IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

DISTRICT JUDGE BARAITSER

EXTRADITION HEARING

THE UNITED STATES OF AMERICA

-v-

JULIAN ASSANGE

SKELETON ARGUMENT

ON BEHALF OF THE UNITED STATES OF AMERICA

Date of hearing: 24 February 2020
Time estimate: 5 days
References are to the Defence Core Bundles [CB] and the United States Core Bundle [USCB]
Essential reading: The first Affidavit of Gordon Kromberg [USCB2]; The second Affidavit of Gordon Kromberg [USCB3].

CONTENTS

I. OVERVIEW

1. This is an application for the defendant to stand trial in the United States of America. It is not a trial of the facts or issues, which the defence are endeavouring to make it. The sole questions are whether the statutory requirements of the Extradition Act 2003 ("the Act") are satisfied. The Act is meant to be an exhaustive code to enable the court to deal sequentially with the questions set out for determination.

2. A very limited, residual abuse of process discretion is available where the statutory tests or bars to extradition are not engaged. This abuse of process is not to be equated to the abuse of process jurisdiction available in domestic criminal trials. It is an exceptional jurisdiction with a very high threshold and only arises in extradition proceedings if there has been a bad faith manipulation of the English extradition process which is not covered by the statutory scheme.

3. The defence have already conceded at § § [3] (and [8]) of their written submissions on abuse of process ("Particulars of Abuse") that "..each individual limb of the evidence relied on for the purposes of abuse engages the Act in its own right (and the evidence is thus admissible anyway)." That concession alone demonstrates that the application for abuse of process is misconceived as the evidence and allegations go to the statutory bars.

4. The defence are attempting to use an application for abuse of process in extradition proceedings as a means of collateral challenge to the facts set out in the Request which the Supreme Court has held to be impermissible. They are also attempting to use an application for abuse of process as a means of dealing with trial issues which, likewise, is impermissible. This even goes so far as to set out a defence, to the crux of the allegation against Mr Assange, that he published the classified materials so as to reveal the names of sources "…*the release of some un-redacted materials came about as a result of 'a series of unforeseeable events ….outside of the control of Mr Assange or indeed Wikileaks.*." [Particulars of Abuse [§83]].

5. The words of Lord Templeman in In re Evans [1994] 1 W.L.R. 1006, 1013 -1015 setting out the role of the Magistrate in extradition proceedings are apposite:

> "The magistrate will first consider whether the equivalent conduct would constitute an offence against the equivalent law of the United Kingdom…The magistrate is not concerned with proof of the facts, the possibilities of other relevant facts, or the emergence of any defence; these are matters for trial.
>
> …Again the magistrate is not concerned with proof of the facts, the possibility of other relevant facts or the emergence of any defence; these are matters for trial in the foreign state."

6. The court is best assisted by following the scheme of the Act, dealing with the tests and bars to extradition sequentially and individually as the Act dictates. This provides for a logical and sensible means for the court to determine the issues rather than the morass of issues and evidence the defence allege (incorrectly) can be dealt with under the broad umbrella of an abuse of process application. It allows the court to focus on the precise statutory test for each bar to extradition and not the nebulous 'kitchen sink' approach of the defence, which is in any event wrong in law.

7. The abuse application amounts to an aggregate of individual weak points and non - sequiturs. The approach of the defence is to obfuscate and confuse the statutory bars to extradition because each bar has a high statutory hurdle: Section 81 – "if (and only if) … the request is in fact made for the purpose of prosecuting or punishing on account of his political opinions.."; Articles 3,6 and 10 of the ECHR require a 'flagrant breach which nullifies the right entirely'.

8. The prosecution apologise in advance for the length of this written argument. It was envisaged that the particulars of abuse to be served on 14 February 2020 would simply refine the particulars set out in the Statement of Issues ('SOI') (and accurately identify the evidence which demonstrates each particular), given that document, in December 2019, said only a "very small amount of potential evidence will remain outstanding". In fact, the document served by the defence is 35 pages long and replete with misstatements of the law and the correct approach this court should adopt. It has therefore been necessary to set the position straight in some detail.

II. INTRODUCTION

9. The following issues arise for this hearing:

   9.1 whether the initial stages of the extradition hearing pursuant to section 78 of the 2003 Act are satisfied;

   9.2 whether the conduct relied upon by the defence, if established, would be capable of amounting to an abuse of process; per R (United States) v The Senior District Judge, Bow Street Magistrates' Court v Tollman and Tollman [2007] 1 W.L.R. 1157;

   9.3 whether an abuse, going to a material inaccuracy in the particulars set out in the Request, can be made out; Zakrzewksi v. Regional Court in Lodz, Poland [2013] 1 W.L.R 324;

   9.4 whether the political offence exception is available to the defence in proceedings under the Extradition Act 2003 (dealt with by separately served skeleton argument, USCB at Tab 5); and

   9.5 in so far as it arises, whether the defence is entitled to rely upon anonymous witnesses (witnesses 1 and 2 in the defence core bundle).

III. SECTION 78 – INITIAL STAGES

10. The Act reads:

(1)This section applies if a person alleged to be the person whose extradition is requested appears or is brought before the appropriate judge for the extradition hearing.

(2)The judge must decide whether the documents sent to him by the Secretary of State consist of (or include)—

(a)the documents referred to in section 70(9);

(b)particulars of the person whose extradition is requested;

(c)particulars of the offence specified in the request;

(d)in the case of a person accused of an offence, a warrant for his arrest issued in the category 2 territory;

(e)in the case of a person alleged to be unlawfully at large after conviction of an offence, a certificate issued in the category 2 territory of the conviction and (if he has been sentenced) of the sentence.

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

(4)If the judge decides that question in the affirmative he must decide whether—

(a)the person appearing or brought before him is the person whose extradition is requested;

(b)the offence specified in the request is an extradition offence;

(c)copies of the documents sent to the judge by the Secretary of State have been served on the person.

(5)The judge must decide the question in subsection (4)(a) on a balance of probabilities.

(6)If the judge decides any of the questions in subsection (4) in the negative he must order the person's discharge.

(7)If the judge decides those questions in the affirmative he must proceed under section 79.

(8)The reference in subsection (2)(d) to a warrant for a person's arrest includes a reference to a judicial document authorising his arrest.

11. It appears that section 78(2) is conceded. It also appears section 78(4)(a) and (c) are conceded. It follows only section 78(4)(b) remains in issue; namely extradition offence. This is the dual criminality requirement, tested by application of section 137 of the Act.

12. The prosecution have already identified the English offences that are disclosed by the conduct with which the defendant is accused (in the Prosecution Opening Note). That document should be read alongside these submissions.

A. Dual Criminality

13. Section 137(3) of the 2003 Act provides, so far as is relevant:

137 Extradition offences: person not sentenced for offence

(1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person—

(a) is accused in a category 2 territory of an offence constituted by the conduct, or

(b) has been convicted in that territory of an offence constituted by the conduct but not sentenced for it.

(2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.

(3) The conditions in this subsection are that—

(a) the conduct occurs in the category 2 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;

(c) the conduct is so punishable under the law of the category 2 territory.

….

(7A) References in this section to "conduct" (except in the expression "equivalent conduct") are to the conduct specified in the request for the person's extradition"

14. For the purposes of section 137, conduct takes place "in" the requesting territory if the impact or effect of the conduct was felt, at least in part, in that territory (see Office of the King's Prosecutor, Brussels v. Cando Armas [2006] A.C 1).

15. Section 137(7A), set out above, reflects what has been repeatedly stated in case law. See Office of the King's prosecutor v Cando Armas [ibid] at [16]. In Norris v. The Government of the United States of America and others [2008] UKHL 16 the House of Lords confirmed that the Court should look to the conduct alleged (within the extradition request and not confined simply to that alleged in the indictment), ignoring mere narrative background, and not seek to match the ingredient of the foreign offence with those of an offence known to English law (§91):

> "The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence. Had Mr Norris's appeal failed on the first issue the extradition order on count 1 would have stood."

16. Where conduct in the request is reflected in different counts in the requesting state, and that conduct is closely interconnected and concerns the same criminal enterprise, it is not necessary to demonstrate a separate extradition offence for each of the counts; Tappin v. USA [2012] EWCA 22 (Admin**)** at §§44 and 46).

17. The transposition exercise to be conducted under section 137 should include, so far as is possible, transposition of the environment in the requesting state, to include local institutions, and laws effecting legal powers (Norris (supra) at §§93-99)

18. For the purposes of dual criminality, the court is concerned, and only concerned, with the content of the extradition request (Norris v Government of the United States of America [2008] 1 AC 920 per Lord Bingham at §91; In re: Evans [1994] 1 WLR 1006 per Lord Templeman at pp1013-1014 (*supra*)).

19. There can be no recourse to extraneous material; Sir John Thomas PQBD in United States of America v Shlesinger [2013] EWHC 2671 (Admin), §§5, 11 and 12:

> "…It is clear from the decision in Norris v Government of the USA (No.1) [2008] 1 AC 219 at paragraph 91 that the court must look at the conduct alleged in the documentation constituting the request to see if the conduct constitutes an offence under the law of the United Kingdom...
>
> It was submitted by Mr James Lewis QC on the respondent's behalf that, in determining whether the conduct alleged in the extradition request constituted an offence under the law of England and Wales, it was permissible for the court to consider extraneous evidence served by the requested person. He accepted that there was no authority to this effect, but contended that it must be open to the court to receive such evidence, as whether the conduct constituted an offence under the law of England and Wales would not be determined in the state to which he was returned. He submitted that the position was analogous to the position that arises when the court considers bars to extradition, such as those relating to human rights, the rule against double jeopardy, passage of time and other matters set out in the 2003 Act. In such cases the court always receives evidence from the requested person.
>
> We cannot accept that submission. It is clear that the scheme of the Act, and such authority as there is, lead to the very clear conclusion that in determining the issue of dual criminality the court examines the documents constituting the extradition request. It determines on the basis of that material whether the conduct alleged in the documents constitutes an offence under the law of England and Wales. It is not permissible for a requested person to put in evidence contradicting what is set out in the extradition request, unless he can bring himself within the very narrow exception to which we refer at paragraphs 14 and following below. The court must proceed to determine the issue of dual criminality on what is set out in the extradition request alone."

20. Indeed, since July 2014, this approach has the force of statute. Section 137(7A) [also cited above] of the 2003 Act provides that:

> "(7A) References in this section to "conduct" (except in the expression "equivalent conduct") are to the conduct specified in the request for the person's extradition."

21. It is therefore plain that consideration of conduct for the purposes of assessing dual criminality must be by reference to the conduct in the request and accompanying papers only.

22. There is a bright line between determining an extradition offence and any abuse of process application. The defence consistently seek to elide the tests and attempt to modify the conduct against which the dual criminality test, pursuant to section 137 of the Act, is to be carried out. This is fundamentally wrong as a matter of extradition law.

23. The determination of extradition offence is solely and entirely tested against the conduct alleged in the Request. Defence evidence is utterly irrelevant.

24. The residual abuse of process jurisdiction is a separate jurisdiction as explained below. There can be no watering down of the conduct against which to test extradition offence. That conduct is solely to be found in the Request. It follows the extraneous material relied on by the defendant is irrelevant to the Court's consideration of the issue. It can only be relevant to a ***Zakrzewski*** type abuse of process argument which is, for the reasons set out in this skeleton argument, destined to fail.

B. Submissions on dual criminality

25. It appears the defendant makes two submissions as to dual criminality:

25.1 In relation to count 18, the "password hash" conspiracy amounts at most to a "bare request" with "no evidence of agreement, or information being sent"; and

25.2 In relation to all charges, they seek to criminalise the act of publishing leaked information which is "essential to investigative press freedom" which "offends against the core notions of Article 10 ECHR" and "No precedent exists of the Official Secrets Acts being deployed in this way".

1. *Count 18*

26. The absence or otherwise of "evidence" of an agreement is irrelevant. This Court must assess the allegation contained in the request and accompanying documents, and is not required to consider the sufficiency of evidence [see s.84(7) of the 2003 Act and *Shlesinger* [infra]].

27. The request *does* allege an agreement. The Request expressly so states at page 10 paragraph [25]:

> "In furtherance of this scheme, according to the Jabber communications, ASSANGE agreed to assist Manning in cracking a password hash stored on United States Department of Defence computers connected to the Secret Internet Protocol Network…a United States government network used for classified documents and communications…" [request, p10, §25].
>
> And at [request p11, §28]:
>
> The Jabber communications show that around 8th March 2010, after ASSANGE indicated that he was "good" at "hash-cracking" and that he had a type of tool used to crack Microsoft password hashes, Manning provided ASSANGE with an alphanumeric string. A U.S. Army forensic expert subsequently examined the SIPRNet computers used by Manning and determined that the alphanumeric string that Manning sent to ASSANGE to crack was identical to a password hash stored on the SAM registry file of a SIPRNet computer used by Manning that was associated with an account that was not assigned to any specific user.

28. This is described as a "password cracking agreement" [request p12, §30 and p13, §31(d)].

29. "The United States will establish that in or around March 2010 **ASSANGE agreed to assist Manning in cracking a password hash** stored on United States Department of Defense computers…". Cracking that password would "have allowed Manning to log onto the computers under a surname that did not belong to her" [request p40 §87].

30. The matter is further addressed in the affidavit of Gordon Kromberg dated 17th January 2020:

> "An independent Grand Jury has already found probable cause of Mr. Assange's "agreement to obtain classified information through computer hacking" [§6].

31. Upon Mr. Assange's extradition the US authorities "intend to prove this agreement, beyond a reasonable doubt, through a variety of evidence…" [§166].

32. Electronic messages show Ms. Manning and Mr. Assange conversing about cracking a password hash. Ms. Manning asked Mr. Assange if he was good at hash cracking, to which Mr. Assange replied that he was, and stated that he had "rainbow tables", tools

used for hash cracking. Subsequent to this conversation, Ms. Manning provided Mr. Assange with a hash password, which Assange then asked questions about **"in order to help [Mr.]Assange crack it, such as "any more hints about this lm…no luck so far"**. [§167]

33. There is "no question that neither Assange nor Manning was authorized to access this account – that is the whole reason why they needed to crack a stolen password hash in the first place" [§171].

34. Accordingly, the conduct described in the request would be indictable in this country as a conspiracy to commit a number of substantive offences set out in the Computer Misuse Act 1990, the Official Secrets Act 1911 and the Official Secrets Act 1989 (for more detail as to which, see the prosecution opening note §29 *et seq*).

35. In any event, the conduct is so closely interconnected with the other conduct alleged in the request, that it is unnecessary to show a separate extradition offence in relation to count 18 alone (*Tappin* [supra]).

2. ***Patrick Eller***

36. The reliance by the requested person on the witness statement of Patrick Eller, and the exhibits he produces (defence bundles H1 to H5) in relation to dual criminality is misplaced. This evidence is, simply, irrelevant and inadmissible in these proceedings:

36.1 **First**, this Court cannot look to extraneous material when considering the issue of extradition offences (per section 137(7A) of the Act; Norris and Shlesinger [both supra]).

36.2 **Second,** to the extent that it is asserted that Mr. Eller's statement is demonstrative of a lack of evidence, or of the innocence of Mr. Assange, this is an irrelevance. The instruction of Mr. Eller appears to have been targeted at this precise issue (see §7 "I was asked…to conduct *a review of the available evidence and to consider the validity of the prosecution's claims within the request*"). This is defence evidence for trial. It is irrelevant to extradition. There is no need to demonstrate a case calling for an answer in this Court (per s.87(7)). Evidential matters would also be irrelevant to any potential abuse argument (see AB, Symeou [both supra]).

36.3 **Third**, Patrick Eller's understanding of the allegation in the request *undermines the argument of the requested person*. At §6, Mr. Eller states that he "note[s] the claim made by the US prosecutors, contained in their affidavits alleges first that Mr. Assange and Private Manning **reached an illegal agreement during March 2010** in which **Assange agreed to assist Manning in cracking a password** stored on US Department of Defence (DOD) computers connected to…SIPRNet". Mr. Eller confirms, therefore, that the allegation made by the US prosecutors amounts to an agreement to crack passwords held on computers connected to the classified network. This conduct amounts to an extradition offence.

36.4 **Fourth**, Mr. Eller's conclusions are an irrelevance. The key passages of Mr. Eller's statement are:

(a) "I found strong support for the proposition that the interpretation placed by the prosecution on the conversation with Manning and Assange could not be reliably or safely construed to be for the purpose of obtaining anonymity for Manning **so that classified information could be extracted without personal anonymity being compromised**" [§11, emphasis added];
(b) The SAM file alone would not be sufficient to crack the password hashes. Both the SAM and system files would be required. It would not have been possible therefore to crack the password [§32-4].
(c) In relation to the "password cracking agreement", Mr. Eller does "not proffer a view as to whether it can be considered that there was such an agreement…" [§62], although he lists matters which he considers may be "relevant" to this issue, those being that Ms. Manning did not state explicitly that she was trying to crack the hash in order to obtain data anonymously, that she already had access to the data by "booting a Linux CD and reading the files without the access controls imposed by the Windows operating system" [§63] and that Ms. Manning did not have a decrypted password hash that could be used to crack the password [§64], she had only the encrypted hash from the SAM file, and not the key to decrypt it which could be derived from the system file [§65].

37. As to (a), this is an evidential matter and irrelevant to these proceedings (see above). In any event, the fact that the conspiracy would not succeed in achieving the desired anonymity does not mean that the conspiracy did not exist.

38. As to (b), this is also an evidential matter. In any event, again, the fact that the conspirators are said not to have possessed all the information they needed to crack the password does not mean that the agreement did not exist.

39. As to (c), there is considerable overlap with (a) and (b). Mr. Eller's statement is a summary of evidence that the defence may wish to deploy at trial. It is irrelevant for these proceedings.

3. *The publishing of leaked information*

40. The Statement of Issues ("SOI") further alleges, in relation to dual criminality, that "all charges seek to criminalise the act of publishing leaked information", which is said to offend against "the core notions of article 10 ECHR". It is further said that "no precedent exists of the Official Secrets Acts being deployed in this way".

41. If the argument is to be maintained that the charges offend core notions of the defendant's article 10 Convention rights, this is an argument that should be deployed pursuant to s87. It is irrelevant to the notion of dual criminality.

42. The suggestion that "no precedent exists of the Official Secrets Acts being deployed" in "this way" is an irrelevance. It is noted that the SOI does not suggest that the conduct alleged would *not amount to an offence* under the Official Secrets Acts. This is, presumably, because it is conceded that it would.

43. For the reasons already set out in the prosecution opening note (§§28 to 56) the conduct detailed in the request would amount to a number of offences pursuant to the Official Secrets Acts.

44. It follows, for all these reasons, that section 78(4)(b) is satisfied and the offence specified in the Request is an extradition offence. The court should then move to section 79 of the Act – the bars to extradition. Section 79(1)(b) is raised (extraneous considerations under section 81, namely whether the request for his extradition was made for the purpose of prosecuting or punishing him, on account of his political opinion).

45. However, the defence have raised issues of abuse of process and the availability of the political offence exception. It is submitted that these can be determined and disposed of during this hearing to clear the way for the applications under sections 79(1)(b) and 87. The prosecution do not accept that when dealing with each bar to extradition and compatibility with the ECHR, irrespective of the abuse issue, much of the morass of evidence adduced by the defendant is admissible.

46. For example, the court should deal with each bar to extradition or Article of the ECHR in a focused way and only consider evidence that is relevant to that bar or Article at a time.

IV. ABUSE OF PROCESS - SUMMARY

47. The purpose of this hearing (insofar as it relates to abuse of process) is to enable the court to consider whether any of the conduct relied upon by the defence warrants further investigation by the Court, because it is capable of meeting the high threshold that is necessary for the court to exercise its limited residual jurisdiction. It does not:

    47.1 **First:** Much of what is relied upon to support this application falls outside the Court's implied abuse of process jurisdiction to order a defendant's discharge on grounds of abuse of process. Fundamentally, the Court's abuse of process jurisdiction is regarded as a *residual* jurisdiction because it covers misconduct <u>not</u> caught by the statutory scheme. Almost the entirety of what is alleged in this application goes to bars to extradition.

    47.2 **Second**: The defence application invites the Court to aggregate a great deal of the evidence upon which it relies and to find that abuse of process is made out (the "*it's all an abuse*" argument). <u>This approach would lead the Court into basic error</u>. The defendant is not permitted to side step that much of the evidence deployed goes to the bars to extradition. <u>Nor</u> is he permitted to sidestep that many of issues

raised have already been conclusively determined, as a matter of English law, *not* to reach the threshold to be a bar to extradition.

47.3 **Third:** The discretion focuses upon whether the statutory regime in the Extradition Act 2003 A is being "usurped" by the requesting state. That is, falsely manipulated by the requesting state to prevent the court being able to carry out its statutory function under the Act. The Court being manipulated and deceived is a key component. The discretion is not one that permits the extradition court to police the wider executive functions of a foreign state (in essence what part of the defence application invites) – the focus must be on whether the requesting state is subverting the Court's extradition processes. Fundamentally, there is a lack of nexus between the allegations in this application and the extradition process (still less the trial process).

47.4 **Fourth:** It is not the function of this Court to vouchsafe the freedom of the press in the United States. Its focus must on whether these extradition proceedings constitute an abuse of process in relation to the defendant.

47.5 **Fifth**: Although not required to, the United States has provided a complete answer to the allegations made by the defendant.

47.6 **Sixth**: As regards any application of Zakrzewksi, this application constitutes an indirect and contentious challenge to the factual or evidential basis of the conduct alleged in the United States and is impermissible per se.

48. To the extent that it matters, no proper basis has been advanced for the reliance upon anonymous witnesses.

A. Abuse of Process – jurisdiction

49. There is a fundamental presumption of good faith which applies to extradition proceedings; Ahmad and Aswat v. USA [2007] H.R.L.R 8 §101 (cited by the Supreme Court) in Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmatullah [2013] 1 A.C. 614. The United States is a country with which the UK has entered into five substantial treaties on extradition over a period of more than 150 years. It is an important criminal justice partner to the UK. The Tollman process operates so that nascent abuse applications can be considered and concluded, as a preliminary matter, without the requesting State being asked to respond to, or to litigate allegations, which do not fall within the Court's jurisdiction. It is to avoid the court's time being wasted and taken up with unmeritorious applications. It also provides the Court with a structured process by which it can seek, where so required, further information from a requesting state.

50. The procedure to be adopted, where it is submitted that the conduct alleged constitutes an abuse of the Court's process, per Tollman, is that the defendant must:

50.1 Identify with specificity what is alleged to constitute the abuse;

50.2 Satisfy the court that the matter complained of is capable of amounting to an abuse; and

50.3 Satisfy the court that there are reasonable grounds for believing that such conduct has occurred.

51. It is only if all of the above criteria are satisfied, that the court should require the requesting state to provide "whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not".

52. The question of whether the matter complained of is capable of amounting to an abuse is the prior and critical question. Whether there is evidence that the conduct occurred is irrelevant if the conduct could not amount to an abuse.

53. There is no power for the Court to seek further information from the requesting state in cases said to be "analogous to abuse of process"; Norris [2008] 1 A.C. 920 at §108.

54. It is respectfully submitted, for all of the reasons set out below, that the Court should:

(i) Examine the evidence relied upon and determine whether it goes to a statutory bar to extradition.
(ii) Consider what, if any, *residual* matters are left which may, upon particularisation, engage the Court's abuse jurisdiction.
(iii) Consider whether those particulars are capable of constituting an abuse.

55. To the extent that the defence pleads that it will call all of this evidence in any event (as part of its case on bars to extradition) it is (i) not accepted that this is necessarily open to it (see for example, the Eller evidence) or (ii) that this permits the Court to disapply Tollman (it obviously does not)

B. Abuse of Process – the correct approach

56. The ambit of the jurisdiction is focused on the extradition process and on conduct which is not caught by the statutory provisions. There are a number of elementary principles which define it:

56.1 **First**: The focus of this implied jurisdiction is the abuse of the requested state's duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition. Abuse will **not arise** if other bars to extradition on the point are available. Atkin LJ said in Belbin v. France [2015] EWHC 149 (Admin) at §59:

> 59. We wish to emphasise that the circumstances in which the court will consider exercising its implied "abuse of process" jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual, implied jurisdiction. [Emphasis added]

In Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece [2009] 1 W.L.R. 2384, Laws LJ at §33 said:

"The focus of this implied jurisdiction is the abuse of the requested state's duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition. [Emphasis added]

56.2 **Second**: That such a discretion is "implied" by the 2003 Act is only justified by "the imperative that the regime's integrity must not be usurped." R (Bermingham) v Director of the Serious Fraud Office [2007] 2 WLR 635 [Laws LJ at §§97-98]; see Devani v. Kenya [2015] EWHC 3535 (Admin**)** at §117:

"Two conditions must be satisfied before this jurisdiction will be exercised. They are, first, that the authority has conducted itself in a way that has "usurped" the statutory regime in the EA and, second, that this usurpation of the statutory extradition regime has resulted in the extradition being unfair and unjust to the requested person either because he has been unfairly prejudiced in his challenge to extradition in this country or because he will be unfairly prejudiced in the proceedings in the requesting country if surrendered there."

56.3 **Third**: This requirement imports a high threshold before an abuse will be recognised Belbin v France [2015] EWHC 149 (Admin) , per Aikens LJ §59).

56.4 **Fourth**: It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted intent and purpose which constitutes the abuse. R (Bermingham & Others) v The Director of the Serious Fraud Office v Her Majesty's Attorney General, The Secretary of State for the Home Department [2007] Q.B. 727; Symeou *supra.*

56.5 **Fifth**: It requires evidence of bad faith, a knowing failure to use correct extradition procedures (Bermingham, per Laws LJ at §100) and that the prosecutor or the court is:

"manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court" (Tolman, per Lord Philips CJ at §82).

56.6 **Sixth**: The abuse jurisdiction does not extend to considering misconduct or bad faith by the police of the requesting state in the investigation of the case or the preparation of evidence for trial: Symeou at [34] .

56.7 **Seventh**: is an important delineation between those matters which are properly for the trial court and those matters which are for the extradition court; Republic of Ireland v. AB [2019] NICA 59 §25, Pakstys v. Lithuania [2017] EWHC 47 (Admin) §35, Symeou at [35]:

"It is the exclusive function of the Court of the requesting state to try the issues relevant to the guilt or otherwise of the individual. This necessarily includes deciding what evidence is admissible, and what weight should be given to particular pieces of evidence having regard to the way in which an investigation was carried out. It is for the trial court in the requesting state to find the facts about how evidence was obtained, which may go to admissibility or weight, both of which are matters for the court conducting the trial. It is the function of that court to decide whether evidence was improperly obtained and if so what the consequences for the trial are. It is for the trial court to decide whether its own procedures have been breached."

That allegations of *bad faith* in the prosecution of an individual are a matter for investigation by the Court, in the requesting state, and only exceptionally a matter

for an extradition court (*a fortiori* when it is recognised that the requesting state has an independent judiciary) was reiterated in Sofia City Court, Bulgaria v Dimintrinka Atanasova-Kalaidzhieva [2011] EWHC 2335 (Admin) [§36]:

> "We recognise the authority of the view of this court in Symeou that allegations of bad faith in the investigation of an offence and prosecution of a suspect are ordinarily matters for the court in the requesting state about which the requested court will make no examination. Confidence will be reposed in the independent judiciary of a party to the Framework Decision to make an Article 6 compliant inquiry into the matters raised."

56.8 **Eighth**, issues relating to the internal procedure of the requesting state are outside the implied abuse of process jurisdiction concerning extradition proceedings: [§36] of Symeou.

57. Consequentially, the power to stay extradition proceedings is to be used sparingly and only for very compelling reasons and in exceptional circumstances; Belbin [29] (*supra*).

V. SUBMISSIONS ON ABUSE IN THIS CASE

58. On 11 February 2020, the Defence indicated however that the following witnesses are *all* relied upon as demonstrating that these proceedings are an abuse of the Court's process: Lewis (Statements 1 and 2); Feldstein; Prince (Statements 1 and 2); Boyle, Tigar, Jaffer, Pollack, Shenkman, Durkin, Ellis, Peirce (Statements 1 and 2); Goodwin-Gill and Eller.

59. In the particulars of abuse ("POA"), served on 14 February 2020, the defence identified that the following are relied upon as demonstrating that these proceedings are an abuse of the Court's process:

59.1 "That the request is politically motivated at root" §7 First of the POA;

59.2 "knowing that publishing state secrets has been held to be lawful by the US Supreme Court, the US Government brings this prosecution" §7 Second of the POA;

59.3 "the prosecution was then deliberately situated in Alexandria, a jury pool known to contain an abnormally high proportion of government employees and contractors" §7 Third of the POA;

59.4 "the US Government from early 2017 onwards then engaged in a campaign of highly prejudicial and public statements, demonising Mr Assange as a '*hostile non-state intelligence agency*', all designed to influence the public, increase the pressure to bring a prosecution, and influence any jury that tried him" §7 Fourth of the POA;

59.5 "in August 2017 a pardon was offered to Mr Assange by intermediaries close to the President (Congressman Rohrabacher and Charles Johnson)." §7 Fifth of the POA;

59.6 "the US proceeded (against all international legal norms) to violate Mr Assange's asylum in the Ecuadorian Embassy" §7 Sixth of the POA;

59.7 "when (through its unlawful acts) the US Government learned that Mr Assange was being given diplomatic status on 21 December 2017, it issued its criminal complaint and sought a provisional extradition request on the same day." §7 Seventh of the POA;

59.8 "request for a provisional arrest warrant in December 2017 defied the prohibition on extradition for political offences contained in the Anglo-US Treaty" §7 Eighth of the POA;

59.9 "from February 2018 onwards, to execute its request, the US government engaged in diplomatic pressure on Ecuador to withdraw asylum." §7 Ninth of the POA;

59.10 "the US continued its brazen and deliberate invasion of Mr Assange's legally privileged materials" §7 Tenth of the POA;

59.11 "the need for the US request to be afforded priority over Sweden's, on 23 May 2019 the US then ratchetted up the charges to add multiple Espionage Act offences by means of a Superseding Indictment. This escalation in the charges had nothing to do with the requirements of justice. §7 Eleventh of the POA; and

59.12 "pressure was exerted on defence witness Chelsea Manning, in order to attempt to force her to provide evidence against Mr Assange."

60. The POA also cite the following (set out here for completeness), in an unstructured way (which seem to add nothing to the §7 formulation):

60.1 "A discredited and unlawful prosecution theory";

60.2 "The political war on journalism";

60.3 "Unlawful political denunciations of Mr Assange";

60.4 "The violation of LPP";

60.5 "Ignoring treaty protections";

60.6 "Bullying Ecuador"

60.7 "The Swedish problem";

60.8 "Getting to Manning";

60.9 "The most wanted list"; and

60.10 "alleged recklessness to sources"

61. Conspicuous by its absence is any particularisation of the prejudice the allegations of abuse are meant to have caused in these proceedings or the proceedings in the United States of America. As Laws LJ said in Bermingham [ante], prejudice must be shown. This is of course at the heart of all abuse of process applications. He said:

> "…because he has been unfairly prejudiced in his challenge to extradition in this country or because he will be unfairly prejudiced in the proceedings in the requesting country if surrendered there". [Emphasis added]

62. It follows the defendant must show the court why he is being prejudiced in these proceedings. It is obviously not enough to simply say he should not be extradited. Actual prejudice must be shown and particularised. There is simply no articulation of prejudice caused to the defendant in these proceedings. The evidence shows his allegations of abuse can be taken by him in the trial process in the United States of America and so he cannot show "he will be unfairly prejudiced in the proceedings in the requesting country".

63. The absence of actual and demonstrable prejudice of the type identified by Laws LJ is fatal to the abuse of process application in its entirety.

64. It is submitted one only has to look at these particulars to see they are either to be dealt with under section 79 or 87 of the Act; or are utterly unsustainable as an abuse of process (and equally unsustainable under section 79 or 87 of the Act but the defence are entitled to make submissions and call relevant evidence in support of those submissions).

65. The Court will need to bear in mind the outer limits of the abuse of process jurisdiction. Abuse of process is not an argument to be deployed in parallel with, or as a substitute for, the statutory bars. Nor should the jurisdiction be invoked to cover a situation in which an applicant is *unable to make good* a statutory bar, but nonetheless seeks to argue the same point separately as an abuse of process. As noted above, many of the issues raised have already been conclusively found not to constitute a bar to extradition.

66. Where the 2003 Act provides a remedy, the abuse of process jurisdiction does not arise. The jurisdiction is a residual one. Indeed, an alternative statutory route of challenge means there is no prejudice to the challenge the defendant can make in the extradition proceedings (see Laws LJ quoted above). An abuse only arises when by a bad faith manipulation the defendant is deprived of a challenge he could otherwise make in the extradition process. Where he is not so deprived of a challenge *a fortiori* there can be no abuse. Where the integrity of the statutory scheme is protected by other powers, there is no need to infer an abuse jurisdiction, and indeed no such jurisdiction exists; [Belbin §59, Bermingham §97, Symeou §33].

67. Much of the evidence, deployed as demonstrating that these proceedings are an abuse of process, addresses the issue of whether extradition is barred by reason of article 3, 6 and 10 Convention rights. It is not open to the defendant to argue, for example, that his article 6 rights would be flagrantly breached *and* that this would amount to an abuse of the

Court's process. Such an argument can only be deployed pursuant to section 87 of the Act.

68. Similarly, it is not open to a defendant to argue that *something less* than a flagrant breach of Article 6 rights going to concerns about the trial process could nonetheless constitute to an abuse. This would be to subvert the statutory scheme by introducing a lower threshold than parliament intended in resisting extradition, and is contrary to the fundamental nature of the abuse jurisdiction. Still less is it open to a defendant to argue that a series of points (none of which reaches the threshold of a bar) can be aggregated so as to constitute an abuse of process.

69. It is respectfully submitted that the correct approach is for the Court to analyse the evidence relied upon, determine whether it goes to a statutory bar and where it does, hold it is inadmissible in relation to the abuse of process application. In order to assist the court we have carried out such an analysis.

A. Witnesses

1. *Eric Lewis*

70. Eric Lewis has provided three witness statements (core bundle tabs 3 and 24), which are relied upon in relation to abuse. The first statement [core bundle tab 3] addresses (i) Where will Mr Assange be held pretrial (ii) Under what regime will Mr Assange be held on remand (this evidence goes to administrative detention and Special Administrative Measures); (iii) what restrictions will be applied to him and/or his counsel on access to classified information essential for his defence (iv) What is Mr Assange's potential criminal sentence; (v) Where would Mr Assange serve his sentence if convicted.

71. As must be entirely plain to the Court, this statement does not engage its abuse jurisdiction. Where it relates to prison conditions, it goes to Article 3 Convention rights argument. Where it relates to the trial process in the United States, it goes to Article 6 convention rights (as indeed the defence specify in the SOI (see §17)). Where it relates to length of sentence, this goes to Article 3. The system of plea bargaining has been dealt with as a matter arising (but not giving rise to any breach per se) under Article 6, see the ECtHR in Babar Ahmad v United Kingdom (2010) 51 E.H.R.R. SE6 and was discounted as giving rise to an abuse of process in McKinnon v USA[2008] UKHL 59 [33] where the issue was "Did the US prosecuting authority here "attempt to interfere with the due process of the Court"? Did it place "undue pressure [on the appellant] to forego due legal process" in the UK and so disentitle itself from pursuing extradition proceedings?". In other words, the Court considered it under abuse of process because the issue was whether the plea bargaining impacted upon the *extradition* process (to which the answer was *no*- those facts do not even arise here).

72. In fact, it is noted that Mr Lewis's evidence goes to issues considered at length by the courts and not found to bar extradition on Convention rights. (See for example Pham v US [2014] EWHC 4167 (Admin)) and the ECtHR in Ahmad v United Kingdom

(24027/07); Al-Fawwaz v United Kingdom (67354/09); Bary v United Kingdom (66911/09); Mustafa (aka Abu Hamza) v United Kingdom (36742/08); Ahsan v United Kingdom (11949/08) (2013) 56 E.H.R.R. 1

73. Mr Lewis's second affidavit concerns the alleged political motivation behind the prosecution of Mr. Assange. If admissible, it can only go to the express statutory bar in section 81.

74. Finally, Mr Lewis's third statement (served on 13 January 2020) is directed squarely at the question of '*..whether there is evidence that the prosecution of Mr Assange is politically motivated*' [§2]. If admissible, it also goes only to section 81.

2. ***Feldstein***

75. The statement of Professor Feldstein (journalism historian) statement is at Tab 18 of the core bundle. It sets out the history of publishing national security documents in America, the history of prosecutions arising from such actions, and purported importance of the defendant's actions. It concludes that Mr Assange's prosecution is a politically motivated one and, like other evidence in this case, seeks to assimilate the prosecution of Mr Assange into what is described as a campaign by President Trump against the press. It is noted that this statement, like others, steps around President Trump's stated support for Wikileaks in the past.

76. Setting that to one side, this statement constitutes allegations which fall squarely within s.81 (extraneous considerations) and s.87 (article 10 convention rights) submissions. It gives rise to no residual issue. As set out above, it is not the function of the extradition court to investigate press freedom concerns in the US (the focus of the investigation cannot be the rights of third parties). Even insofar as Mr Assange seeks to argue that his extradition will engage his Article 10 rights to freedom of expression, it will be submitted in due course, that Article 10 does not confer any right to take part criminal acts (like theft, burglary or computer hacking) so as to obtain information in the first instance and is not engaged by the publication of the identities of sources.

3. ***Prince***

77. Bridget Prince's two affidavits are at Tab 13 of the core bundle. They concern the potential jury pool for Mr. Assange's trial in the Eastern District of Virginia, and what is alleged to be a narrow pool available (affidavit 1). Her evidence also goes to public statements relating to the defendant (affidavit 2). It is presumed that this evidence goes to the potential contamination of the pool or to demonstrating the political nature of the statement made against Mr Assange.

78. Evidence going to the lack of independence of a jury or the potential contamination of a jury is an Article 6 issue (again it is to be noted that the threshold to be met before

statements by public officials or political figures will engage Article 6 is a high one; see Ali v UK (2016) 62 E.H.R.R. 7).

79. A third statement by Ms Prince was served on 13 February 2020. This appears to be intended to fortify the allegation that there is a link between surveillance on the Ecuadorian embassy and an individual who supports President Trump. Allegations going to surveillance are dealt with below.

4. ***Boyle***

80. Mr. Boyle's statement is at tab 5 of the core bundle. It addresses the issue of subpoenas to testify before federal grand juries and how those laws have been applied in the case of Chelsea Manning. As noted above, this is said to demonstrate how *extraneous influences* are at work in the prosecution of Mr Assange.

81. Mr Boyle makes clear that an individual called to give evidence before a Grand Jury can assert the privilege against self- incrimination [30] and that Ms Manning has the benefit of immunity as regards the use and derivative use of any evidence that she gives [44]. Mr Boyle's evidence is based upon Ms Manning's argument that she gave "an exhaustive sworn statement before the Military Court ….and which truthfully set forth the full extent of her knowledge…" [45]. He also relies upon her assertions that the request that she provide evidence (under immunity) is 'vindictive and politically motivated' [cited at 48]. As is clear at §55, the main plank of his opinion appears to be that because a superseding indictment has been issued against Mr Assange, Ms Manning must be detained so that the prosecution can 'preview' her evidence for the defence or gather evidence for the prosecution. The essence of the statement is thus a complaint that the treatment of Ms. Manning, and specifically her incarceration in contempt of court following her refusal to testify in grand jury proceedings, is punitive and an abuse of the grand jury process.

82. This is not capable of giving rise to an abuse of this Court's process:

82.1 **First**: the incarceration of Ms. Manning for refusing to testify cannot amount to an abuse of the extradition courts in this country, in a case concerning Mr. Assange.

82.2 **Second**: As the statement of Mr Boyle makes clear, the issue here is not even that Ms Manning *has been* coerced to give evidence against Mr Assange which could be used at his trial (this is not the function of the Grand Jury). Even if it was, this does not constitute an abuse (see Symeou on coerced evidence at [25] and [39]).

82.3 **Third**: to the extent that it is deployed to show *extraneous influences*, this is the defendant's political motivation argument.

82.4 **Fourth**: as noted in the further affidavit of Mr. Kromberg [§§121 -165, but in particular §§157 to 165], the history of Ms Manning's litigation shows the "extraordinary level of due process" she has been afforded. Mr. Boyle lacks the appropriate knowledge to express an opinion on whether Ms Manning was

properly subpoenaed, and in any event these arguments were litigated successively by Ms Manning before the US Courts, unsuccessfully.

5. *Tigar*

83. Professor Tigar's evidence at Tab 23 sets out his conclusions in a summary at page 2 of his witness statement. They are:

(i) The superseding indictment represents "an unprecedented advance on US prosecutions who obtain and publish truthful information"
(ii) The interpretation of USC §793 in the indictment is overbroad and unduly vague.
(iii) The "choice of targets" reflects political motivation.
(iv) The indictment reflects a "constricted view" of the right to free expression.
(v) Wikileaks is a journalistic enterprise.
(vi) The US courts have taken a narrow view of judicial review and Mr. Assange "would very likely not have the right to make an effective defense to the charges".
(vii) The US government systematically over-classifies relevant information.
(viii) The separation of powers is being eroded with knock on consequences for the defendant's fair trial rights.

84. Issues (i), (iv), (v), (vi), (vii) and (viii) all relate to the defendant's article 6 or 10 Convention rights.

85. Issue (iii) relates to the defendant's s.81 extraneous considerations argument. As set out, throughout this argument, the defence cannot run a political motivation argument whilst simultaneously running the same argument as an abuse of process - this is expressly precluded by the caselaw cited above.

86. In relation to issue (ii), whether the indictment is overbroad and unduly vague that (i) raises an issue under Article 7 (no punishment without law) and (ii) in any event is a matter which the defendant can litigate in the United States; see Kromberg at §§169-171. Indeed, as is clear, the United States authorities strongly contest any suggestion that the behaviour of the defendant was not a clear violation of a law which was sufficiently precise; Kromberg §7, §§169-17. This is a matter (if it has any force) which obviously ought to be adjudicated upon by the US courts.

6. *Jaffer*

87. Jameel Jaffer's statement is at Tab 22 of the Core Bundle. It concerns Mr. Jaffer's contention that the prosecution of Mr. Assange poses a "grave threat to press freedom", the public interest in publishing classified information, and the contention that the Espionage Act has been used increasingly aggressively and in selective fashion by prosecutors.

88. The observation is repeated that it is not the function of this Court to vouchsafe the freedom of the press in the United States. Its focus must on the Defendant and whether these extradition proceedings are an abuse of process: that through bad faith the defendant has been deprived of a challenge he could otherwise make in these proceedings or in the United States of America. This evidence is not accepted as relevant or admissible, but in so far as it is, it can only go to Article 10 and section 87.

89. In addition, as the Kromberg Affidavit makes clear, it is also open to the Defendant to argue in the United States of America at trial that he has been selectively prosecuted under the US Constitution [§17].

7. ***Pollack***

90. Mr Pollack's statement may be found at Tab 19 of the core bundle. It is entirely concerned with the procedure at any future trial and whether the defendant can receive a fair trial. Again, this falls squarely within Article 6 and section 87 argument. It is to be noted at this juncture that, insofar as he and other witnesses raise issues as to Mr Assange's ability to access classified material pre-trial, that the protections appear to go beyond those available in this jurisdiction (see Mr Pollack's explanation of his being licensed to access classified material [13]).

8. ***Shenkman***

91. Mr. Shenkman's statement contains a history of the Espionage Acts, and the Computer Fraud and Abuse Act. The best guide to his evidence is set out in his conclusions at §41. He concludes that there is no precedent for the US Espionage Acts extraterritorial application to a publisher of leaked information. He criticises the Espionage Act for its lack of a proportionality defence, and criticises both Acts for lack of definition.

92. As set out above, it is not within this Court's jurisdiction to investigate or police the drafting or application of foreign law or wider press freedom issues. Furthermore, to the extent that Mr. Shenkman avers that the Espionage Act is impermissibly vague, or that the Mr. Assange's acts should be lawful by reference to his free speech rights, then **first:** these are issues which go to Article 10 and 7**. Second** it is clear that these are highly contentious issues in the United States [Kromberg §7, §§169-171]. **Third**: these are issues which are eminently for the US Courts [Kromberg, §69-71].

9. ***Durkin***

93. Mr Durkin's statement may be found at Tab 17. His statement addresses five issues:

(i) Access by the defence to evidence in the trial process;
(ii) Access by the defence to classified material in the trial process;
(iii) The discovery procedure and the "unprecedented volume of material";
(iv) Plea bargaining/ "trial tax";
(v) The rule of specialty and sentencing.

94. This evidence is repetitive of evidence considered above. As must be clear it goes to whether Mr Assange can have a fair trial (although it is observed that even at this juncture the sorts of issues raised fall well short of any flagrant breach of Article 6 [see, for example, his complaint about the visiting hours]). Issue (v) relates to the specialty arrangement between the UK and the USA. This is a matter which can be raised before the Secretary of State pursuant to s.95 of the 2003 Act. The issue of US sentencing practice and whether it comports with specialty has been exhaustively considered Welsh, Thrasher v The Secretary of State for the Home Department the Government of the United States of America [2007] 1 W.L.R. 1281 [2007] 1 W.L.R. 1281.

10. ***Ellis***

95. JE Yancey Ellis' statement may be found at Tab 15 of the Core Bundle. It deals entirely with prison conditions in Alexandria jail and matters which may be material to Convention rights (although, again it is noted that many of these have already been determined as not precluding extradition to the United States).

11. ***Goodwin-Gill***

96. Professor Goodwin – Gill's evidence may be found at Tab 25 of the Core Bundle. The relevance of this evidence to these extradition proceedings is unclear. Professor Goodwin-Gill sets out an account of visiting Mr Assange for a "legal conference" (although as is clear it was not a privileged conference as it involved the attendance of Ecuadorian officials). He states he left a tablet and phone 'at the door'. He states that he was shocked that his participation in the conference may have been shared with others and that his electronic equipment may have been copied. The broader issue of the alleged surveillance of the embassy is dealt with below. It suffices to state here that there is nothing in Mr Goodwin Gill's statement which relates to the extradition process.

B. Submissions on each POA

1. *§7 First of the POA*

97. The particular is that the request is politically motivated at root. This, which is denied, is obviously to be dealt with under section 79 and 81 of the Act.

98. This is, in any event, mere superstition and allegation (much of which does not cohere). It is clear beyond argument that there is an overwhelming case of computer misuse and disclosure of classified sources. These are serious crimes and the prosecution is undertaken by independent prosecutors in the United States of America. Moreover, per

Symeou and Atanasova (*supra*) that these allegations will be tried before an independent judiciary, puts them beyond the examination by the extradition court.

2. *§7 Second of the POA;*

99. The particular is, knowing that publishing state secrets has been held to be lawful by the US Supreme Court, the US Government nonetheless brings this prosecution. This is arrant nonsense. It is clear beyond argument that what is alleged (complicity in illegal acts to obtain classified documents, an agreement and an attempt to obtain classified information through computer hacking and the disclosure of the identity of classified sources - which might lead to their serious mistreatment or even death) is illegal. It is illegal both here and in the United States of America.

3. *§7 Third of the POA;*

100. The particular is that the prosecution was then deliberately situated in Alexandria, a jury pool known to contain an abnormally high proportion of government employees and contractors. This, which is denied, is obviously to be dealt with under Article 6 and section 87 of the Act.

101. Moreover, this is nonsense. The prosecution is brought by the Eastern District of Virginia. The Federal system is the same throughout the United States of America.

4. *§7 Fourth of the POA*

102. The particular is that the US Government from early 2017 onwards engaged in a campaign of highly prejudicial and public statements, demonising Mr Assange as a '*hostile non-state intelligence agency*', all designed to influence the public, increase the pressure to bring a prosecution, and influence any jury that tried him. This, which is denied, is obviously to be dealt with under Article 6 and section 87 of the Act.

5. *§7 Fifth of the POA*

103. The particular is that in August 2017 a pardon was offered to Mr Assange by intermediaries close to the President.

104. The evidence does not support this bald statement. The late affidavit of Jennifer Robinson (served on 14 February 2020) speaks of a "pardon, assurance or agreement". If this offer is true it cannot amount to an abuse of process. Day in day out in all criminal justice systems defendants are offered immunity, lesser pleas and other inducements to co-operate with the authorities. In the United Kingdom there is even a statutory basis for granting immunity. Sections 71 to 74 of the Serious Organised Crime and Police Act 2005 allows immunity for serious crimes to be granted in return for co-operation. See also McKinnon v USA [2008] UKHL 59 [33] which makes this unarguable as a head of abuse.

105. The alleged offer was rejected by the defendant so no deal was made. It is impossible to see how this can show a bad faith manipulation of the English extradition proceedings.

6. *§7 Sixth of the POA*

106. The particular is that the US proceeded (against all international legal norms) to violate Mr Assange's asylum in the Ecuadorian Embassy. This is simply wrong and the evidence does not substantiate this allegation. But even if it were true, the defendant was a fugitive from justice (as regards the United Kingdom authorities) and a suspect in the United States while in the embassy. Mr Assange's grant of asylum was not an immunity. The rule of international law simply makes the embassy of a foreign state inviolate unless the foreign state invites the host country in.

107. One would expect both the United States of America and the United Kingdom to do all they could in their relations with Ecuador to persuade it that Mr Assange should not escape justice indefinitely. That course was reasonable and lawful. Again, it is impossible to characterise this as a bad faith manipulation of the English extradition proceedings.

108. In fact, the defendant's asylum was not violated and the Ecuadorian Embassy's inviolability was adhered to, showing respect for international law. The arrest by the Metropolitan police, upon the invitation of the government of Ecuador, was unquestionably lawful.

7. *§7 Seventh of the POA*

109. The particular is that when (through its unlawful acts) the US Government learned that Mr Assange was being given diplomatic status (on 21 December 2017), it issued its criminal complaint and sought a provisional extradition request on the same day. This is utterly incapable of amounting to an abuse of process.

110. Fugitives have attempted (unsuccessfully) to use diplomatic status to avoid extradition (see Teja and Osman). Osman became a Liberian ambassador (by paying $1m) to avoid extradition. The Divisional Court held his diplomatic status was irrelevant as it had not been recognised by the Court of St James in the United Kingdom. Only accredited diplomats enjoyed diplomatic immunity in the United Kingdom and a diplomat could only be accredited by the court of St James (which had a discretion whether or not to accredit). It follows, even if the defendant had been made a diplomat while in the Ecuador embassy he could not have enjoyed diplomatic immunity. A State will be astute to ensure that a grant of diplomatic status is not a device to assist an individual to evade justice. Furthermore, it is not improper to request the extradition even of an accredited diplomat. (See the recent case of the United Kingdom asking for the extradition of Anne Sacoolas in relation to the death of Harry Dunn.) It can never be improper because the immunity belongs to the sending state and can be waived by the sending state as it sometimes is.

111. If true, it cannot even approach a bad faith manipulation of the English extradition proceedings. If true, the United States of America did exactly the right and proper thing.

8. *§7 Eighth of the POA;*

112. The particular is that the request for a provisional arrest warrant in December 2017 defied the prohibition on extradition for political offences contained in the Anglo-US Treaty.

113. This is the subject matter of the separate submission by the defence that the defendant can avail himself of treaty provisions. This particular is misconceived. For example in the 1972 treaty there remained the requirement for a *prima facie* case to be presented. However, the Divisional Court in Norris held that no such requirement was within the 2003 Act. If this particular could be capable of abuse all extraditions such as Norris were abusive, which they clearly were not.

114. It is self evident that if a defendant is not entitled as a matter of law to avail himself of a challenge (in this case a *prima facie* evidence), conduct depriving him of such a challenge cannot be an abuse of process: he suffers no prejudice by the alleged abuse. The operation of law has deprived him of the challenge.

9. *§7 Ninth of the POA*

115. This particular is that from February 2018 onwards, to execute its request, the US government engaged in diplomatic pressure on Ecuador to withdraw asylum. Again, if correct, there is nothing remotely wrong in this and it is to be expected. This is not different from particulars 6 and 7 above.

10. *§7 Tenth of the POA*

116. This particular concerns surveillance and allegations over LPP. It requires a more detailed analysis as it appears to be a cornerstone of the defendant's complaint.

117. However, it is firstly noted that no prejudice to the defendant's ability to make a challenge to his extradition is alleged or particularised. Given that the US prosecutors will never see and cannot use any LPP materials and that no LPP materials form part of the request, there is no possible basis for alleging the type of prejudice articulated as necessary by Laws LJ (*ante*). There is no *nexus* of prejudice between the complained of conduct and these extradition proceedings.

118. Mr Assange has issued a criminal complaint in Spain (on 29 July 2019) through his lawyer in Spain [Bundle D, Second Statement of Mr Jimenez] about alleged surveillance and these matters are under investigation there; a search has been conducted at the home and office of the accused [First statement of Ms Peirce §34] and the accused has been arrested and questioned [§34]. It is also suggested that the witnesses have been given 'protected status' [§34]; Mr Assange has been asked to provide evidence pursuant to a European Investigation Order [34] (it is understood that Mr Assange provided that evidence in Westminster Magistrates' Court).

119. The second witness statement of Aitor Martinez Jimenez exhibits a self -serving document which appears to form part of (or is) the complaint before the Spanish Court. It refers to "..*facts that should be investigated in Spanish jurisdiction and that are relevant to the effects of the extradition process against Mr Assange in the United Kingdom*".

120. This gives the appearance that part of the rationale for this criminal complaint is to generate materials for these proceedings.

121. Setting that to one side, the fact that this matter is under investigation in Spain tells this Court nothing about the accuracy of the allegations. As must be plain, this Court could only adjudicate upon them if it too embarked upon the sort of wide- ranging investigation the defence foresees in Spain. Many of the allegations (if there is any substance to them at all) would go to sensitive issues between States. The extent to which, for example, in this sort of context, a state consented to the surveillance of its embassy is an obvious one.

122. Press reporting of this issue puts a very different slant on the reports allegedly gathered by UC Global. See for example CNN Report of 15 July 2019 report - *Security reports reveal how Assange turned an embassy into a command post for election meddling:*

> "Despite being confined to the embassy while seeking safe passage to Ecuador, Assange met with Russians and world-class hackers at critical moments, frequently for hours at a time. He also acquired powerful new computing and network hardware to facilitate data transfers just weeks before WikiLeaks received hacked materials from Russian operatives."

123. It is also of note that The Guardian published an article on 15 May 2018 entitled "*Revealed: Ecuador spent millions on spy operation for Julian Assange*". This puts a different slant again on matters, reporting that there was a large-scale surveillance operation ongoing in the embassy for Mr Assange's protection:

> "Ecuador bankrolled a multimillion-dollar spy operation to protect and support Julian Assange in its central London embassy, employing an international security company and undercover agents to monitor his visitors, embassy staff and even the British police, according to documents seen by the Guardian…..
>
> Documents show the intelligence programme, called "Operation Guest", which later became known as "Operation Hotel" – coupled with parallel covert actions – ran up an average cost of at least $66,000 a month for security, intelligence gathering and counter-intelligence to "protect" one of the world's most high-profile fugitives."

124. The Court is not asked (and indeed cannot be asked) to consider these articles beyond that they show that the case presented on behalf of Mr Assange may rather more nuanced than is presented here (regardless of who consented to the alleged surveillance or ordered it or received the product of it).

125. The Court should equally be wary of general expressions of outrage about the surveillance of privileged communications. As is set below, there is no absolute rule against surveillance which includes privileged communications as a matter of UK law.

126. The objection to the "surveillance allegations" constituting an abuse of this Court's process is however far more fundamental. This application fails to demonstrate any nexus

between the alleged surveillance and *these* proceedings. It is not the function of this Court to police the surveillance activities of another state. The focus of an abuse application is how the conduct alleged subverts the extradition process.

The evidence on surveillance

127. The crux of the abuse alleged is set out in the first statement of Ms Peirce (which is understood to be a hearsay account of the allegations in Spain). The allegation appears to be that a Spanish company, carrying out security functions at the embassy gathered data about Mr Assange (allegedly at the behest of the US intelligence agencies [see §13). Particular emphasis is placed upon the surveillance of Mr Assange's legal and medical visits and communications [§25]. It is also said that electronic devices were scanned [§§25-26].

128. At § 28 Ms Peirce states:

> "Later, the focus of particular surveillance on the Ecuadorian Consul and Mr Assange appeared to immediately trigger the issuing of December 22nd 2017 International Arrest Warrant by the United States [Gareth Peirce statement §28].

129. This is understood to be the foundation for the defence submission [Statement of Issues at [11]] that the extradition request (issued on 22 December 2017) was issued in conjunction with deliberate monitoring of Ecuadorian officials in the London Embassy.

130. This appears, in turn, to relate to §76 of the criminal complaint. It sets out some detail of a meeting between the head of the Ecuadorian Intelligence Service and Mr Assange on 21 December 2017. It is suggested that this was a meeting about an Ecuadorian operation (presumably the plan to make Mr Assange a diplomat) to remove Mr Assange from the embassy and that information provided by the Spanish Company prompted the US to issue an international arrest warrant.

131. If this is the nexus between the surveillance and this extradition request, it amounts to the suggestion that the surveillance in some way stopped a plan (or a device) to help Mr Assange to escape the Embassy (without being arrested by the British authorities for having breached the conditions of his bail in the Swedish extradition proceedings). The suggestion that this could amount to an abuse of this Court's proceedings is unsustainable. How the issue of any warrant could be said to have stopped Mr Assange escaping from the embassy, in these circumstances, is wholly unclear.

132. The evidence of witnesses 1 and 2 (the only primary evidence cited in support of the allegations) is not repeated here. Neither their evidence (nor even the wider self- serving complaint submitted on behalf of Mr Assange in Spain) comes close to demonstrating an abuse of this process:

132.1 **First**: The conduct which is the focus of the US indictment is alleged to have occurred between 2009 and 2011, some five years (at least) before it is alleged that the monitoring in the embassy took place.

132.2 **Second**: the extradition request sets out the evidence upon which the US Government expects to support the charges. This is not exhaustive but it gives this Court a good insight into the evidence which forms the basis of the prosecution case [see Dwyer Affidavit at §64]: evidence gathered from Ms Manning's personal and government computers, including classified information that Ms Manning searched for and downloaded from US Government computers; electronic messages Ms Manning sent to and received from Mr Assange; statements by Ms Manning and statements made by Ms Manning to others in furtherance of and in scope of the conspiracy; testimony of former members and affiliates of Wikileaks; documents and materials gathered from the Wikileaks website and evidence from the "Wayback Machine" (information once on its website); Assange's public statements and tweets and testimony from those with expertise in US military, intelligence and diplomatic fields. Self- evidently there was sufficient evidence upon which to convict Ms Manning.

132.3 **Third**: there is nothing, <u>on the defence case</u>, to show that any privileged materials were gathered in the embassy which are now deployed against Mr Assange.

132.4 **Fourth**: The United States has put this beyond dispute. The first Kromberg Affidavit states (i) no privileged communications will be used against Mr. Assange in criminal proceedings; (ii) if the fruits of any surveillance in the Embassy exist they will not be reviewed or used by prosecutors [§174]; (iii) "any use of privileged material against Assange would be barred by American law" [§175] (privileged communications include confessions to past wrongdoing).

132.5 **Fifth**: developed procedures are in place to prevent <u>agents and prosecutors</u> receiving or viewing privileged materials in cases they are investigating. There is a separate filter team.

132.6 **Sixth** (and moreover) to the best of the knowledge, information, and belief of the Prosecutor, the allegations in the superseding indictment and the affirmations made in the affidavits submitted by the United States in support of the extradition request, contain no legally privileged material and were not derived from legally privileged knowledge (Kromberg §5).

133. However widely it is put by the defence, it is submitted that the allegations going to the surveillance of the embassy cannot be capable of amounting to an abuse of this Court's jurisdiction.

134. To the extent that the second statement of Ms Peirce raises any separate issue (in terms of any hard copy materials seized from the embassy), the United States Prosecutor has affirmed that the assurance that no privileged materials could be used against Mr Assange during criminal proceedings in the United States would equally apply to any such material.

135. This is sufficient to dispose of this particularisation concerning surveillance and LPP. <u>However,</u> it is further noted that:

136. The Divisional Court rejected (in the context of submissions made in relation to an Applicant's article 6 Convention rights), that the monitoring of lawyer-client conversations could lead to a flagrant denial of the right to a fair trial, where there were mechanisms in place to ensure it did not reach the prosecution (Pham v. USA [2014] EWHC 4167 (Admin), citing the admissibility decision in Barbar Ahmad and others v. UK (2010) 51 E.H.R.R).

137. English law *permits* the surveillance of communications and consultations between a lawyer and client; see Re McE [2009] UKHL 15; *Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010* ('the 2010 Order): directed surveillance carried out on premises originally used for legal consultations, at a time when they are being used as such, is to be characterised as intrusive surveillance for the purposes of Part II of RIPA; *Covert Surveillance and Property Interference* – Revised Code of Practice 2018 (which also applies to foreign surveillance by UK authorities).

138. In the context of abuse of process, the deliberate and unlawful invasion of a suspected person's right to legal professional privilege is not to be assimilated with the abduction and entrapment cases. Whether it amounts to an abuse of process will depend on the circumstances of the case: Warren and others v Her Majesty's Attorney General of the Bailiwick of Jersey [2011] UKPC 10, 2011 WL 1060048 PC (noting [at 45]:

> "The police were unquestionably guilty of grave prosecutorial misconduct in this case. They acted in the knowledge that the Attorney General and the Chief of Jersey Police had not given authority to install the audio device without the consent of the relevant foreign authorities and would not do so; and that the foreign authorities had refused their consent."

139. Accordingly, even assuming that there has been surveillance of Mr Assange and that privileged material relating to Mr. Assange has been obtained, there can be no abuse of process of the extradition court. The material has no impact on proceedings in this court. The material will not be used in the criminal trial in America. Therefore, there has been no *usurpation* of the statutory extradition regime and there is no prejudice that can accrue either in these proceedings or upon Mr. Assange's return.

11. *§7 Eleventh of the POA*

140. This particular alleges that in order for the US request to be afforded priority over Sweden's request, on 23 May 2019, the US ratchetted up the charges to add multiple Espionage Act offences (by means of a Superseding Indictment). This escalation in the charges had nothing to do with the requirements of justice.

141. This again is arrant nonsense. The Swedish request was discontinued and never remade because of the time the defendant spent in the embassy. When the United States of America made its request there was no extant request and no need for any increase in charges. Indeed any charge would have sufficed because there was no competing request from Sweden when the defendant was arrested from the embassy.

142. There is not and has never been a need for a decision of the Secretary of State to accord precedent to the Swedish request. This particular is not only fanciful but a hopeless grasping at straws.

12. *§7 Twelfth of the POA*

143. This particular states that pressure was exerted on defence witness Chelsea Manning, in order to attempt to force her to provide evidence against Mr Assange.

144. This is not capable of giving rise to an abuse of this Court's process for all of the reasons set out above. However, it is commonplace for witness to be ordered to court to give evidence against a defendant (which is not even what is alleged here); there is nothing inherently wrong in that. It cannot be an abuse of process to lawfully require someone to give evidence while respecting their right to claim the privilege against incrimination. Indeed section 2 notices under the CJA 1987 have even abrogated the right to claim such privilege.

145. It follows the incarceration of Ms. Manning for contempt of court cannot amount to an abuse of the extradition court in this country, in a case concerning Mr. Assange. Mr Kromberg explains the function of the Grand Jury and the purpose of calling a witness before it. The evidence is not evidence which is admitted at trial. Even where it is alleged that a witness has been coerced to give evidence at a trial, this does not constitute an abuse of the extradition process (see Symeou on coerced evidence at [25] and [39]).

13. ***Alleged recklessness to sources***

146. Within the particulars there is an argument the defendant did not recklessly reveal the identity of those named within the materials Wikileaks published. This is Mr Assange's defence; it is a trial issue *par excellence*. This account should also be considered in light of paragraphs 31-34 of the indictment and Mr Assange's use of 'insurance' tactics so as to defeat prior restraint. Paragraph 42 of the indictment also refers to Mr Assange's public statements in 2010 whereby he described it as "regrettable" that sources revealed by Wikileaks "may face some threat as a result" and where he discussed not being obliged to protect sources.

147. It is of note that the five media partners with whom Wikileaks worked drew a distinction between their handling of the material and Wikileak's treatment of it. The following extracts from respected newspapers which had partnered Wikileaks demonstrate their view of the action taken by it (and is to be contrasted with the evidence served on 13 February 2020 from witnesses such as Mr Augstein and Mr Goetz).

148. The Guardian newspaper published on 2 September 2011[1] the following:

[1] https://www.theguardian.com/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables

"WikiLeaks has published its full archive of 251,000 secret US diplomatic cables, without redactions, potentially exposing thousands of individuals named in the documents to detention, harm or putting their lives in danger.

The move has been strongly condemned by the five previous media partners – the Guardian, New York Times, El Pais, Der Spiegel and Le Monde – who have worked with WikiLeaks publishing carefully selected and redacted documents.

"We deplore the decision of WikiLeaks to publish the unredacted state department cables, which may put sources at risk," the organisations said in a joint statement.

"Our previous dealings with WikiLeaks were on the clear basis that we would only publish cables which had been subjected to a thorough joint editing and clearance process. We will continue to defend our previous collaborative publishing endeavour. We cannot defend the needless publication of the complete data – indeed, we are united in condemning it.

"The decision to publish by Julian Assange was his, and his alone."

Diplomats, governments, human rights charities and media organisations had urged WikiLeaks's founder, Assange, not to publish the full cache of cables without careful source protection.

The newly published archive contains more than 1,000 cables identifying individual activists; several thousand labelled with a tag used by the US to mark sources it believes could be placed in danger; and more than 150 specifically mentioning whistleblowers.

The cables also contain references to people persecuted by their governments, victims of sex offences, and locations of sensitive government installations and infrastructure."

149. The New York Times published on 25 July 2010[2]:

"The Times and the other news organizations agreed at the outset that we would not disclose — either in our articles or any of our online supplementary material — anything that was likely to put lives at risk or jeopardize military or antiterrorist operations. We have, for example, withheld any names of operatives in the field and informants cited in the reports. We have avoided anything that might compromise American or allied intelligence-gathering methods such as communications intercepts. We have not linked to the archives of raw material. At the request of the White House, The Times also urged WikiLeaks to withhold any harmful material from its Web site.

150. The New York Times magazine published on 26 January 2011[3]:

"Assange was openly contemptuous of the American government and certain that he was a hunted man. He told the reporters that he had prepared a kind of doomsday option. He had, he said, distributed highly encrypted copies of his entire secret archive to a multitude of supporters, and if WikiLeaks was shut down, or if he was arrested, he would disseminate the key to make the information public."

"While we assumed we had little or no ability to influence what WikiLeaks did, let alone what would happen once this material was loosed in the echo chamber of the blogosphere, that did not free us from the need to exercise care in our own journalism. From the beginning, we agreed that in our articles and in any documents we published from the secret archive, we would excise material that could put lives at risk. Guided by reporters with extensive experience in the field, we redacted the names of ordinary citizens, local officials, activists, academics and others who had spoken to American soldiers or diplomats. We edited out any details that might reveal ongoing intelligence-gathering operations, military tactics or locations of material that could be used to fashion terrorist weapons."

"He was angry that we declined to link our online coverage of the War Logs to the WikiLeaks Web site, a decision we made because we feared — rightly, as it turned out — that its trove would contain the names of low-level informants and make them Taliban targets"

[2] https://www.nytimes.com/2010/07/26/world/26editors-note.html
[3] https://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html

> "As for the risks posed by these releases, they are real. WikiLeaks's first data dump, the publication of the Afghanistan War Logs, included the names of scores of Afghans that The Times and other news organizations had carefully purged from our own coverage. Several news organizations, including ours, reported this dangerous lapse, and months later a Taliban spokesman claimed that Afghan insurgents had been perusing the WikiLeaks site and making a list. I anticipate, with dread, the day we learn that someone identified in those documents has been killed."
>
> "As for our relationship with WikiLeaks, Julian Assange has been heard to boast that he served as a kind of puppet master, recruiting several news organizations, forcing them to work in concert and choreographing their work. This is characteristic braggadocio — or, as my Guardian colleagues would say, bollocks. Throughout this experience we have treated Assange as a source."

151. The aforegoing contrasts the actions of the defendant with those of reputable media outlets. He is described as a source. He was warned not to publish the names of informants and others in danger if they were identified. He, according to his former media partners, deliberately chose to do so (in contradistinction to what any self-respecting and professional journalist would do).

C. Abuse of Process - Zakrzewski

152. If it is alleged that the particulars contained in an extradition request are materially inaccurate, the Supreme Court has accepted it may amount to an abuse of process. However, even this narrow area of discretion operates so as to preclude the extradition Court from adjudicating upon disputed matters of fact going to the conduct alleged in the requesting state.

153. Thus, in Zakrzewksi v. Regional Court in Lodz, Poland [2013] 1 W.L.R 324 the Supreme Court (per Lord Sumption at §13, emphasis added) set out the conditions in which the Court's abuse jurisdiction may be invoked in relation to the description of the conduct:

153.1 **Firstly**, the jurisdiction "is exceptional". The statements in the [warrant] Request must comprise "statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally)".

153.2 **Secondly**, the true facts required to correct the error or omission "must be clear and beyond legitimate dispute". The abuse of process jurisdiction "is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court".

153.3 **Thirdly**, the error or omission must be material to the operation of the statutory scheme.

153.4 **Fourthly**, the sole juridical basis for the inquiry into the accuracy of the particulars in the [warrant] Request is abuse of process. The materiality of the error in the warrant will be of critical importance.

154. There appear to be three areas of potential Zakrzewski abuse:

(i) Firstly, in relation to the "passcode hash allegation", it is said that illegality only arises if the publisher actually participated in illegally obtaining the material. This is said to be "flatly contradictory to Manning's unchallenged evidence before her Court Martial".

(ii) Secondly, there is said to be evidence that Ms. Manning's disclosures were not linked to the Wikileaks "most wanted" lists.

(iii) Thirdly (in the SOI) there are said to be further areas which could be undermined by the "hard evidence".

155. Each of these arguments is an impermissible attempt to litigate matters of US law and/or evidence, and to reverse the fundamental basis upon which extradition operates- that the Court is not concerned with foreign law when assessing dual criminality, through the "back door" of an abuse argument.

1. ***Passcode hash***

156. As to the passcode hash, as a matter of English law, conspiracy under either the Computer Misuse Act or the Official Secrets Act is illegal at the point of agreement. It does not require participation in "illegally obtaining the material".

157. If submissions are to be made to the effect that, as a matter of US law, illegality would only arise upon the publisher participating in illegally obtaining material, the submissions are misplaced.

158. It is not the function of the extradition court to resolve conflict of opinion as to the meaning of foreign law. Such a dispute, even if legitimate, cannot give rise to a Zakrzewski abuse in this jurisdiction:

159. It is well established that the Court should not undertake analysis of foreign law for the purposes of determining whether the conduct alleged amounts to an offence in the foreign jurisdiction (see Dabas v. Spain [2007] 2 A.C. 31 §55, Cando Armas v. Belgium [2005] UKHL 67 at §16 and Norris v. USA [2008] UKHL 16 §§85 and 89).

160. This approach is consistent with other areas which fall to be considered under the 2003 Act:

161. In relation to s.12A of the 2003 Act "It is no part of the function of the extradition court to embark upon an investigation of the legal niceties in the jurisdiction of the requesting judicial authority. It should not seek to resolve apparent conflicts of opinion about the meaning of foreign law.": [Puceviciene v. Lithuania [2016] 1 W.L.R. 4937 at §62].

162. In relation to limitation periods:

> "this kind of debate should only be entered by the courts of the requested state in the most exceptional of circumstances when there is the clearest possible evidence of the engagement in abuse by the prosecuting authorities of the requesting state…… the domestic courts should be extremely reluctant to engage in evaluating the competing arguments about the local law of limitation in the requesting state. It is always wise never to say 'never', but the circumstances when it is justified must surely be truly exceptional." (Villota v. Spain [2014] EWHC 2623 (Admin) at §35 and §40)

163. In relation to abuse of process also predicated on the contention that a limitation period had expired:

> "…the prior question is whether this court should become involved in adjudicating upon these inconsistent interpretations of Italian law. For my part, it seems to me fundamental that in a European Arrest Warrant case it is wholly inappropriate for this court to proceed to adjudicate upon rival interpretations of Italian law. All this is a matter for the Italian courts in accordance with the principle expounded by Lord Brown in Gomes. Quite simply, we should not get involved." (Battistini v. Italy [2009] EWHC 3536 (Admin) §15).

164. In relation to abuse of process predicated on the contention that the requesting authority had failed to comply with its own legal procedure

> "…though Lord Hope couches his language in terms that the judge "need not concern himself" with the criminal law of the requesting state, the thrust is that he should not do so, except in true abuse of extradition process cases, and should not do so, not as a matter of discretion, but as a matter of jurisdiction. Such inquiry is simply not his task. The effect of the Framework Decision, and the interpretation of the 2003 Act Part I, go further than the traditional assumption of good faith between sovereign states and a need to accommodate different national legal processes.
>
> 52 The circumstances of this appeal illustrate the point, and the way in which the contrary view would undermine the legislative intention. The context is an extradition case, pursuant to what is intended to be a simplified decision-making process in an area of mutual recognition of judicial decisions in criminal matters. There is a disagreement among the Greek lawyers about what the Greek Code of Criminal Procedure requires. It would be quite extraordinary for the District Judge to hear evidence from competing experts on Greek law, including the Prosecutor of the requesting state, so as to rule as a matter of fact on what Greek law was, then to find whether in fact the actions of the Prosecutor had breached whatever the law was found to be, then to rule on the effect on the validity of the warrant of a breach of its Code, each of which might be quite uncertain in Greek law, and then to rule on whether that caused the EAW to be invalid as a matter of English law implementing the Framework Decision. And if extradition then ensued, the matter would be dealt with by the Greek Courts who would be unlikely to regard the views of the English Courts on Greek law as of more than passing interest. If it did not ensue, the Greek Courts would never have the chance to put it right." [Symeou v. Greece [2009] 1 W.L.R 2384, §§52-3]

165. It is, fundamentally, not the role of this Court to enquire into whether the conduct alleged amounts to an offence as a matter of US law. The request and further information assert that it does. This is the end of the matter. The defendant's argument is, in reality, an attempt to litigate dual criminality by reference to the provisions of US law under which the defendant is indicted. This does not go to an abuse of process.

166. A further, insurmountable hurdle is that the factual contentions of the defendant are manifestly not "clear beyond legitimate dispute". The request and further Affidavit of Gordon D. Kromberg assert:

167. The defendant's extradition is requested in relation to an "agreement to obtain classified information through computer hacking" [§6] and publishing classified documents containing the unredacted names of innocent people [§6].

168. Such acts are "illegal and not protected by the constitution" [§§7-9].

169. The defendant's extradition is requested for *agreeing* to assist Manning in cracking a password hash [§166], in order to obtain unauthorised access to an account in a which would have allowed Manning to log onto a classified DoD account in a manner which would make it more difficult for investigators to identify her [§168, 171].

170. The superseding indictment is brought on the basis of the rule of law and not to prosecute the defendant for his political opinions. A motion for selective prosecution (which could be brought on the basis that the prosecution was brought for a discriminatory purpose) may be filed if the defendant wishes to challenge this [§17, §68].

171. If extradited, the defendant may challenge the charge against him at first instance, with one appeal as of right, and further discretionary appeals as far as the Supreme Court [§67].

172. If extradited, the defendant may challenge the indictment on the basis that his conduct was protected by the free speech provisions of the First Amendment, or that the charges are "void for vagueness", although the US prosecutors are of the view that such arguments would have no merit [§69-71].

173. Bias among potential jurors is remedied by a robust jury selection process (far more rigorous than that which would be afforded to the defendant in England) and by the large size of the jury pool in Northern Virginia [§§72-81].

174. After the guilty pleas of Ms. Manning, a "providence enquiry" was initiated to ensure that the plea was voluntary and grounded in fact. This was a limited enquiry into the facts which Manning had chosen to admit and Manning was not subjected to exhaustive questioning about the offences or surrounding circumstances [§§142-3]. Thereafter, Ms. Manning refused to testify before a grand jury and has as a consequence been incarcerated [§§145-156].

175. Mr. Boyle's assertions to the continued incarceration of Ms. Manning and the nature of her summons before the grand jury are disputed and have already been litigated, unsuccessfully, in America [§§157- 165].

176. Even if, therefore, it were permissible to litigate an alternative construction of the US law under which the defendant is indicted, the scope of American criminal law in this case is not clear beyond legitimate dispute and could not therefore amount to a Zakrzewski abuse.

177. The first head of Zakrzewski abuse identified by the defendant must fail because, **first**, this court should not entertain rival constructions of US law under the heading of abuse of process and, **second**, because the facts relied on by the defendant are not clear beyond legitimate dispute.

2. ***Most Wanted***

178. As to the most wanted lists, the defence contention is a simple evidential dispute, of a type that the extradition courts should not, indeed cannot, entertain.

179. The defendant submits that the allegation that Ms Manning's disclosure was given in response to the Wikileaks "most wanted" lists is contradictory to the evidence given in Ms Manning's Court Martial.

180. This assumes that the US prosecution is somehow bound to accept the account given by Ms Manning in her own defence or mitigation. As need hardly be said, this is not the position. After Ms Manning's guilty pleas, a "providence enquiry" was initiated to ensure that the plea was voluntary and grounded in fact. This was a limited enquiry into the facts which Ms Manning had *chosen* to admit and she was not subjected to exhaustive questioning about the offences or surrounding circumstances [Kromberg 1 §§142-3]. Thereafter Ms. Manning refused to testify before a grand jury and has been found to be in contempt [§§145-156].

181. The second affidavit of Gordon Kromberg (§§12 and 13) maintains the factual position of the prosecution. Ms. Manning is alleged to have responded to requests made in the most wanted list.

182. Therefore:

182.1 The defendant's submissions as to this issue amount to an evidential dispute of the kind that is irrelevant in extradition proceedings.

182.2 Because the defendant's submissions represent an evidential *dispute* there is no matter of fact relied on by the defendant in furtherance of the abuse argument which is clear beyond legitimate dispute (Zakrzewski [supra]).

3. ***Other areas***

183. The final area of Zakrzewski abuse identified in the SOI is that there are "other areas" which could be "undermined by hard evidence". These are not identified and so cannot be responded to with precision; however, it will be noted by the Court that the mere assertion that prosecution allegations can be "undermined" is a formulation of the sort of evidential dispute which the extradition courts cannot consider.

4. ***Eller***

184. Should the defendant seek to rely on the witness statement of Mr. Eller (and his exhibits) to argue that an extradition offence is not made out or in furtherance of a Zakrzewski abuse argument, any such argument must also fail. For the reasons set out below, Mr. Eller's statement and exhibits are relevant, if at all, to evidential dispute at trial. This is precisely the sort of evidence Lord Sumption warned the Court **not to consider** in Zakrzewski [§13].

VI. CONCLUSION

185. No issue of abuse or Zakrzewski abuse arises.

VII. ANONYMOUS WITNESSES

186. If the Court agrees that the allegations about surveillance in the Embassy are incapable of constituting an abuse of the Court's process, then the evidence of Witnesses 1 and 2 is irrelevant. Submissions as to their evidence being anonymous are set out here for fullness.

187. There does not appear to be any application in the files nor any witness statement explaining the basis upon they seek anonymity. All that appears in the evidence is that:

188. [3] "After being made aware of the evidence outlined below lawyers acting for Mr Assange in Spain, Baltasar Garozón Real and Aitor Martinez took a number of steps towards alerting Spanish prosecuting authorities. Those steps involved establishing protection for witnesses involved, and the confidentiality necessary if arrests and search warrants were thereafter to be ordered by a court. That confidentiality has been maintained by Mr Assange's lawyers both in Spain and in the UK, all of whom have been made aware of the likely progression of steps being taken." [Ms Peirce – Statement 1]

189. [5] "… In addition the Central Investigative Court No. 5 has agreed a set of proceedings, including the protection of former workers as protected witnesses, and the taking of the statement of Julian Assange as a witness, through a European Order of Investigation sent to the British authorities, as a victim of the alleged crimes being investigated.": Jiménez Statement 1 (19 October 2019**)**

190. [6] "To avoid unnecessary interference with the Article 8 ECHR rights and/or the privacy, confidentiality and Data Protection rights concerning third parties whose confidential or private data appears in the material before the court I have taken a selective approach to what I have included of the attachments but can confirm that all the attachments mentioned in the exhibited Criminal Complaint were filed with the court in Spain."; Jiménez Statement 2 (18 December 2019).

191. (pg.66) "Third Additional Pleading: It is requested the adoption of protection measures for the witnesses who are cited in the body of this statement of complain and whose statements are provided in copy of notarial deed in sealed envelope to prevent their knowledge until it has been adopted the measure that, respectfully, is requested, at certain risk to their personal integrity and security, therefore …"Complaint to the Spanish Court (Central Examining Magistrate Number 5.

192. "With this affidavit I make myself available to the justice system, with the aim of cooperating openly in relation to some events that I have information about and by their

contents may reveal unlawful activities. I wish to express that at no point have I intended to commit nor am I aware of having committed any unlawful activities myself. That is why I wish to make myself available to the justice system to ask it for protection and be granted the status of a protected witness given that, with this decision which I have taken freely, my family and I are put at risk with the information and documentation I am providing." Witness 1

193. "I have made this affidavit so that it can be presented before the judiciary. I intend that my explanation of facts be put before the authorities and I understand that it may contain activities that are considered to be illicit. I never participated in illicit acts, nor did I intend to participate in such acts nor was I aware of them. That is why, despite being subjected to a confidentiality agreement, I am now putting these facts before the justice system. However, as a prior necessity I require the status of a protected witness, given that with this information, as well as the documentation that I am providing, my family and I will be put at risk." Witness 2

194. The Court cannot grant an application for anonymity unless it is satisfied that there is a genuine cause for anonymity, generally a justified fear for the safety of the witness or others which cannot otherwise be protected, and that justice requires that the evidence be given. Per R. (on the application of B) v Westminster Magistrates' Court [2014] UKSC 59; [2015] A.C. 1195, Lord Hughes gave the following explanation of the correct approach to the test in the context of extradition proceedings (at [73]).

195. It is noted that the identity of Witnesses 1 and 2 must be known to any accused persons in Spain. It is wholly unclear what possible basis they could have for submitting that they have a justified fear for their safety in these proceedings. Any application that their evidence remains anonymous would fall at the first hurdle given that there is simply no evidence about this.

James Lewis QC

Clair Dobbin

Joel Smith

17 February 2020