IN THE HIGH COURT OF JUSTICE

Case Nos: AC-2022-LON-001745 & 1476
ADMINISTRATIVE COURT

IN THE MATTER OF APPEALS UNDER S.103 & 108 EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Applicant

V

GOVERNMENT OF THE UNITED STATES OF AMERICA

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

FIRST RESPONDENT'S

SUBMISSIONS REGARDING ASSURANCES

I. INTRODUCTION

1. The issue before the court is whether, in the light of the First Assurance, there remains a reasonable argument (real prospect of success) that the District Judge was wrong in her finding of fact that the Applicant had not made out the bar to extradition under section 81(b) of the Extradition Act 2003 ("the 2003 Act").

2. The Applicant does not allege the Assurances are given in bad faith or would not be adhered to, (albeit strictly construed), but that the Assurances do not meet their section 81(b) of the 2003 Act ground of appeal.

3. Further, the Applicant submits that if the Assurance is to be taken to disapply US law they should not be accepted. This last point can be quickly resolved in that the Assurances do not, and cannot, as a Constitutional matter owing to the separation of powers, disapply US law. As in the United Kingdom the executive cannot bind the courts, who are the final determiners of domestic law, on an issue of constitutional law or legal interpretation. That is not to say the judiciary will do other than take solemn notice and give effect so far as they are able to a promise given by the executive, particularly in relation to international relationships.

4. It is submitted that, in the light of the Assurances, permission to appeal should be refused. In any event, if the matter is still arguable notwithstanding the Assurance, permission should only be granted against counts 15 to 17 of the Indictment as only those publication

counts concern freedom of expression/speech. See this Court's judgment at paragraph [149] (the only counts that directly concern freedom of expression are counts 15-17). The remainder of the counts are ordinary crimes because they allege Assange's involvement in the underlying theft of the documents at issue.

II. THE FRESH EVIDENCE

5. It is not accepted the fresh evidence sought to be adduced by the Applicant meets the *Fenyvesi*[1] test. The Applicant could easily have provided this evidence, with due diligence, at the extradition hearing in support of his section 81(b) of the 2003 Act argument. The burden of proof was on him on this point before the District Judge and he decided not to adduce expert evidence to deal with the statement of Mr Kromberg. Indeed, he made a conscious decision to simply rely on the statement of Mr Kromberg. Moreover, it is not decisive evidence as it does no more than support the observation made by Mr Kromberg and the Court that a prosecutor could make this argument. Contrary to the assertion made by the Applicant in his application to adduce fresh evidence this issue has not arisen since this Court's judgment on permission to appeal, the fact there was no expert evidence below was because the Applicant chose not to adduce any.

6. Of course, if the new evidence went to the validity, veracity or efficacy of the Assurance it would be proper for the Court to receive such evidence. However, it does not, it solely goes to the underlying issue decided below.

7. However, the First Respondent is content for the Court to consider the evidence of Professor Paul Grimm *de bene esse*. In such circumstances the First Respondent makes the following observations on the expert evidence:

    a. Professor Grimm states at paragraph 3(b)(i): "In my opinion, however, there is a line of authority that the United States could rely on in support of an argument Mr. Kromberg might make that foreign nationals are not entitled to protection under the First Amendment to the United States Constitution, at least as it concerns National Defense information." [Emphasis added].

    b. Professor Grimm states at paragraph 3(b)(i): "namely the al Qaeda recruitment video he created…As with Bahlul's claimed jury trial right, no governing precedent extends First Amendment protection to speech undertaken by *non-citizens* on foreign soil" "[emphasis added].

    c. Professor Grimm states at paragraph 3(b)(ii): "First, it is long settled as a matter of constitutional law that *foreign citizens* outside US. territory do not possess rights under the US. constitution. " [Emphasis added].

    d. Professor Grimm states at paragraph 3(b)(iv): "The court stated *"Absent national security concerns not present in this case,* the First

[1] Hungary v Fenyvesi [2009] EWHC 231 (Admin); [2009] 4 All ER 324.

Amendment right to receive information includes the right to receive information from outside the United States." [Emphasis in original]

e. Professor Grimm states at paragraph 3(b)(v): "I express no concluded opinion regarding the successfulness of such an argument."

III. SUBMISSIONS

A. The Correct Approach

8. The correct test for section 81(b) of the 2003 Act is whether the Applicant has shown there is a 'reasonable chance' or 'reasonable grounds for thinking' or a 'serious possibility' that prejudice at trial will occur as a result of his nationality[2].

9. In *Antonov & Barauskas*[3] it was said at [27] "… the 'serious possibility' test applies to both what might happen and the reason for it happening".

10. The legislative history of the provision[4]; the fact that 'nationality' must be construed *ejusdem generis* with "race, religion, nationality, gender, sexual orientation, or political opinions"; and the inapplicability to the provision to rights and obligations arising from citizenship,[5] indicates the provision is limited to prejudice on the basis of nationality (place of birth), not citizensip, and is concerned with due process and fair trial rights. It is a trial anti-discrimination clause.

B. No prejudice based on nationality

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[2] In *Hilali v. Spain* [2006] EWHC 1239 (Admin) at [62]:
"The burden is on the appellant to show a causal link between the issue of the warrant, his detention, prosecution, punishment or the prejudice which he asserts he will suffer and the fact of his race or his religion. He does not have to prove on the balance of probabilities that the events described in s.13 (b) will take place, but he must show that there is a 'reasonable chance' or 'reasonable grounds for thinking' or a 'serious possibility' that such events will occur (*Fernandez v The Government of Singapore* [1971] 1 WLR 987)"

[3] [2015] EWHC 1243 (Admin)

[4] The provision first appeared in Article 3(2) of the European Convention on Extradition 1957 (modelled on Article 14 of the ECHR 1953: protecting *inter alia* the procedural trial safeguards of Article 6. The ECHR is itself territorial)); was embodied in section 4(1)(c) of the Fugitive Offenders act 1967; section 2(1) of the Suppression of Terrorism Act 1978; Article 3(a) of the Supplemental Extradition Treaty between the United Kingdom and the United States of America 1986; and section 6(1)(d) of the Extradition Act 1989.

[5] People may have rights and liabilities imposed because of their citizenship. The following are examples: (1) a United Kingdom citizen entering the United Kingdom, at say Dover, will not have liability (having a right of abode in the United Kingdom) for an immigration offence, but a non-United Kingdom citizen will be liable. (2) A British citizen may be prejudiced at his trial for a sexual offence or corruption offence because the provision extends to him for conduct committed by him abroad while it will not extend to a foreigner for the same conduct in that place committed abroad. (3) A British citizen has procedural rights over and above those of a foreigner in the United Kingdom: In this jurisdiction, extradition is a case in point - only British citizens are entitled to rely upon Article 6. Foreign nationals are not; *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20; see also *R (Al Rawi & Others) v The Secretary of State for Foreign and Commonwealth Affairs & Anor* [2008] Q.B. 289 §78.

11. In the present case, the reason put forward by the Applicant, but not conceded as correct, is that the Applicant will be prejudiced at trial by reason of his being a non-US citizen, because the U.S. prosecutor indicated in one sentence contained within hundreds of pages of supplemental declarations that "Concerning any First Amendment challenge, the United States could argue that foreign nationals are not entitled to protections under the First Amendment, at least as it concerns national defense information…" Critical language that the Applicant does not highlight follows: "and even were they so entitled, that Assange's conduct is unprotected because of his complicity in illegal acts and in publishing the names of innocent sources to their grave and imminent risk of harm." *Id*.

12. The position of the US prosecutor is that no-one, neither US Citizens nor foreign citizens, are entitled to rely on the First Amendment in relation to publication of illegally obtained national defence information giving the names of innocent sources to their grave and imminent risk of harm. This was extensively set out in paragraphs [7] to [9] and [71] of Mr Kromberg's Declaration (Kromberg 4th Supp. Decl. at Para. 71). It follows the issue raised by the Applicant is unlikely to arise. The overriding First Amendment argument put forth by the Requesting State is contained in the omitted portion of Kromberg's Declaration set out above. This principal applies equally to US citizens and non-US citizens irrespective of their nationality, or place of birth, and irrespective of where the conduct took place, though it is ultimately a question of law for the U.S. courts. The conduct in question is simply unprotected by the First Amendment[6]. There can be no "serious possibility" of prejudice on the basis of nationality when the issue of nationality (or even citizenship) is not dispositive and may, in fact, never factor into a US court's legal analysis.[7]

13. Even if nationality and citizenship are meant to be synonymous terms under the 2003 Act Act, - and we submit that they are *not*[8] - the applicability of the Applicant's First Amendment argument requires *inter alia* the components of (1) conduct on foreign (outside the United States of America) soil; (2) non-US citizenship; and (3) national defence information. See Grimm at 3(b)(i).[9] The fact that non-US citizenship is but one factor in a multi-factored analysis cannot establish the requisite causation required by the words of section 81(b) of the 2003 Act, namely: " *by reason of … his nationality"*.

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[6] By parity of reasoning it is not accepted there is a real question as to whether or not his Article 10 rights would be engaged at all based on the DJ's factual finding that he went "outside the role of investigative journalist" (paragraph 102) as it relates to the non-publication charges. And that while Art. 10 is engaged on the publication counts, prosecution under OSA on those counts "where they are used to prosecute the disclosure of the names of informants, are necessary in a democratic society in the interests of national security" and therefore would not be prevented by Article 10 (paragraphs 136 and 273)

[7] Similarly, there cannot be said to be a real risk of a "flagrant denial" of Applicant's Article 10 freedom of expression rights in light of the lower court's finding that, under the balancing test, Article 10 does not protect the kind of speech at issue here.

[8] As Professor Grimm's submission makes clear, while there is a line of authority under US law that might lead a court to find that non-US citizens are not entitled to First Amendment protection for acts occurring on foreign soil that engage national security concerns, this argument considers citizenship and not nationality. As such, Section 81(b) of the 2003 Act barring prejudice based on nationality at trial is not engaged as a threshold matter.

[9] The Court may have been led into an error by the passage given by Gordon Kromberg at [71] of his declaration in support of extradition dated 17th January 2020, as it is incomplete and omits the additional point that the argument can only concern foreigners outside the United States of America as the declaration of Professor Grimm correctly states.

14. Regardless, there is no question that the Applicant, if extradited to the United States, will be entitled to the full panoply of due process trial rights, including the right to raise, and seek to rely upon, the First Amendment as a defense. The Equal Protection clause in section 1 of the XIV Amendment to the Constitution applies to US citizens and non-citizens alike. It prohibits discrimination: "… nor deny to any person within its jurisdiction the equal protection of the laws." Given the relevant provision's overarching concern with due process and trial rights, this is all that is required.

C. The Assurance

15. While the Assurance does nothing to assure the success of the Applicant's defences, the Applicant admits that this is not required. See Para. 7 of Applicant's Submission Regarding Assurances ("The US is not required to assure that the Applicant's First Amendment arguments will succeed."). The Assurance removes any argument that the Applicant ".. will be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his … nationality… The following points demonstrate this.

16. First, the first sentence of the Assurance is in an express and unambiguous term. It says:

> " 1. ASSANGE will not be prejudiced by reason of his nationality with respect to which defences he may seek to raise at trial and at sentencing."

17. The United States Government is well aware of the importance and meaning of the anti-discrimination clause as identical terms were agreed between the High Contracting Parties in the 1986 Supplemental Treaty. It follows the United States Government is enjoined to ensure the Applicant will not be so prejudiced as the Assurance is given in good faith and should be taken at face value.

18. Secondly, for the 'serious possibility' threshold to be crossed, there must be a serious chance that the Applicant will be prejudiced on the basis of his nationality. As stated, while a U.S. court may factor citizenship in determining the application of First Amendment protections, nationality (place of birth) is not a consideration. Further, the principal argument of the U.S. government here is - and has always been - that, regardless of citizenship or nationality, the accused conduct of revealing names of sources and placing them in imminent risk of harm is unprotected speech not covered by the First Amendment.

19. Thirdly, the judicial branch of the United States will take due notice of this solemn Assurance given by its government in the course of international relations.

20. Fourthly, the Applicant himself maintains it is impossible he will not be afforded First Amendment rights.

21. It follows, if there was a serious possibility of prejudice by reason of nationality, it has been reduced to vanishing point by this Assurance.

IV. CONCLUSIONS

22. Permission to appeal should be refused.

23. If, notwithstanding the Assurance the Court still finds the issue arguable, then permission should only be granted on Ground (iv) on Counts 15 to 17 of the Indictment[10].

James Lewis KC

Joel Smith KC

14 May 2024

[10] This is because of The Extradition Act 2003 (Multiple Offences) Order paragraph 24 which modifies section 79 of the principle 2003 Act. As Holgate J. said in *Cleveland v United States of America* [2019] 1 WLR 4392 at [21]: "Where, as in the present case, the request alleges multiple offences, each one needs to be considered separately,..."