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Public Briefing - USA v Assange - September hearings Q&A

Summary: Julian Assange's first instance extradition hearing resumes on 7 September 2020. Extradition proceedings can be obscure and this is a particularly complex case. The late appearance of a second superseding indictment (now entered into the UK proceedings as an entirely new extradition request) adds to these difficulties. This briefing gives a general overview of what those following the hearings can expect.

How do these hearings relate to what happened in February?

In February, the defence made some preliminary legal arguments. In these hearings, we will hear witness testimony, primarily from the defence. Both defence and prosecution will have the opportunity to cross-examine witnesses.

The defence will also be making different points and putting forward new arguments. In February, the defence argued that the extradition proceedings could be an abuse of process in three respects. Specifically, they argued that the extradition had been initiated for political reasons, that it was not compatible with the UK-US Extradition Treaty and that the factual basis of one of the charges was wrong.

What will the defence argue this time?

In these hearings, the defence will focus on statutory bars to extradition – that is, the exclusions included in the UK's Extradition Act of 2003. Those exclusions include beaches of the European Convention on Human Rights (incorporated into UK law in the Human Rights Act of 1998).

In extradition cases, the prosecution has to demonstrate that the alleged offence would be a crime in both jurisdictions (dual criminality). Once dual criminality has been established, the presumption is that a defendant will be extradited unless the defence can demonstrate that one of the exclusions should apply. At that point, the onus is therefore on the defence to prove their case.

The defence will argue that Julian Assange should not be extradited for the following reasons:

- a. The extradition is politically motivated. As a result it discriminates against Julian Assange on the basis of his political opinions and his nationality. (Extradition Act, Articles 81(a) and 81(b))
- b. The extradition would violate key human rights principles, including the rights to a fair trial and freedom of expression. (Extradition Act, Article 87; Human Rights Act/ECHR Articles 6 and 10)
- c. Extradition would expose Julian Assange to inhuman or degrading treatment in the US prison system. (Extradition Act, Article 87; Human Rights Act/ECHR Article 3)
- d. It would be unjust and oppressive to extradite Julian Assange by reason of his mental condition and the high risk of suicide that might result. (Extradition Act, Article 91)
- e. It would be unjust and oppressive to extradite Mr Assange because of the length of time since the alleged offences. (Extradition Act, Article 82)

The prosecution will then, naturally, seek to counter each of these arguments.

Are any of those arguments likely to succeed?

While some of the arguments the defence will make reflect the individual circumstances of this case – for instance that UC Global’s surveillance means that extradition should be barred on Article 6 grounds – others have succeeded in past extradition battles.

British-Finnish computer scientist Lauri Love won his first appeal against extradition to the US on the basis of Article 91 – that the consequences of extradition for Love’s physical and mental well-being meant it would be “unjust and oppressive.”¹ Public opposition in the UK to the country’s extradition arrangements with the US has also tended to focus on these kinds of welfare arguments, particularly as they impact on individuals on the autism spectrum.

In addition, courts in the UK can and do rule out extradition on political grounds – that is, discrimination against an individual for their political opinions. These rulings have, however, tended to involve countries other than the United States.

What difference does the second superseding indictment make?

The second superseding indictment makes significant changes to the CFAA conspiracy charge Julian Assange faces.

1 Lauri Love also won his appeal on forum grounds, which are less relevant here.

In recent administrative hearings, the defence has proposed that the case should continue on the basis of the previous indictment. It is unlikely this will happen.

The formal introduction of the second superseding indictment into the case (as a new extradition request) happened only in mid-August, *after* the final deadline for defence evidence. This, of course, makes it challenging for the defence to deal with.

How the court decides to treat the new allegations in what is now Count 2 of the new US indictment is a key issue for the forthcoming hearings.

Julian Assange will be re-arrested on the first day of the resumed hearings. Is this normal?

Julian Assange has to be re-arrested because the US has issued a new extradition request. It is not usual for this to happen at this late stage in proceedings.

Superseding indictments responding to defence arguments are normal in the context of US domestic proceedings, much less so in extradition cases.

Who will the witnesses be?

The defence has previously indicated that it intends to call more than 20 witnesses. Not everyone who has provided evidence in the case will be called to testify.

Where a witness does testify in court, they can be cross examined by both sides.

The nature of extradition cases means that almost all of the witnesses who do testify in the September hearings will be witnesses for the defence.

What happens next?

The September hearings have been scheduled for three weeks. There is the possibility of an overrun into a fourth week, which may have to be set for a later date.

Once the hearings are concluded, District Judge Baraitser will not deliver her ruling immediately. She may specify a date when her ruling will be handed down. If Baraitser rules in favour of extradition, papers go to the UK Home Secretary for approval. There is the possibility to make representations at this stage.

There are then two levels of domestic appeal as well as possible recourse to the European Court of Human Rights in Strasbourg.