutional hostility.

We were now on last orders in the last chance saloon, as we waited outside the Royal Courts of Justice for the appeal for a right of final appeal.

The architecture of the Royal Courts of Justice was the great last gasp of the Gothic revival; having exhausted the exuberance that gave us the beauty of St Pancras Station and the Palace of Westminster, the movement played out its dreary last efforts at whimsy in shades of gray and brown, valuing scale over proportion and mistaking massive for medieval. As intended, the buildings are a manifestation of the power of the state; as not intended, they are also an indication of the stupidity of large scale power.

Court number 5 had been allocated for this hearing. It is one of the smallest courts in the building. Its largest dimension is its height. It is very high, and lit by heavy mock medieval chandeliers hung by long cast iron chains from a ceiling so high you can't really see it. You expect Robin Hood to suddenly leap from the gallery and swing across on the chandelier above you. The room is very gloomy; the murky dusk hovers menacingly above the lights like a miasma of despair, below them you peer through the weak light to make out the participants.

A huge tiered walnut dais occupies half the room, with the judges seated at its apex, their clerks at the next level down, and lower lateral wings reaching out, at one side housing journalists and at the other a huge dock for the prisoner or prisoners, with a massy iron cage that looks left over from a production of The Hunchback of Notre Dame.

This is in fact the most modern part of the construction; caging defendants in medieval style is in fact a Blair era introduction to the so-called process of law.

Rather incongruously, the clerks' tier was replete with computer hardware, with one of the two clerks operating behind three different computer monitors and various bulky desktop computers, with heavy cables twisting in all directions like sea kraits making love. The computer system seems to bring the court into the 1980's, and the clerk behind it looked uncannily like a member of a synthesiser group of that era, right down to the upwards pointing haircut.

In period keeping, this computer feed to an overflow room did not really work, which led to a number of halts in proceedings.

All the walls are lined with high bookcases housing thousands of leather bound volumes of old cases. The stone floor peeks out for one yard between the judicial dais and the storied wooden pews, with six tiers of increasingly narrow seating. The barristers occupied the first tier and their instructing solicitors the second, with their respective clients on the third. Up to ten people per line could squeeze in, with no barriers on the

bench between opposing parties, so the Assange family was squashed up against the CIA, State Department and UK Home Office representatives.

That left three tiers for media and public, about thirty people. There was however a wooden gallery above which housed perhaps twenty more. With little fuss and with genuine helpfulness and politeness, the court staff – who from the Clerk of Court down were magnificent – had sorted out the hundreds of those trying to get in, and we had the UN Special Rapporteur on Torture, we had 16 Members of the European Parliament, we had MPs from several states, we had NGOs including Reporter Without Borders, we had the Haldane Society of Socialist Lawyers, and we had, (checks notes) me, all inside the Court.

I should say this was achieved despite the extreme of official unhelpfulness from the Ministry of Justice, who had refused official admission and recognition to all of the above, including the United Nations. It was pulled together by the police, court staff and the magnificent Assange volunteers led by Jamie. I should also acknowledge Jim, who with others spared me the queue all night in the street I had undertaken at the International Court of Justice, by volunteering to do it for me.

This sketch captures the tiny non-judicial portion of the court brilliantly. Paranoid and irrational regulations prevent publications of photos or screenshots.

Picture by Matt O Branain provided via Twitter

The acoustics of the court are simply terrible. We are all behind the barristers as they stood addressing the judges, and their voices were at the same time muffled yet echoing from the bare stone walls.

I did not enter with a great deal of hope. As I have explained in How the Establishment Functions, judges do not have to be told what decision is expected by the Establishment. They inhabit the same social milieu as ministers, belong to the same institutions, attend the same schools, go to the same functions. The United States' appeal against the original blocking of Assange's extradition was granted by a Lord Chief Justice who is the former room-mate, and still best friend, of the minister who organised the removal of Julian from the Ecuadorean Embassy.

The blocking of Assange's appeal was done by Judge Swift, a judge who used to represent the security services, and said they were his favourite clients. In the subsequent Graham Phillips case, where Mr Phillips was suing the Foreign Commonwealth and Development Office (FCDO) for sanctions being imposed upon him without any legal case made against him, Swift actually met FCDO officials – one of the parties to the case – and discussed matters relating to it privately with them before giving judgment. He did not tell the defence he had done this. They found out, and Swift was forced to recuse himself.

Personally I am surprised Swift is not in jail, let alone still a High Court judge. But then what do I know of justice?

The Establishment politico-legal nexus was on even more flagrant display today. Presiding was Dame Victoria Sharp, whose brother Richard had arranged an £800,000 loan for then Prime Minister Boris Johnson and immediately been appointed Chairman of the BBC, (the UK's state propaganda organ). Assisting her was Justice Jeremy Johnson, another former barrister representing MI6.

By an amazing coincidence, Justice Johnson had been brought in seamlessly to replace his fellow ex-MI6 hiree Justice Swift and find for the FCDO in the Graham Phillips case!

And here these two were now to judge Julian!

What a lovely, cosy club is the Establishment! How ordered and predictable! We must bow down in awe at its majesty and near divine operation. Or go to jail.

Well, Julian is in jail, and we stood ready for his final shot for an appeal. We all stood up and Dame Victoria took her place. In the murky permanent twilight of the courtroom, her face was illuminated from below by the comparatively bright light of a computer monitor. It gave her a grey, spectral appearance, and the texture and colour of her hair merged into the judicial wig seamlessly. She seems to hover over us as a disturbingly ethereal presence.

Her colleague, Justice Johnson, for some reason was positioned as far to her right as physically possible. When they wished to confer he had to get up and walk. The lighting arrangements did not appear to cater for his presence at all, and at times he merged into the wall behind him.

Dame Victoria opened by stating that the court had given Julian permission to attend in person or to follow on video, but he was too unwell to do either. After that disturbing news, Edward Fitzgerald KC rose to open the case for the defence to be allowed an appeal.

There is a crumpled magnificence about Mr Fitzgerald. He speaks with great authority and a moral certainty that compels belief. At the same time he appears so large and well-meaning, so absent of vanity or pretence, that it is like watching Paddington Bear in a legal gown. He is a walking caricature of Edward Fitzgerald. Barrister's wigs have tight rolls of horsehair stuck to a mesh that stretches over the head. In Mr Fitzgerald's case, the mesh has to be stretched so far to cover his enormous brain, that the rolls are pulled apart, and dot his head like hair curlers on a landlady.

Fitzgerald opened with a brief headline summary of what the defence would argue, in identifying legal errors by Judge Swift and Magistrate Baraitser, that meant an appeal was viable and should be heard.

Firstly, extradition for a political offence was explicitly excluded under the UK/US Extradition Treaty which was the basis for the proposed extradition. The charge of espionage was a pure political offence, recognised as such by all legal authorities, and Wikileaks' publications had been to a political end, and even resulted in political change, so were protected speech.

Baraitser and Swift were wrong to argue that the Extradition Treaty was not incorporated in UK domestic law and therefore "not justiciable", because extradition against its terms engaged Article V of the European Convention on Human Rights on Abuse of Process and Article X on Freedom of Speech.

The Wikileaks revelations had revealed serious state illegality by the government of the United States, up to and including war crimes. It was therefore protected speech.

Article III and Article VII of the ECHR were also engaged because in 2010 Assange could not possibly have predicted a prosecution under the Espionage Act, as this had never been done before despite a long history in the USA of reporters publishing classified information in national security journalism. The "offence" was therefore unforeseeable. Assange was being "Prosecuted for engaging in the normal journalistic practice of obtaining and publishing classified information".

The possible punishment in the United States was entirely disproportionate, with a total possible jail sentence of 175 years for those "offences" charged so far.

Assange faced discrimination on grounds of nationality, which would make extradition unlawful. US authorities had declared he would not be entitled to First Amendment protection in the United States because he is not a US citizen.

There was no guarantee further charges would not be brought more serious than those which had already been laid, in particular with regard to the Vault 7 publication of CIA secret technological spying techniques. In this regard, the United States had not provided assurances the death penalty could not be invoked.

The CIA had made plans to kidnap, drug and even to kill Mr Assange. This had been made plain by the testimony of Protected Witness 2 and confirmed by the extensive Yahoo News publication. Therefore Assange would be delivered to authorities who could not be trusted not to take extrajudicial action against him.

Finally, the Home Secretary had failed to take into account all these due factors in approving the extradition.

Fitzgerald then moved into the unfolding of each of these arguments, opening with the fact that the US/UK Extradition Treaty specifically excludes extradition for political offences, at Article IV.

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;

(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.

Fitzgerald said that espionage was the “quintessential” political offence, acknowledged as such in every textbook and precedent. The court did have jurisdiction over this point because ignoring the provisions of the treaty rendered the court liable to accusations of abuse of process. He noticed that neither Swift nor Baraitser had made any judgment on whether or not the offences charged were political, relying on the argument the treaty did not apply anyway.

But the entire extradition depended on the treaty. It was made under the treaty. “You cannot rely on the treaty, and then refute it”.

This point brought the first overt reaction from the judges, as they looked at each other to wordlessly communicate what they had made of it. It was a point of which they had felt the force.

Fitzgerald continued that when the 2003 Extradition Act, on which the Treaty depended, had been presented to Parliament, ministers had assured parliament that people would not be extradited for political offences. Baraitser and Swift had said that the 2003 Act had deliberately not had a clause forbidding extradition for political offences. Fitzgerald said you could not draw that inference from an absence. There was nothing in the text permitting extradition for political offences. It was silent on the point.

Nothing in the Act precluded the court from determining that an extradition contrary to the terms of the treaty under which the extradition was taking place, would be a breach of process. In the United States, there had been cases where extradition to the UK under the treaty had been prevented by the courts because of the 'no political extradition' clause. That must apply at both ends.

Of the UK's 158 extradition treaties, 156 contained a ban on extradition for political offences. This was plainly systematic and entrenched policy. It could not be meaningless in all these treaties. Furthermore this was the opposite of a novel argument. There were a great many authoritative cases, stretching back centuries, in the UK, US, Ireland, Canada, Australia and many other countries in which no political extradition was firmly established jurisprudence. It could not suddenly be "not justiciable".

It was not only justiciable, it had been very extensively adjudicated.

All of the offences charged were as "espionage" except for one. That "hacking" charge, of helping Chelsea Manning in receiving classified documents, even if it were true, was plainly a similar allegation of a form of espionage activity.

The indictment describes Wikileaks as a "non-state hostile intelligence agency". That was plainly an accusation of espionage. This is self-evidently a politically motivated prosecution for a political offence.

Julian Assange is a person in political conflict with the view of the United States, who seeks to affect the policies and operations of the US government.

Section 87 of the Extradition Act 2003 provides that a court must interpret it in the light of the defendant's human rights as enshrined in the European Convention of Human Rights. This definitely brings in the jurisdiction of the court. It means all the issues raised must be viewed through the prism of the ECHR and from no other angle.

87 Human rights

(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited.

To depend on the treaty yet ignore its terms is abuse of process and contrary to the ECHR. The obligation in UK law to respect the terms of the extradition treaty with the USA while administering an extradition under it, was comparable to the obligation courts had found to follow the Modern Slavery Convention and Refugee Convention.

Mark Summers KC then arose to continue the case for Assange. A dark and pugnacious character, he could be well cast as Heathcliff. Summers is as blunt and direct as Fitzgerald is courteous. His points are not so much hammered home, as piledriven.

This prosecution, Summers began, was "intended to prohibit and punish the exposure of state level crime". The extradition hearing had heard unchallenged evidence of this from many witnesses. The speech in question was thus protected speech. This extradition was not only contrary to the US/UK Extradition Treaty of 2007, it was also plainly contrary to Section 81 of the Extradition Act of 2003.

81 Extraneous considerations

A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—

(a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

This prosecution was motivated by a desire to punish and suppress political opinion, contrary to the Act. It could be shown plainly to be a political prosecution. It had not been brought until years after the proposed offence; the initiation of the charges had been motivated by the International Criminal Court stating that they were using the Wikileaks publications as evidence of war crimes. That had been immediately followed by US government denunciation of Wikileaks and Assange, by the designation as a non-state hostile intelligence agency, and even by the official plot to kidnap, poison, rendition or assassinate Assange. That had all been sanctioned by President Trump.

This prosecution therefore plainly bore all of the hallmarks of political persecution.

The magistrates' court had heard unchallenged evidence that the Wikileaks material from Chelsea Manning contained evidence of assassination, rendition, torture, dark prisons and drone killings by the United States. The leaked material had in fact been relied on with success in legal actions in many foreign courts and in Strasbourg itself.

The disclosures were political because the avowed intention was to effect political change. Indeed they had caused political change, for example in the Rules of Engagement for forces in Iraq and Afghanistan and in ending drone killings in Pakistan. Assange had been highly politically acclaimed at the time of the publications. He had been invited to address both the EU and the UN.

The US government had made no response to any of the extensive evidence of United States state level criminality given in the hearing. Yet Judge Baraitser had totally ignored all of it in her ruling. She had not referred to United States criminality at all.

At this point Judge Sharp interrupted to ask where they would find references to these acts of criminality in the evidence, and Summers gave some very terse pointers, through clenched teeth.

Summers continued that in law it is axiomatic that the exposure of state level criminality is a political act. This was protected speech. There were an enormous number of cases across many jurisdictions which indicate this. The criminality presented in this appeal was tolerated and even approved by the very highest levels of the United States government. Publication of this evidence by Mr Assange, absent any financial motive for him to do so, was the very definition of a political act. He was involved, beyond dispute, in opposition to the machinery of government of the United States.

This extradition had to be barred under Section 81 of the Extradition Act because its entire purpose was to silence those political opinions. Again, there were numerous cases on record of how courts should deal, under the European Convention, with states reacting to people who had revealed official criminality.

In the judgment being appealed Judge Baraitser did not address the protected nature of speech exposing state criminality at all. That was plainly an error in law.

Baraitser had also been in error of fact in stating that it was "Purely conjecture and speculation" that the revelation of US war crimes had led to this prosecution. This ignored almost all of the evidence before the court.

The court had been given evidence of United States interference with judicial procedure over US war crimes in Spain, Poland, Germany and Italy. The United States had insulated its own officials from ICC jurisdiction. It had actively threatened both the institutions and employees, of the ICC and of official bodies

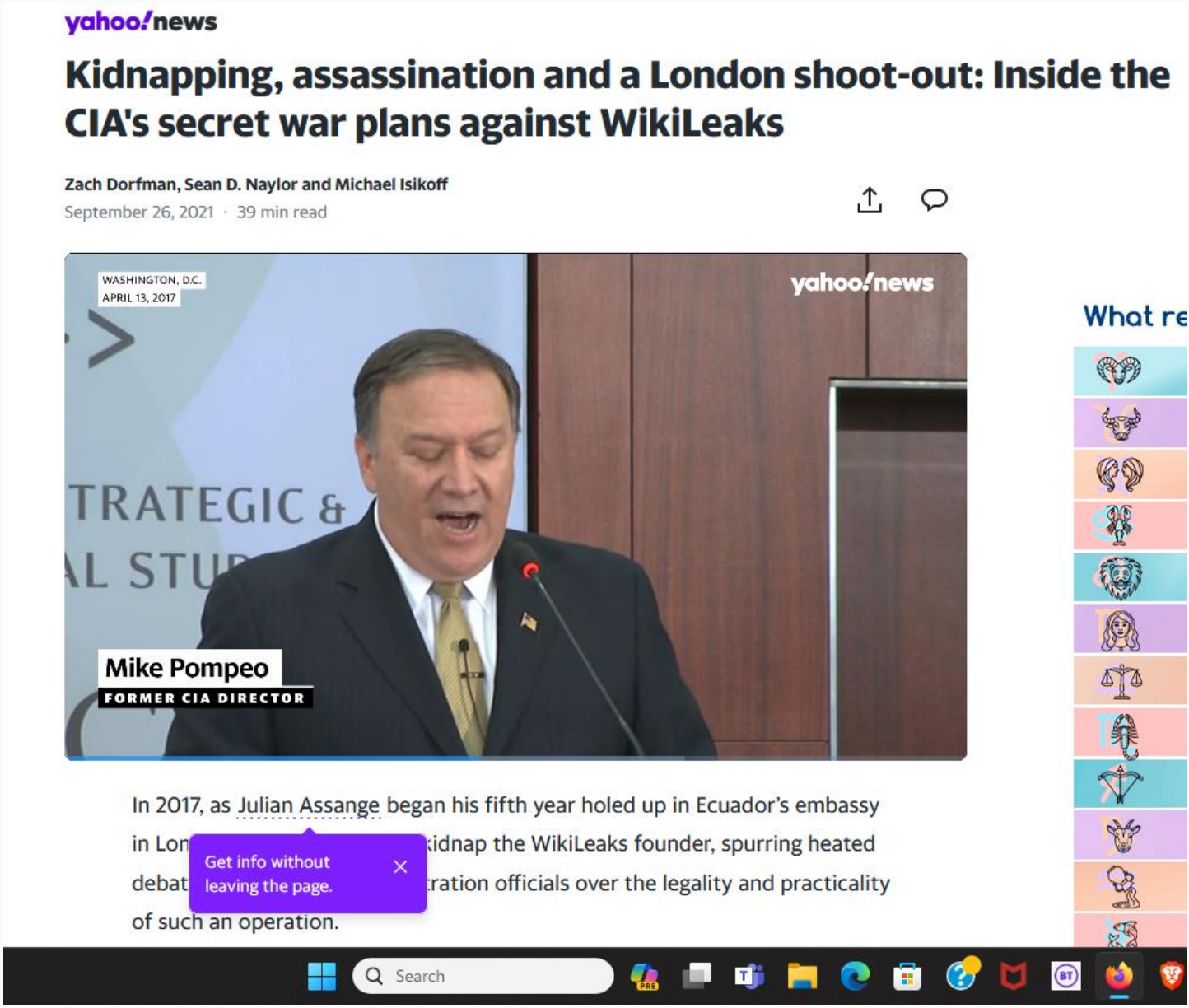
of other states. All of this had been explained in detail in expert evidence and had been unchallenged. All of it had been ignored by Baraitser.

Following the publication of the Manning material, there had been six years of non-prosecution of Assange. Why was there then a prosecution after six years? What had changed?

Following the declaration by the International Criminal Court that it would use Wikileaks material to investigate US government officials for war crimes, US officials described Assange as “a political actor”. This period saw the origin of the phrase “non-state hostile intelligence agency”. Assange had been accused of “working with Russia” and “trying to take down the USA”.

Baraitser had acknowledged in her judgment the hostility from the CIA but stated that “the CIA does not speak on behalf of the US administration”.

It was important to note that it was after the Baraitser judgment that Yahoo News had published its investigation into the US government plot against Assange.



The court had heard of CIA action against Assange from Protected Witness No.2, but that had only gone to unlawful surveillance at the Ecuadorean Embassy and elsewhere. He did not know of the kidnap and kill plot. This was very real, and it was chilling. Indeed, the prosecution and extradition request was only initiated in order to provide a framework for the rendition attempt.

NSC officials also worried about the timing of the potential Assange kidnapping. Discussions about rendering Assange occurred before the Justice Department filed any criminal charges against him, even under seal — meaning that the CIA could have kidnapped Assange from the embassy without any legal basis to try him in the United States.

Eisenberg urged Justice Department officials to accelerate their drafting of charges against Assange, in case the CIA's rendition plans moved forward, according to former officials. The White House told Attorney General Jeff Sessions that if prosecutors had grounds to indict Assange they should hurry up and do so, according to a former senior administration official.

Things got more complicated in May 2017, when the Swedes dropped their rape investigation into Assange, who had always denied the allegations. White House officials developed a backup plan: The British would hold Assange on a bail jumping charge, giving Justice Department prosecutors a 48-hour delay to rush through an indictment.

Eisenberg was concerned about the legal implications of rendering Assange without criminal charges in place, according to a former national security official. Absent an indictment, where would the agency bring him, said another former official who attended NSC meetings on the topic. "Were we going to go back to 'black sites'?"

Political persecution was also apparent in the highly selective prosecution of the appellant. Numerous newspapers had also published the exact same information, as had other websites. Yet only Assange was being prosecuted. Baraitser had simply ignored numerous facts which were key to the case, and therefore her judgment was plainly wrong.

The European Court of Human Rights had ruled that, under Article 7 of the Convention, a prosecution must be foreseeable, for the act committed to be criminal. This prosecution failed the foreseeability test because no journalist had ever before been prosecuted under the US Espionage Act. Baraitser was obliged to rule on this but instead had simply said it would be a matter for the US court.

Publication of leaks was routine. National security journalism is a thing. It was a well established aspect of the profession in the USA. Encouraging those in possession of classified material to reveal it, is routine journalistic practice. Whistleblowers themselves had been frequently prosecuted. But no publisher or journalist had ever been prosecuted for obtaining or publishing classified state material.

Baraitser had heard much unchallenged evidence on this point. A prosecution which has never happened before is not foreseeable.

At this point, Judge Johnson intervened to ask whether the publication of so many unredacted names of informants had not also been unprecedented, and if this may have been expected to trigger an unprecedented response?

Summers replied there had indeed been other examples of publication of names.

At this point, the court broke up for lunch.

It had been a strong start to the case by the defence. The judges had appeared to pay increasing attention as the case went on, and at times seemed surprised by some of the assertions made. The first substantive

question from the judges, coming just on the lunch break, was however plainly intended to be hostile to Assange.

We left the courtroom and headed for the canteen. This has no frills and a very limited menu, designed to shove the food out quick. I was with John Shipton and German MP Sevim Dagdelen, who kindly paid for lunch, thus immediately distinguishing herself from all the British MPs I have known.

I asked for a baked potato with cheese, but it turned out that baked beans and cheese were not a choice but a pre-mix, and the potato came covered in this bright orange mess. I accidentally got some on my thumb, which despite the passage of 48 hours and frequent washing, remains the colour of Donald Trump's face.

After lunch, Mark Summers was able to return to the question raised about the release of names of agents and informants.

He said there were many examples in the past of such names being published, including en masse, and it had never resulted in the Espionage Act or any other charges being brought against a publisher. In the case of Philip Agee, the publication of names had led to revocation of the article but no prosecution of the publisher. Daniel Ellsberg had in fact given evidence in this very case that publication of the Pentagon Papers had revealed numerous names, for which there had been no prosecution of the New York Times.

He suggested it was also worth noting there is currently no prosecution of Cryptome, which published the unredacted Manning material before Wikileaks, and still carries it. There has, since these events, been a law passed in the United States specifically outlawing the publishing of the names of secret service officers and sources, but this legislation is specifically limited to officers of the state only and specifically does not include publishers or journalists.

This prosecution therefore remains unprecedented and unforeseeable. No American case has ever sought to prosecute publishers who publish state secrets. The governing principle remained as famously defined by Justice Stewart "The autonomous press may publish what it knows and seek to learn what it can".

Against this great raft of practice and jurisprudence, continued Summers, all the US government had managed to produce was a court of first instance case named Rosen, in which the court had "entertained the possibility" that the receipt and passing of classified information, not by the whistleblower, might be an offence. But that case was about corporate lobbyists and not about journalism or publishing, it had anyway never concluded and it was from a court with a comparative authority to Truro Magistrates Court.

That was literally the only argument the US government had to offer. Yet Baraitser had found in their favour.

Judge Johnson now interrupted to ask how this related to the theft of information aspect of the charges against Assange, and assisting Manning to crack a hashtag? Taken at its highest, was this not conspiracy to get hold illegally of state material?

Summers responded that it was standard journalistic practice to encourage and assist whistleblowers to obtain material for the press. There were a very large number of such instances, but in 2010 there had never been a prosecution. The US government had asserted two examples of such prosecutions, but there were from 2012 and 2016, and they were not relevant to whether such a prosecution could have been foreseeable to Julian Assange in 2010.

At this point Summers appeared very exasperated indeed. He addressed the judges as though he were a leading astrophysicist who, for some reason, found himself teaching elementary mathematics to an unruly remedial class at a young offenders' institution. His jaw was set and his hands clenched and unclenched. I would not have bet any significant sum against his next words being "listen, you bloody fool". Every now and then there was a menacing pause while he lent forward and rested his weight on fists bearing down on the desk in front of him, which seemed to help control his anger.

Gathering himself, he continued:

It was the duty of Judge Baraitser to ensure that the extradition did not breach the ECHR Article VII on the rule of law. If the prosecution were unforeseeable – as it was – that was a breach. Baraitser's ruling left the decision on this point to be decided by the court in the United states. But she could not abdicate responsibility in this way. She had an explicit duty to offer ECHR protection and consider the point herself. By not doing this, she had erred in law. The Court cannot be absolved of its duty to deal with Convention rights.

Summers continued: the Court had a duty to consider the case the way that Strasbourg would judge the case, applying "European values". Justice Johnson asked whether that applied to all the charges of the indictment. Summers answered simply "all of them". Dame Victoria then asked whether it made a difference whether Ms Manning had come across the information in the ordinary course of her employment, or had actively sought it out.

Summers replied that what the court at Strasbourg would say on this is that there was a "proportionality balance".

Manning had revealed massive state level criminality going to the very heart and purpose of the organisation for which she worked. Of course she was entitled actively to look for evidence of it. Manning's exposures were conscience driven and from no other motive. There was plainly enormous public interest in the publication.

On the question of public interest the Strasbourg jurisprudence differs radically from English domestic legislation on official secrets, but in considering Convention rights the court is obliged to look at it through the Strasbourg lens.

The question was this: "Is the public interest in the disclosure sufficient to outweigh the duty of confidentiality of the employee?"

Strasbourg judgments made plain it was not enough just to say "national security". The actions of governments, especially when it came to state crime, must be subject to scrutiny by the public.

Justice Johnson then intervened to ask how this related to the harm caused to human sources whose names were revealed in the publication?

Summers again controlled himself, and then said there had been no evidence presented, at these hearings or at the trial of Chelsea Manning, that any harm had actually occurred to any named individual. There was no allegation, in all the United States case, that any individual had actually come to harm. The allegation was they were put at risk.

What had been exposed was state-level crime on a massive scale, including very grave war crimes. Set against that was a potential risk to individuals involved in those crimes. In considering the balance, Strasbourg would consider that they themselves as a court had made use of the Manning material in several very important legal cases. The International Criminal Court has similarly used the material.

Manning was a whistleblower and her material was of enormous, the greatest, public interest. That would weigh very heavily in the balance of proportionality, compared to the disproportionate American sentencing for disclosure.

More fundamentally, Manning was a whistleblower who had revealed state level serious criminality. The publications were therefore protected speech and Strasbourg would rule there should be no prosecution at all. And the answer to Dame Victoria's question, Summer concluded, is this:

"If the speech is protected, then helping it cannot be criminal".

Assange's intention was political and the effects were political. These had included an end to drone killing in Pakistan, changes to the Rules of Engagement for US forces in Afghanistan and even arguably they had helped bring an end to the war in Iraq. There was no doubt the public interest in this eclipses all the other arguments.

While, unlike Manning, Assange had been under no duty of secrecy to the US government of any kind.

Dame Victoria interrupted to say that Judge Baraitser had dealt with all of these arguments at para 110 of her judgment.

Summers looked at her pityingly. “No, she doesn’t,” he said “she just looks at the Official Secrets Act plus Shayler. Nowhere does she ever acknowledge the public interest in the disclosures. She just recognises everything in the other side of the balance. She does not do the required balancing exercise at all. She never understands the test she has to apply and to judge public interest on the facts of the case.”

Plainly in the lunch period the judges had returned to their corner stools, where they had been given smelling salts, splashed with water and instructed to come out swinging. Judge Johnson asked with extra sarcasm: “So, revealing the identities of informants. How do you balance that?”

Dame Victoria said that Judge Baraitser had noted that this was a matter of “indiscriminate disclosure” that had been condemned by the New York Times, the Guardian and Mr Assange’s other media partners.

Summers replied that the risk to those people named simply formed a part of the balancing exercise which Judge Baraitser had failed to carry out. It had to be set against the value of disclosing ongoing war crimes. And you are talking about a potential risk to US informants who might come to harm, against actual war crimes which really had happened. Thousands of people who had been assassinated, tortured, renditioned etc.

Baraitser’s failure to carry out the balancing exercise on public interest and the rule of law under Article 7 of the Convention was blatant, but even more so was that she had failed to engage at all with Article X – Freedom of Speech. She had stated that whether Assange was entitled to First Amendment protection in the United States was for the American judge to decide, but had ignored her own duty to consider the same freedom of speech arguments under Article X of the Convention.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

There was established Strasbourg jurisprudence that showed that news gathering activity was as much a part of the act of protected speech as the publication of the information. The allegation in the indictment ftom the USA that Assange helped Manning with hashtag hacking could bear two interpretations. It was either news gathering, or providing the source with protection. Both were legitimate.

The court had also to consider the enormity of the sentence Assange could face. This was so disproportionate, at up to 175 years as currently charged, that it should itself fall foul of Article III of ECHR. There was also the question of the sheer chilling effect of this kind of prosecution and sentence, on other journalists and publishers. That too had to be considered in the balance of public interest.

Summers now finished and sat down. We looked around, and were rather relieved to find that it appeared that he had got through his performance without any actual physical harm coming to anybody.

But Summers very definitely had an effect. The attitude and the body language of the judges had changed. It was perfectly plain that he had presented them with facts about the case that they had never heard before, and arguments that they found cogent. Their interchange of glances with each other became more frequent, and at times Johnson had walked over to confer. They looked things up and moved papers and furrowed brows. It was obvious they had a great deal of respect for Summers, even though, if it were mutual, he hid that fact very well.

Edward Fitzgerald stood up again and the whole court relaxed. Everybody's shoulders lowered an inch. Both judges looked at him fondly, as at a beloved uncle getting to his feet after an excellent Christmas lunch, who is now going to do conjuring tricks for the family, which everyone knows will go hilariously wrong in the middle but be spectacularly successful in the end.

For some reason, Fitzgerald was carrying the desktop lectern in the crook of his elbow as he started to address the judges, gradually sorting out this and his boxes of papers as he went along. He said that the extradition must be blocked because Assange faced discrimination on grounds of nationality. In his affidavit for the prosecution, Deputy Attorney General Kronberg stated that it may be held that Assange was not entitled to First Amendment rights and protections for free speech, as he was a foreign national. This had also been stated by Mike Pompeo, a senior administration official.

Judge Baraitser had said that the USAID case on this point was not relevant as it only applied to companies outside the United States. But the very affidavit setting out the indictment stated that the US might apply this to Assange, and so had Pompeo. So Baraitser was plainly wrong.

Dame Victoria interjected that Judge Baraitser had also said that the US government position is that this case is not really a First Amendment case at all. Fitzgerald replied that it most certainly is at least arguably a First Amendment case on freedom of speech; that the defence wished to argue the First Amendment. The prosecution themselves said there was at the least an option to deny this defence to Julian Assange on discriminatory grounds of nationality.

If the defendant's preferred defence were blocked on the grounds of nationality, that was enough to deny the extradition. The notion of an unfair process was not dependent on its result.

The point had been extensively raised and the United States had given no assurances that they would not treat Assange in this discriminatory way.

This was another point where the judges looked at each other, clearly perplexed. This case was not as simple to dismiss as they had expected.

Fitzgerald then said that, contrary to Articles VI and VII of ECHR, it was possible in the USA to be sentenced for conduct with which you have not been charged or of which you have even been acquitted. This could occur at "sentencing enhancement", where a judge could bring in other alleged conduct which had not been in the trial, to affect the sentence. As this was done on a "balance of probabilities" basis, there were even many cases where the judge had sentenced people for offences of which they had been acquitted by the jury on the measure of "beyond reasonable doubt".

Fitzgerald gave the example of a person accused of dealing cannabis who had been sentenced for a second degree murder which had never been prosecuted. He said that in the Assange case, this was particularly likely to happen. None of the charges now before the court related to the Vault 7 leaks, but the defence believed these had motivated the prosecution. It was following the Vault 7 publication that Pompeo designated Wikileaks a "non-state hostile intelligence agency". It was very likely Assange could be sentenced for the Vault 7 leaks with which he had never been charged. Joshua Schulte, the supposed Vault 7 leaker, had just been sentenced to 40 years in jail.

These kind of arrangements certainly reached the bar of a "flagrant denial of justice" which the courts had set as necessary to prevent an extradition on grounds of lack of due process.

Dame Victoria asked whether this would extend so far as to put aside extradition in every US criminal case? Fitzgerald replied no, you would have to look at each individual case and assess how great the risk.

She asked whether the Vault 7 disclosures created the risk in this case, and Fitzgerald replied yes, though there were also other factors.

Fitzgerald then moved to the evidence of Protected Witness 2 and the issue of illegal surveillance of Assange in the Embassy, including of his legal consultations, and the plot to kidnap and even kill him, by the authorities of the state that was seeking his extradition. Baraitser's answer to this was not to take it into account because it was the subject of criminal proceedings in Spain, but (said Fitzgerald) "that cannot be a reason not to look at it".

In considering real danger to life when issues of human rights and political motivation are concerned, the strict rules of legal evidence, as in a criminal court case, do not apply. The Yahoo News article would be considered acceptable evidence in weighing an asylum application under the Refugee Convention, and it should be given the same weight now. Pompeo had himself confirmed that some of it is true.

If removed to the USA there is a real danger that Assange's life could be targeted by US intelligence organisations. The CIA also has a major role in prison allocation and the imposition of Special Administrative Measures, defined by the UN as tantamount to torture.

Dame Sharp said that the US prosecution had said Assange could be transferred to prison in Australia. Fitzgerald said that was a highly conditional suggestion. Assange would be in any event liable for two years or more pre-trial detention in the USA, then years more if an appeal was to be heard. The conditions of transfer between the USA and Australia would be subject to diplomatic negotiation. All the time Assange would be subject to the "real possibility of extrajudicial attack", while being held in the USA.

Finally, Fitzgerald turned away from the grounds on which appeal should be allowed against Baraitser's judgment, to the grounds where the Home Secretary (Priti Patel I think – they come and go so fast) had failed in her duty by authorising the extradition.

Fitzgerald said the Home Secretary had a separate obligation to enforce Article 4 of the Extradition Treaty, as she was executing an instrument under the Treaty. She had failed to do so. She had also not exercised her own judgment, as she ought to have done on the Gary McKinnon precedent. The Secretary of State must also act in conformity at all times with the ECHR.

Separately, the Secretary of State had failed in her specific duty to obtain assurances that the death penalty would not be implemented, before agreeing an extradition. The United States could add further charges at any time were Assange in the US, including aiding and abetting treason or other Espionage Act charges which attract the death penalty. It was routine in these circumstances to obtain assurances against the death penalty, and it was sinister they had not been obtained.

The law on this point was very clear; in the absence of assurances against the death penalty, the extradition must be stopped by the Home Secretary and the defendant discharged.

On this rather sombre point, Judge Sharp called the end of the day, and we staggered out into a wet London evening. It was a huge amount to pack into our heads in a day for those of us with brains smaller than Mr Fitzgerald, and the large crowd that roared its approval as we emerged hardly registered with me at all.

It had gone better than I expected.

For the first time in the five years of these extradition hearings, I felt that the judges were genuinely listening and engaged. It was obvious that they had been briefed by the security services beforehand, that the only issue in this case was the placing at risk of US informants whose names had been revealed. It was also plain that they had read very little of the documentation, as they continually asked for references and seemed unacquainted with many basic facts of the case. But as the day went on, they had discovered that there was very much more to be considered, and they looked like they were considering it.

You may think this strange, but they also both came over as rather nice people. They were unfailingly polite, and it did not seem a pretence. They both found the odd moment amusing that was natural to be amusing, and engaged sympathetically with the defence team throughout. Of course, I do not pretend that

any of that is more powerful than the Establishment desire to see Julian crushed, and I am well aware they both have truly Deep State backgrounds. But I left encouraged.

Julian remained in his tiny cold cell. The next day would be the US government response.