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

[BARS TO EXTRADITION/ HUMAN RIGHTS]

Date of hearing: 7 September 2020
Time estimate: 3-4 weeks
References are to the Defence Core Bundles [CB] and the United States Core Bundle [USCB]

Essential reading:

1. *The first Affidavit of Kellen S Dwyer [CB1];*
2. *Declaration in support of request for extradition (Second Superseding Indictment) Gordon Kromberg [CB9];*
3. *Declaration of Gordon Kromberg dated 17 January 2020 [CB2] 1-76 pages.*
4. *Supplemental Declaration of Gordon Kromberg dated 19 February 2020 [CB3];*
5. *Second Supplemental Affidavit of Gordon Kromberg dated 12 March 2020 [CB7] [1-11 pages]*
6. *Third Supplemental Affidavit of Gordon Kromberg dated 24 March 2020[CB8][1-21 pages]*
7. *Report of Professor Fazel [CB10];*
8. *Report of Dr Blackwood [CB11];*
9. *Affidavit of Dr Leukefeld [CB12]*
10. [*Further affidavit in response to new materials served in reply (by the defence) in July and August 2020. To be received [CB13]*

Contents

I. FOREWORD

1. The prosecution apologise in advance for the length of this skeleton argument. It had been anticipated that this hearing was essentially evidential the previous hearing having dealt with legal submissions. However, the defence has served a 200 page submissions document altering and expanding their arguments and continued to serve new evidence up to 25 August 2020. In the circumstances the prosecution has attempted to assist the court by a comprehensive reply, as the prosecution's position is that the defence submissions are fundamentally misleading as to the prosecution case.

II. INTRODUCTION

2. The point is reiterated, on behalf of the United States, that this is not a trial. The evidence served by the defence and the issues which its seeks to litigate almost entirely go to trial issues; to rights which are protected within the United States system (at an equivalent level or a greater level than is afforded in the United Kingdom) or to issues which a court in the United States is more appropriately placed to determine. Alternatively, the defence case seeks to relitigate issues which have already been determined as not transgressing fundamental rights in a series of cases which considered, individually and cumulatively, Special Administrative Measures, detention in restricted housing (including at ADX Florence) and mental ill-health.

3. Moreover, it is clear that much of the defence case, even when it comes to reliance upon Convention rights, rests upon a wholesale mischaracterisation of the prosecution case. The case proceeds as though Assange is being prosecuted for mere publication, having been provided with the materials by Manning, as opposed to his being prosecuted for conspiring with Manning to unlawfully obtain them (with Manning undoubtably committing serious criminal offences in so doing) and then disclosing the unredacted names of sources (thus putting those individuals at risk).

4. The starting-point for this Court's consideration of the claims made on behalf of Mr Assange is the fundamental assumption that the requesting state is acting in good faith. Where the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess

special force; Serbeh v Governor of HM Prison Brixton (October 31, 2002, CO/2853/2002) Kennedy L.J. at [40]: R (Adel Abdul Bary and Khalid Al Fawwaz) v The Secretary of State for the Home Department, Scott Baker LJ at 50; Ahmad and Aswat v The Government of the United States of America [2007] H.R.L.R. 8, Laws LJ at 74. Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs [2012] 3 W.L.R. 1087; Lord Kerr of Tonaghmore JSC (with whom Lord Dyson MR and Lord Wilson JSC agreed at [14])

5. Extradition relations are with a State, not its President. To the extent that the defence case is comprised of an attack upon the President of the United States, it ignores the institutional competencies of the agencies relevant to this case, the Constitution of the United States and the independence of its Courts. As put by Sir Igor Judge P, as he then was in Mustafa (Abu Hamza) v The Government of the United States of America and Anr [2008] EWHC 1357 (Admin): "The United States of America is a major democracy, one of the repositories of the common law". The next US election is due to take place on 3 November 2020 – there may or may not be a different administration but that will not affect the continuum of the fundamental assumption of good faith.

6. The defence skeleton argument sets out at great length, and is constructed around, a series of claims, speculation and innuendo which are not accepted. This response will not address all of the allegations relied upon in the defence case. Some are so speculative or remote from these extradition proceedings that they do not warrant comment. Rather than repeat its response to the series of allegations made about Assange being surveilled in the Ecuadorian Embassy, the prosecution incorporates its response as set out in its abuse skeleton (CB5).

7. The defence also appears to proceed on the basis that if it makes an allegation, then the prosecution must respond to it and if it doesn't, the defence allegation must be accepted as true. The prosecution does not take up the invitation to proceed in this way. The burden is on the defence to demonstrate that extradition is incompatible with Convention rights or precluded by a statutory bar or otherwise engages the Court's abuse jurisdiction.

III. APPROACH TO THE EVIDENCE

8. This matter was last before the Court for substantive argument the week commencing 24 February 2020. The prosecution invited this hearing having regard to the process envisaged by R (United States) v The Senior District Judge, Bow Street Magistrates' Court

v Tollman and Tollman [2007] 1 W.L.R. 1157 whereby the Court determines as a preliminary issue (taking the defence case at its highest) whether the conduct relied upon, if established, would be capable of amounting to an abuse of process. The court did not take this approach but determined that it would hear from all of the defence witnesses (to the extent that the prosecution wanted to examine them) prior to determining any issues going to abuse. The Court heard legal argument as to whether the defence could demonstrate an abuse of process, going to a material inaccuracy in the particulars set out in the Request ("Zakrzewksi abuse" per Zakrzewksi v. Regional Court in Lodz, Poland [2013] 1 W.L.R 324 but again determined that it would hear evidence on this point prior to making any determination. The Court also heard argument on the discrete defence argument that the political offence exception is available in proceedings under the Extradition Act 2003. The prosecution does not repeat its argument on this point nor seek to add to it; the defence point is unarguable on the most elementary principles.

9. The Court is understood to have proceeded in this way because its abuse jurisdiction is an entirely residual one that arises, in narrow circumstances, where the statutory tests or bars to extradition are not engaged Belbin v. France [2015] EWHC 149 (Admin) at §59. However as was observed by the Lord Chief Justice in Giese v The Government of the United States of America [2018] 4 W.L.R. 103 at 33 (emphasis added):

> "33. Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition Parliament, originally and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument."

10. The prosecution point is repeated that the evidence deployed by the defence goes either to a bar to extradition or to human rights. If it fails to demonstrate a bar to extradition or that treatment in a requesting State would be incompatible with Convention rights, it is not open to the Court to consider that evidence on an individual or cumulative basis as constituting an abuse. The prosecution will analyse the issues raised by the defence first and foremost through the lens of the statutory scheme.

11. The prosecution does not accept, for the most part, the evidence given by the defence witnesses. Although some of it purports to be expert, it is frequently advocacy. It is not the evidence of impartial witnesses whose evidence is inherently reliable by reason of its disinterest. It fails to present the whole picture or omits to mention protections inherent in the United States system as regards pre-trial detention; trial; healthcare and post-

conviction detention. This skeleton argument will outline such protections and will develop those points in the course of the witness evidence.

12. A number of witnesses give evidence on issues that have previously been determined by the High Court, the Supreme Court or the European Court of Human rights as not barring extradition; which are irrelevant in extradition proceedings or which are inadmissible as going to an abuse of process. The fact that the prosecution has asked that a number of witnesses be called should not be taken as an indication that the prosecution considers that their evidence goes to an arguable issue or an acceptance that their evidence is admissible. Equally, the prosecution has not asked for some witnesses to be called. This should not be taken as any acceptance of the truth of that evidence; its relevance or its admissibility.

A. Case Management

13. Prior to February 2020, the Court had made a series of orders so that the defence case was served prior to that hearing. The defence was afforded a further opportunity, by the Court, to serve evidence in reply to the affidavits (and the two medical reports) that the United States served in response to the defence declarations. This evidence was to be served by 20 July 2020. Service of defence evidence has gone on until 25 August 2020. It went on after the hearing on 14 August 2020 (the defence having omitted to mention to the Court that there was further evidence to come). The defence evidence amounts to some 26 substantive statements including further medical reports suggesting, for the first time, a diagnosis of autism in respect of Mr Assange. One further medical report is dated February 2020; another one relates to an examination which took place in January 2020; but neither of these reports was served when they could have been. Instead they have been held back and served in the last couple of weeks.

14. The basic requirement on any party to litigation is that it serves its case in accordance with the directions set by the Court. It is not permitted to hold back evidence to see what another party serves in response to some of its evidence. It is not allowed a second bite of the cherry by serving further evidence on points it has already sought to evidence. The further evidence served by the defence is not a reply to the prosecution evidence. This very point was foreshadowed in an earlier case management hearing when the defence said they just needed to tidy up their evidence and it would only be responsive! That much should be clear from the fact that the prosecution evidence was itself a reply to the defence case (it did not go to new evidence or issues) and the sheer number of further statements

served. The evidence constitutes impermissible repetition or a shoring up of evidence already given. There are obvious examples of the defence introducing entirely new evidence which it obviously knew about beforehand. Despite this, the defence has sought not leave to serve it but rather suggested that it is for the prosecution to identify why leave should not be sought to adduce it. The reasons why leave ought to have sought is set out in the table appended to this skeleton.

15. The prosecution sets this out to make clear the extent of the further evidence served and why the defence ought to have been candid that this evidence went to new issues and applied for leave to adduce it. It ought to have been served as part of the original defence case. However as is now clear, there is no point too small, nor belatedly made, that the defence will not pursue. It could take as long to litigate whether this evidence ought to be admitted as it will take to examine on it. The prosecution is therefore driven to the unsatisfactory position it will probably be better admitted *de bene esse* and left to the court to decide on relevance (and therefore admissibility) and weight; but it is critical that the Court manages and controls the process going forward. To that end:

    (1) The defence has relied upon a series of lengthy and detailed statements and reports (with some witnesses giving multiple statements or reports). These are often duplicative (even to the extent that witnesses give the same statement as each other). The written evidence should stand as the evidence in chief of each witness.

    (2) The only alternative is that the defence call each witness in chief and their oral evidence will stand as their evidence in chief (not their written evidence). This evidence must be adduced by non-leading questions, in the usual way. The Court would have to limit the time allocated for such examination to that set out in their examination in chief schedule.

B. Dr Leukefeld's Affidavit

16. The United States indicated in the affidavit of Gordon Kromberg [CB2 at §107] that pending the examination of Mr Assange on behalf of the United States, *general* information was provided about mental health care within the Truesdale Adult Detention Centre and Bureau of Prisons institutions. This was for the obvious reason that evidence on mental health care would be more useful, to the Court, if orientated towards any specific diagnoses made in respect of Assange. The experts instructed on behalf of the

United States were unable to examine Assange owing to the Co-vid 19 pandemic. The reports of Dr Blackwood and Dr Fazel were served as soon as possible. As set out below, the defence continued to serve medical evidence about Mr Assange until 14 August 2020. This included evidence diagnosing, for the first time, that he has Asperger syndrome. The evidence of Dr Leukefeld (of the Bureau of Prisons) is served having regard to all of that evidence. The Court indicated (on 14 August 2020) that leave would have to be sought to serve this affidavit. Such leave is sought.

C. The Second Superseding Indictment

17. On 24 June 2020 a Second Superseding Indictment was issued by the US District Court for the Eastern District of Virginia. This Second Superseding Indictment was issued because continued investigation into the criminal activities of the defendant disclosed further particulars of the conspiracies he was engaged upon. As the further affidavit in support of the request for extradition demonstrates (Second Superseding Indictment) Gordon Kromberg [CB9] the effect of the superseding indictment is to allege that Assange conspired with individuals other than Ms Manning. The prosecution repeats that the addition of these particulars may not have warranted the submission of a further request but that course was taken out of an abundance of caution and upon the failure of the defence to respond the prosecution's invitation to express a view on the point[1].

18. The recommencement of extradition proceedings after a *failed* initial attempt at extradition by a requesting State does not constitute an abuse of process. The prosecution is far from being in that position; the further particulars change little as regards its case, save that they add some distinct conduct upon which Assange can and should be extradited.

19. In the context of a *failed* extradition case, the High Court has made clear that the principle in Henderson's Case (1843) 3 Hare 100 does not apply where a requesting state fails to secure extradition on a first attempt and re-institutes further extradition proceedings. Nor does give rise to any distinct head of abuse of process; see Camaras v Baia Mare Local Romania Court [2016] EWHC 1766 (Admin)at 27 (approved in Giese v Government of the United States of America [2018] 4 W.L.R. 103, LCJ; Dingemans at 29).

> "28. Any extension of that jurisdiction however would undermine the statutory process itself and the international arrangements to which they give effect. I do not consider that the residual jurisdiction should be expanded to embrace the principle in *Henderson v Henderson* . If no bar is

[1] See Addendum Opening Note

> made out, it is difficult to see why a person who faces no bars to extradition should then not be extradited, other than as a sanction imposed on the requesting authority for not complying with directions or not getting its case in order. Such an approach, which may run contrary to the overall public interest in any given case, and which may be inconsistent with the primary purpose of extradition arrangements, cannot be extracted from the Framework Decision nor the 2003 Act."

20. In such circumstances the correct approach is to take a "broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case", Such a broad, merits-based judgment should take account of the fact that there is no doctrine of *res judicata* or issue estoppel in extradition proceedings; Giese at [32].

21. This is not a failed attempt at extradition. It constitutes the addition of some conduct as a consequence of further work done by the United States authorities whilst this case has been pending. As regards the interests at stake, there is no proper basis for suggesting that Assange should escape extradition in respect of the additional conduct. Far from it being abusive, it demonstrates that the United States has been careful to ensure that all formalities are complied with (even to the extent to providing a new extradition request) and that he has been given an opportunity to deal with the conduct in these extradition proceedings.

IV. THE NATURE OF THE PROSECUTION CASE

22. The defence case (and indeed a great deal of the recently served material) is premised upon:

    (1) **First,** treating Assange as though he were engaged in reporting, in the same position of any journalist who comes into possession of classified information;

    (2) **Second,** seeking to demonstrate that the public interest was generally served by the disclosure of the materials unlawfully taken as part of the conspiracy with Ms Manning; and

    (3) **Third**, making extradition the arena for a broader determination of whether the disclosure of the material, obtained by complicity in Manning's criminal conduct, served the public interest.

23. It is neither relevant to this process nor viable for this Court to embark on any process of determining where the public interest lies as regards the disclosure of the materials stolen by Manning. The United States has set out in great detail the harm and the risk of harm it

alleges was caused to individuals [**see Kromberg at CB2 /§§30-65**] by the disclosures. The United States evidence extends beyond risk to, and immediate damage done, to individuals and into wider areas identified including the damage done to the security and intelligence services; damage done to the capability of the armed forces and the endangerment of the interests of the US abroad; see the Affidavit of Kellen Dwyer [CB1] at §§ 6, 7, 8 summarising the three bases upon which the prosecution is brought. See also "F. ASSANGE Revealed the Names of Human Sources and Created a Grave and Imminent Risk to Human Life" [Tab 1 page 15 / "G. ASSANGE knew that the dissemination of the Names of Sources Endangered Those Individuals" [Tab 1 page 19].

24. As is stated repeatedly, on behalf of the United States, Assange is being prosecuted (i) for complicity in Manning's unlawful obtaining of the material (and, per the allegations in the second superseding indictment, complicity in hacking by others) and (ii) communicating the names of sources who had provided information to the United States.

25. As to the submissions and evidence which seeks to put Assange in the position of any journalist who reports about classified material provided to him, the prosecution case is expressly brought on the basis that his conduct was not responsible journalistic treatment of classified material. At its most simple, journalists do not conspire to steal, burgle, corrupt or computer hack (or to commit any other offence) in order to obtain classified materials, nor do they publish the names of innocent sources. If they do, they are liable to prosecution.

26. The evidence given by defence witnesses to the effect that: "Good reporters don't sit around waiting for someone to leak information, they actively solicit it, they push, prod, cajole, counsel, entice, induce, inveigle, wheedle, sweet talk, badger and nag…" [Feldstein, Statement of 5 July 2020 at page 2] is nothing to the point. Such statements are not the same as saying that journalists are routinely complicit in theft, hacking, bribery or any other criminal activity in order to obtain classified material. To put the point shortly, neither being a journalist nor Article 10 is a carte blanche to commit a crime.

27. The distinction between responsible journalistic treatment of material and complicity in criminality is drawn in the caselaw of Article 10 (discussed further in the body of this skeleton argument). Two of the issues that the European Court will examine, when it comes determining, ex post facto, whether it was reasonably proportionate to prosecute a journalist for the sharing or publication of confidential material is (i) whether the

journalist was engaged in responsible journalism and (ii) whether the journalist was a party to illegality; see Gîrleanu v Romania 2019) 68 E.H.R.R. 19 at [84] and [91]:

> "[84] However, the protection afforded by art.10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of art.10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.
>
> [91]. The Court further notes that the applicant did not obtain the information in question by unlawful means and the investigation failed to prove that he had actively sought to obtain such information. It must also be noted that the information in question had already been seen by other people before the applicant."

28. Aside that Assange is accused of complicity in criminality in obtaining the classified materials, the defence case can be tested in another way, by asking how the disclosure of the names of innocent sources could possibly be justified by reference to the public interest or protected by any right to free speech.

29. The prosecution case (as regards the materials obtained from Manning) in the United States is expressly put on the following basis:

    (i) An independent grand jury issued these charges based on evidence of the following actions that Assange knowingly took, in committing the charged criminal offenses:

        - His *complicity in illegal acts* to obtain or receive voluminous databases of classified information.
        - His agreement and attempt to obtain classified information through *computer hacking*; and
        - His publishing certain classified documents that contained *the un-redacted names of innocent people* who risked their safety and freedom to provide information to the United States and its allies, including local Afghans and Iraqis, journalists, religious leaders, human rights advocates, and political dissidents from repressive regimes. [Kromberg at Tab 2 §6].

    (ii) The Grand Jury did not charge Assange with passively obtaining or receiving classified information; neither did it charge him with publishing in bulk hundreds and thousands of these stolen classified documents. [Kromberg at Tab 2 §18].

    (iii) Rather the charges against Assange focus on his complicity in Manning's theft and unlawful disclosure of national defense information (Counts 1-4, 9-14); his knowing and intention receipt of national defense information from Manning (Counts 6-8); his agreement with Manning to engage in a conspiracy to commit computer hacking, and his attempt to crack a

password hash to a classified US Department of Defense account. [2] [Kromberg at Tab 2 §19].

(iv) The only instances in which the superseding indictment charges Assange with the distribution of national security information to the public are explicitly limited to his distribution of documents classified up to the secret level containing the names of individuals in Afghanistan, Iraq, and elsewhere around the world, who risked their safety and freedom by providing information to the United States and its allies. [Kromberg at Tab 2 §20].

(v) In short, Assange was charged for publishing specified classified documents that contained the unredacted names of innocent people who risked their safety and freedom to provide information [Kromberg at Tab 2 §18].

30. As regards Article 10 (considered in detail below), the issue is whether it would incompatible to extradite Mr Assange to face *these* charges, per the indictment; not the prosecution as mischaracterised by the defence.

A. Sentence

31. Equally, a number of defence witnesses refer, as though it were fact or preordained that Assange will be subject to detention for the rest of his life. This appears to be premised upon taking the statutory possible maximum for these offences (175 years); ignoring that the sentence is a matter of judicial discretion and treating it as inexorable that Assange will be sentenced to that term.

32. The prosecution does not accept this and regards such estimation as critically flawed. Assange does not face a maximum minimum term. Any sentence that he faces will be arrived at having to the overarching sentencing principles which apply and to the United States Sentencing Guidance:

(1) treating the maximum available sentence as though it were the sentence that *will* be imposed fails to recognize that a "tiny fraction" of federal defendants receive the statutory maximum; Kromberg CB2 at §182;

(2) the overarching principle to be applied by the District Court is that any sentence is sufficient but not greater than necessary (having regard to a number of legitimate penological justifications); Kromberg CB2 at §183;

[2] Per the first superseding indictment.

(3) the factors to be determined in reaching a sentence are multifactorial; Kromberg CB2 at §184;

(4) any calculation based upon a comparison with Manning is limited given that sentences imposed within the military system (which are over one year) are eligible for parole at the one third point. They tend therefore to be much shorter in reality. The ability to compare Assange and Manning is further limited by Manning's being pardoned. Kromberg CB2 at §185;

(5) any sentencing exercise, to achieve parity with other defendants, will thus likely be based sentences imposed by the civilian courts for the disclosure of classified material. These comparisons demonstrate sentences of a far lower order; Kromberg CB2 at §185; and

(6) sentences imposed which go *beyond* the range set out in the United States Sentencing Guidance are very rare. The vast majority of cases in 2018 were either within the range or below the range. Only 3% were above the range; Kromberg CB2 at §186.

33. In short, whilst it is difficult to calculate any sentence which might be imposed on Assange (given all the variables at large), the prosecution rejects any calculation which omits basic considerations that will ultimately apply in Assange's case.

V. ASSANGE AS A TARGET IN A 'WAR' ON JOURNALISTS

34. Almost the entirety of the defence case rests upon the lengthy narrative set out in their skeleton argument [§§ 2.13- 3.2] which is presented as though it were fact when it is speculation. Central to this narrative is the contention that Assange's prosecution is part of a 'war' on journalists. Implicit in this is that his prosecution has no genuine basis but rather that it is driven by political forces (with knowing involvement by federal prosecutors).

35. A necessary part of this speculation narrative is that there was a 'decision' not to prosecute Assange which was reversed post the election in 2016. The United States will neither confirm nor deny its internal prosecution decision-making because it will not waive its deliberative process privilege to discuss the specific decision-making process in this case and open itself up to challenge. Even assuming, *arguendo*, there was an informal decision on publication of passively received documents there is no correlation between that and a

later decision to prosecute for criminal activities the investigation uncovered, being politically motivated.

36. However, it is clear beyond argument that a decision not to prosecute was never communicated to Assange; moreover he always believed he was subject to prosecution..

37. It is also said by the defence that the 'decision' not to prosecute Assange was made on the basis of "the New York Times" problem – that if Assange was prosecuted the Department of Justice would also have to prosecute the New York Times and other news organizations and writers who published classified material.

38. The principal evidence upon which the defence relies to demonstrate the existence of a such a decision is a newspaper article dated 25 November 2013 [Sari Horowitz, "*Julian Assange is unlikely to face US Charges over publishing classified documents*", Washington Post]; Cited by Professor Feldstein at §9 page 18.

39. Professor Feldstein omits important sections of the report upon which he relies to demonstrate a "decision" not to prosecute:

> "The officials stressed that a formal decision has not been made, and a grand jury investigating WikiLeaks remains impaneled, but they said there is little possibility of bringing a case against Assange, unless he is implicated in criminal activity other than releasing online top-secret military and diplomatic documents.
>
> And:
>
> "WikiLeaks spokesman Kristinn Hrafnsson said last week that the anti-secrecy organization is skeptical "short of an open, official, formal confirmation that the U.S. government is not going to prosecute WikiLeaks." Justice Department officials said it is unclear whether there will be a formal announcement should the grand jury investigation be formally closed".

40. Assange *was* implicated in further criminality, as later found by the Grand Jury and as reflected in the Indictment. Moreover, it is odd that defence experts aver to the existence of a decision not to prosecute when Assange's spokesperson, at the time, explicitly made the point that there had been no such decision.

41. Likewise, another defence expert, Eric Lewis suggests that there was a "decision" by former Attorney General Holder not to prosecute Mr Assange [§8]: "*Indeed the clear import of the statements of former Attorney General Eric Holder, in a 2019 interview, that Mr Assange might have been at risk if there was evidence he co-operated with a foreign government to undermine the integrity of the 2016 US Presidential elections, is that his leak of the 2010 information of which the DOJ was aware, would not itself support a prosecution*. [see also §8 referring to the presumed "*extensive legal analysis that led to Attorney General Holder's decision*"]. The Court may think, from this expert, that former Attorney General Holder provided information in 2019 that somehow threw light upon a

decision made in 2013 not to prosecute Mr Assange. The article Mr Lewis relies upon (Andrew Blake, *Eric Holder Revisits Wikileak Probe as DOJ Continues Obama era Investigation*") The Washington Times Apr 2 2019. includes the following:

> "Eric Holder drew a line between WikiLeaks and traditional journalism organizations in an interview Monday, nearly nine years since the Justice Department began investigating the anti-secrecy group under his watch. Mr. Holder, who served as attorney general from 2009 through 2015, revisited the federal government's ongoing WikiLeaks probe in light of prosecutors' continuing efforts targeting Julian Assange, the website's Australian-born publisher, in spite of concerns raised about their potential First Amendment ramifications.
>
> "Should a publisher like that be open to charges by the U.S. government?" MSNBC host Ari Melber asked Mr. Holder.
>
> "If you are acting in a pure journalistic sense, no," Mr. Holder responded. "You look at the leaker you don't look at the journalists. If on the other hand, you're acting at the behest of a foreign power, you are in a fundamentally different position and should be treated differently, I think, than members of the press."

42. Plainly this does not refer to a decision not to prosecute in 2013 (still less the existence of a decision not to prosecute Assange on the basis that what he did was no more than "pure journalistic" activity). It appears to be no more than a reflection of the Department of Justice policy that it does not prosecute journalists for reporting (see below).

43. Much is also made of the delay in charging Assange in the United States (the suggestion being that what changed between the so called "decision" not to prosecute in 2013 and the issue of the criminal complaint in 2017, was the change in US administration (or as the defence put it, the commencement of the "war on journalists").

44. The Court is respectfully reminded of the chronology in this regard insofar as Assange put himself beyond the reach of any prosecution between 2012 and 2019. He did so, by his own admission, for the express purpose of avoiding a United States prosecution; see Kromberg, Second Supplemental declaration [CB7 at §16].

45. Indeed there is an obvious and fundamental inconsistency between the actions of Mr Assange (going so far as to live between 2012 and 2019 in an Embassy in order to avoid prosecution in the United States and only forcibly removed) and the defence case that there was a decision not to prosecute Assange in 2013 which was only reversed post November 2016.

46. The conduct alleged, related to Manning, is said to have taken place in 2009 and 2010:

    (1) on 6 December 2010, an EAW was issued by a Swedish Judicial Authority, in respect of Assange, for offences of unlawful coercion; rape and molestation. He was arrested in this jurisdiction on 7 December 2010;

(2) in 2013, Mr Assange had already been evading surrender to bail in the Swedish proceedings (the Supreme Court having dismissed his appeal on 14 June 2012) for some time. He entered the Embassy on 19 June 2012 and remained there, in breach of bail, until 11 April 2019; and

(3) he was arrested only upon Ecuador revoking his diplomatic status.

47. In his Second Supplemental Declaration in Support of Request for Extradition of 12 March 2020 [**CB7 at §6**], Mr Kromberg refers the Court to two Judgments of the District Court which referred to the ongoing investigation into Wikileaks in 2015 and 2016 related to the disclosure of the materials obtained from Manning:

> "Assange's arguments are contradicted by judicial findings, made in the U.S District Court of the District of Columbia, that the investigation into the unauthorized disclosure of classified information on the Wikileaks website remained ongoing when the present administration came into office."

48. **First:** Elec. Privacy Info. Ctr. v. Dep't of Justice 82 F. Supp. 3d 307 (D.D.C. 2015) concerned a motion brought by the Electronic Privacy Information Center ("EPIC"). It had submitted a Freedom of Information Act ("FOIA") request seeking documents related to the United States investigation into WikiLeaks. Judgment was given on 4 March 2015 and was concerned, in part, with the FBI's reliance upon 5 U.S.C. § 552(b)(7)(A) whereby an agency may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings."

49. The Court noted the background: "On November 28, 2010, WikiLeaks published numerous classified United States government documents that had been provided to it by Private Bradley Manning. The Department of Justice immediately initiated an investigation into the possible unauthorized released of classified information. Compl. ¶¶ 15–16; Defs.' Mot. at."

50. An FBI Agent gave evidence to the Court that "..responsive records are contained in files pertaining to the FBI's investigation of the disclosure of classified information that was published on the WikiLeaks website." Hardy 1 st Decl. ¶ 23. The Court further noted:

> "Similarly, John Cunningham from CRM states that "the responsive records in the possession of the Criminal Division are all part of the Department of Justice's investigation into the unauthorized disclosure of classified information that resulted in the publication of materials on the WikiLeaks website." Cunningham 1 st Decl. ¶ 12. The fact that the agencies have identified a possible security risk or violation of federal law sufficiently establishes, at least for purposes of Exemption 7, that they have acted "within [their] principal function of law enforcement, rather than merely engaging in a general monitoring of private individuals' activities."

51. The District Court concluded that there was an ongoing criminal investigation:

> "….Defendants have provided sufficient specificity as to the status of the investigation, and sufficient explanation as to why the investigation is of long-term duration. See e.g., Hardy 4th Decl. ¶¶ 7, 8; Bradley 2d Decl. ¶ 12; 2d Cunningham Decl. ¶ 8."

52. Thus, there was an ongoing investigation in 2015.

53. **Second:** In Chelsea Manning, Plaintiff, v. U.S. Department Of Justice, et al., Defendants. 234 F. Supp. 3d 26 (D.D.C. 2017), Ms Manning brought a FOIA action against the U.S. Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI"), seeking records related to Defendants' investigation into her and others related to the disclosures. Specifically, in February 2014, Ms Manning submitted a FOIA request to the FBI seeking information related to its investigation of her disclosures to WikiLeaks.

54. Again, the issue was whether the Defendants were entitled to withhold the information responsive to Plaintiff's FOIA request under FOIA Exemption 7(A), on the basis that it would interfere with an ongoing investigation. The Court found that there was an ongoing investigation:

> "A. Whether There is an Ongoing Investigation
>
> To show the existence of an ongoing investigation, Defendants have offered two declarations from David M. Hardy, Section Chief of the Record/Information Dissemination Section of the FBI's Records Management Division. See Hardy Decl.; Defs.' Reply in Supp. of Mot. for Summ. J. and Opp'n to Pl.'s Cross-Mot. for Summ. J., ECF No. 16, Second Decl. of David M. Hardy, ECF No. 16-1 [hereinafter 2d Hardy Decl.]. In his first declaration, Hardy states that "[t]he records responsive to plaintiff's request are part of the FBI's active, ongoing criminal investigation into the ... disclosure of classified information [on the WikiLeaks website]." Hardy Decl. ¶¶ 33–34. He further asserts that "release of these records would interfere with pending and prospective enforcement proceedings." Id. ¶ 41. After Plaintiff questioned how an ongoing investigation could relate to her—given that she already had been prosecuted, convicted, and sentenced, see Pl.'s Cross-Mot. at 14–15—Hardy submitted a second declaration, clarifying that the ongoing investigation focuses not on Plaintiff, but rather on civilian involvement in the publication of classified information. 2d Hardy Decl. ¶ 6 ("To be clear, the FBI's investigation is focused on any civilian involvement in plaintiff's leak of classified records that were published on the Wikileaks website, although plaintiff's conduct is pertinent to the FBI's investigation.").

55. The latter of the FBI affidavits was made on 17 May 2016; see Kromberg Supplemental 2 at 6.

56. Moreover, Mr Pollack (Mr Assange's "lead criminal defense counsel in the United States" and witness in these proceedings)[3] knows this to be the case. He wrote to Attorney General Loretta Lynch referring to the Manning FOIA litigation and to the investigation into Wikileaks and Assange, commenced in 2010 [see Kromberg Second Supplemental §11] (emphasis added)

[3] Pollack at §6.

> "As recently as March 15 2016, the Department of Justice in a publicly filed court document confirmed that this **investigation continues to this day**". ....On May 19 2016, in a subsequent publicly filed pleading, the Department reiterated the ongoing nature of the investigation…"
>
> ….
>
> "Despite the fact that the Department has continually publicly confirmed through court filings and statements to the press that it is conducting an on-going criminal investigation of Mr Assange, the Department has provided me no substantive information whatsoever about the status of the investigation.."

57. These points follow:

    (1) on the defence evidence there was no formal decision in 2013 not to prosecute (nor any discharge of the Grand Jury). What was said in relation to any view that Assange would not be prosecuted was contingent upon his not being implicated in criminal activity other than releasing online top-secret military and diplomatic documents;

    (2) not only does the article not demonstrate any sort of unequivocal decision not to prosecute, Assange's spokesperson, in 2013, made plain that he did not consider that there was any such decision;

    (3) Assange's *own* lawyer referred in 2016 to it being "continually" publicly, confirmed through court filings and statements to the press that the Department of Justice was conducting an on-going criminal investigation of Mr Assange;

    (4) in 2015 and 2016, evidence was put before the District Court by the FBI in order to demonstrate that there was an ongoing investigation into Manning's leaks and into publication on the Wikileaks website. It was found that there was such an investigation; and

    (5) this was prior to any change in the United States administration (in November 2016).

58. This is sufficient to dispose of the suggestion that there was a decision not to prosecute Assange which was reversed, because of a vendetta against journalists, after November 2016.

59. Insofar as the defence also rely upon the Department of Justice as having reversed its view that Assange could not be prosecuted because then media outlets like the New York Times would have to be prosecuted, then this can be answered shortly. Assange was implicated in criminal conduct and in the disclosure of the names of sources, the New York Times was not. As is set out exhaustively in the Second Affidavit of Mr Kromberg, the focus of

this prosecution is avowedly not the disclosure of classified material, save where the disclosure revealed the names of sources [Kromberg CB2 at §20]. The Department of Justice has also made this clear: [Kromberg CB2 at §22 citing the announcement about the superseding indictment issued against Mr Assange]:

> "…The department takes seriously the role of journalists in our democracy …and it is not and has never been the Department's policy to target them for their reporting. Julian Assange is no journalist….
>
> Indeed no responsible actor- journalist or otherwise – would purposely publish the names of publish the names of individuals he or she knew to be confidential human sources in war zones, exposing them to the gravest of danger."

60. If the prosecution of Assange (as opposed to any journalist or newspaper which published the Wikileaks materials) is part of some *war* or intended to chill the media, it might be thought wholly inconsistent with that aim that it was accompanied by an announcement which made plain a policy not to prosecute journalists for reporting and that the Department of Justice did not regard Assange as a journalist.

A. Prosecutorial integrity in this case

61. The necessary implication of the defence case, is that the prosecutors who are bringing this prosecution are a party to political motivation and are improperly bringing this prosecution. What is implied in some statements, is put overtly in Mr Lewis' fourth statement; his evidence is a barely disguised attack upon the integrity of Mr Kromberg.

62. Mr Kromberg has been an Assistant United States Attorney in the Eastern District of Virginia since 1991. Aside setting out the general obligations that prosecutors abide by in determining whether to charge an individual and what charges to bring under The Principles for Federal Prosecution (and which forbid a prosecutor from taking into account a person's 'political associations, activities or beliefs'; his own feelings or the possible effect on the prosecutor's personal or professional circumstances) he makes the following statements to the Court:

    (1) Prosecutors from the US Department of Justice (i.e. federal prosecutors") are required to act in a manner free from political bias or motivation. This is true irrespective of any sentiments or statements made by politicians from any political party [CB2 at §10].

    (2) "My colleagues and I presented these charges and the evidence that supports them to a federal grand jury, which found probable cause to

proceed: at least 16 grand jurors must have been present for the vote and at leaest 12 must have voted in favor" [CB2 at §14].

(3) "As I have previously emphasized, the superseding indictment does not reflect political bias or motivation. See First Declaration ¶ 11. As explained, federal prosecutors are forbidden from taken into account such considerations when making charging decisions…As I have represented the superseding indictment against Assange is not based on Assange's political opinions, but instead on the evidence and the rule of law". [Second supplemental declaration CB7 at §4].

(4) "I re-emphasize that this prosecution is founded on objective evidence of criminality and focused upon Assange's complicity in criminal conduct and his dissemination of the names of individuals who provided information to the United States [Second supplemental declaration CB7 at §5"].

(5) In short, the indictment is based on the evidence and the rule of law not Assange's opinions. If Assange wishes to challenge this, he may do so in the United States, as further, discussed below by asking an independent court to dismiss the superseding indictment because of selective prosecution [CB2 §17].

(6) As regards the Grand Jury, it is also important to remember, that it constitutes an independent and objective decision maker as to whether there is probable cause to proceed. It serves as a means of protecting United States citizens against "unfounded accusation whether it comes from Government, or be prompted by partisan passion or private enmity"; see Kromberg CB2 at §16 citing US v Dionisio, 410 US.17.n.15 (1973).

VI. BARS TO EXTRADITION

A. Political Motivation; section 81(a)

63. That extradition is barred under section 81 is not demonstrated merely by demonstrating that a defendant, whose extradition is sought holds political opinions offensive to a requesting State or that he stands in wholesale opposition to the State which seeks his extradition or that he is viewed with opprobrium by politicians. So much may be said for

anyone accused of terrorism yet no Court would regard the motivation for prosecution as political *per se*. Section 81 requires the defence to demonstrate the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his political opinions.

64. In short, the prosecution must be a tool of oppression, brought to punish for political reasons rather than for any genuine reason expressed in the extradition request.

65. There is no evidence of this:

(1) First, because the allegations are narrow in compass going not to publication but to complicity in criminality and the publication of names of sources. Statements that this prosecution is unprecedented are not evidence of political interference but rather are predicated upon defence witnesses mischaracterizing the prosecution case or failing to recognize that Assange's *criminal* conduct is unprecedented.

(2) Second, per the repeated statements of Gordon Kromberg, there is a proper and objective basis for this prosecution. The suggestion that this prosecution marked a reversal of a decision taken in 2013 not to prosecute and is part of a campaign against journalist has been shown to be wrong.

(3) Third, that politicians comment adversely on crimes and those associated with them self-evidently does not make an investigation and prosecution of those crimes politically motivated. As regard the sorts of statements specifically cited by the defence as demonstrating that this prosecution is politically motivated [see defence skeleton 1 at 2.20] appear more like statements of the obvious (see for example the reliance placed upon the Attorney General "'*if a case can be made, we will seek to put some people in jail"*).

(4) Fourth, the UK had been clear from 2012 that it regarded the grant of diplomatic asylum by Ecuador to Assange as an improper attempt to circumvent UK law:[4]

> "It is a matter of regret that instead of continuing these discussions they have instead decided to make today's announcement. It does not change the fundamentals of the case. We will not allow Mr Assange safe passage out of the UK, nor is there any legal basis for us to do so. The UK does not accept the principle of diplomatic asylum. It is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplomatic asylum by a foreign

[4] Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange

embassy in this country. Moreover, it is well established that, even for those countries which do recognise diplomatic asylum, it should not be used for the purposes of escaping the regular processes of the courts. And in this case that is clearly what is happening."

Thus the United States (or any indeed any other State) would have been entitled to take steps to ensure that Assange could be arrested in the event that he left the Embassy. Moreover, the United Kingdom, the United States (or any other country) would have been perfectly entitled to discuss or negotiate Assange's position with Ecuador. That Assange was not arrested until such time as Ecuador withdrew its grant of diplomatic asylum is demonstrative of international law being respected.

Assange claims that diplomatic sanctity was violated and Ecuador was 'bullied' although is of note that Assange does not point to Ecuador raising any complaint about US conduct in its embassy. Assange was arrested only with Ecuador's co-operation (see below).

(5) Fifth: allegations which Assange makes about being surveilled in the Embassy are not evidence that this prosecution is politically motived. The allegations are largely the same as the allegations which Assange makes going to abuse of process. These allegations are addressed in the prosecution abuse skeleton argument and are not repeated here. In short, taking the defence evidence at its highest, even if Assange was surveilled by or on behalf of the United States, that does not demonstrate that this prosecution is politically motivated. Surveillance may evidence wider concern about a risk an individual poses or concern to know their movements. Surveillance may demonstrate a state's interest in apprehending an individual but that does not make a prosecution for criminal conduct politically motivated.

(6) Sixth: the evolution of the case against Assange reflects the way the case has developed. As set out in Mr Kromberg's evidence, that a superseding indictment discloses more serious criminality is "quite common"; Kromberg at CB2 §23.

(7) Seventh: the evidence going to the visit by former Congressman Rohrabacher does not demonstrate that this prosecution is politically motivated and indeed makes little sense. On the one hand, the thrust of the defence case is that this administration is prosecuting Assange as part

of a war on journalists, intended to chill free speech. On the other, it is suggesting that an offer was made to pardon Assange. As the defence case accepts Rohrabacher, in public reports, stated that he was not authorized to make that approach on behalf of the United States (or on the part of the President) [skeleton 1 at 3.10]. Regardless, this is nothing to point. Assuming, *arguendo*, a pardon offered in the context of a properly instituted and motivated prosecution, does not make that prosecution politically motivated. The defence would have to show that the prosecution had been instituted to obtain leverage and continued for this purpose for political ends. That is wholly at odds with the core of the defence case which is that this prosecution has been instituted to serve a wider political purpose.

66. The defence reliance on asylum cases on 'imputed political opinion' (skeleton argument 2 at 186 *et seq*) is wide off the mark. These cases concern individuals who are witnesses to a crime and who seek asylum on the basis that they will be persecuted if they make complaint about it. The sort of lawless state where this might arise is discussed in Suarez v The Secretary of State for the Home Department [2002] 1 W.L.R. 2663 at [Potter L at 30]:

> "Thus, if the maker of a complaint relating to the criminal conduct of another is persecuted because that complaint is perceived as an expression or manifestation of an opinion which challenges governmental authority, then that may in appropriate circumstances amount to an imputed political opinion for the purposes of the Convention."

67. This goes to the issue of what is capable of constituting a political opinion – it does not demonstrate nexus between that opinion and prosecution.

68. The "hallmarks" which the defence relies upon to demonstrate this is a politically motivated prosecution may thus be dealt with shortly. Taking each in turn [see Defence Skeleton Argument 1 at §7.2]:

    (1) The defence evidence does not demonstrate the complete reversal of position contended for but, at most, conditional statements premised upon whether Assange was implicated in further criminality.

    (2) Assange's position is not akin to a that of publisher or journalist who reports and who acts with journalistic responsibility toward classified material and his prosecution is not brought on that basis.

(3) The suggestion that this prosecution is part of a wider 'war' on journalists rests upon the defence assertion that the decision to prosecute marked a reversal of position toward Assange. Aside that this is not made out, Mr Kromberg's evidence that this prosecution is brought in good faith and upon objective evidence is definitive on this point.

(4) The so called "denounciations" that Assange relies upon, and particularly the examples singled out by the defence for mention in the skeleton argument, appear no more than fairly obvious statements (as set out above).

(5) Assange was not "stripped" of his protections" in the Ecuadorian Embassy. Assange's presence in the Embassy was a result of his unlawful conduct in the first place. It is wholly unclear how the defence assert that international law was violated in the embassy. It is for Ecuador to assert if it considers its Embassy to have been violated. As stated above, the defence do not point to Ecuador having raised any complaint against the United States in respect of its London embassy or as having broken any international law in that regard. Ecuador stripped Assange of asylum he having violated the conditions of such asylum. There are numerous public reports of the President of Ecuador's statement about removing Assange's asylum. As was stated in the forward to the Secretary of State for the Home Department's statement on the arrest of Assange: Statement: "Julian Assange arrested after seven years in embassy", 11 April 2019:

> "The Wikileaks founder was arrested at the Ecuadorean Embassy this morning after Government of Ecuador revoked his asylum status. Assange has spent the last seven years taking refuge in the embassy, to avoid extradition, first to Sweden, on a rape charge since dropped, but more recently to the USA.
>
> The President of Ecuador said that Ecuador had "reached its limit on the behaviour of Mr Assange" who is accused of continued intervention in the affairs of other states, and political activity, which is not allowed while claiming asylum."

B. Discrimination; section 81(b)

69. Each of the points relied upon by the defence may be dealt with shortly.

70. First, prejudicial statements by politicians or publicity (even if virulent or sustained), prior to trial, will not result in a defendant having an unfair trial or being punished for his

opinions or beliefs. The European Court recognises that the effect of such statements can be mitigated within the trial process (by, for example, jury directions) to ensure that it is fair. As set out in Mr Kromberg's declaration in support of extradition [CB2 at §72- 81] dealing with the suggestion that Assange could not have a fair trial owing to the composition of any jury pool the United States has strong, well evolved procedures in order to determine whether any prospective juror holds prejudicial views or would not be impartial. The aim is precisely the same as would be in this jurisdiction [75]:

> "If Assange is extradited to face trial in the United States, the district judge would conduct a thorough voir dire of all potential jurors, in the presence of attorneys for both the government and the defendant, to ensure that selection of a fair and impartial jury that is able to set aside any pre-conceived notions regarding this case and to render an impartial verdict based solely on the evidence presented in the case and and the district court's instruction of law"

71. Second, that the prosecution may seek to *argue* that Assange as a foreign national is not permitted to rely on the First Amendment, at least as it concerns defence information, or is not entitled to rely on the First Amendment as a defence to his complicity in Manning's criminality or as a defence to publishing the names of sources [See Kromberg at CB2 §71], these do not demonstrate that Assange will be punished on account of nationality or his opinions or prejudiced at trial on account of them. First, they are possible arguments of law that may be utilised at a trial to define the outer limits of Assange's right to rely on free speech in any prosecution. They are arguments which may or may not be taken and which may or may not be accepted by the Court. There is an obvious difference between a legal process that will judge the availability of certain rights to defendants and those rights being removed for prejudicial reasons like nationality or political opinions. There may be objective reasons for determining that one group of individuals is entitled to rights based upon their nationality, whilst non-nationals are not. In this jurisdiction, extradition is a case in point - only British nationals are entitled to rely upon Article 6. Foreign nationals are not; Pomiechowski v District Court of Legnica, Poland and another [2012] UKSC 20; see also R (Al Rawi & Others) v The Secretary of State for Foreign and Commonwealth Affairs & Anor [2008] Q.B. 289 §78

72. Regardless even of this (and as developed below), it is not accepted that Assange would have a free-standing right to rely on Article 10 in this jurisdiction were he charged with equivalent offences in this jurisdiction.

73. As regards Assange being subjected to SAMs (and any consequences that may have on his prison conditions), the High Court rejected, in a series of cases that SAMs were utilized as a means of punishing Muslim prisoners given that SAMs are often directed

against terrorists Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America [2006] EWHC 2927 (Admin) (considered in greater detail below). The same reasoning applies here, if Assange is subjected to SAMs, it will not be because he is Australian or professes to hold beliefs about free speech or Government secrecy but because the risk that he poses to national security.

74. Equally, that it is possible that Mr Assange may be detained away from the general prison population, in protective custody, does not demonstrate that Assange will be subject to adverse conditions because he is Australian or holds certain beliefs but because of risk he poses to himself or may be at from others; Kromberg, CB2 at §84.

75. Reliance upon allegations that the current administration in the United States has sought to intervene in prosecutions, for the benefit of individuals, does not demonstrate that the trial process is unfair or impartial. Such allegations do not demonstrate that this prosecution is politically motivated.

C. Passage of Time; section 82

76. That the defence should rely upon passage of time only fleetingly is not surprising. This is a case where the defendant*, on his own case* (see Kromberg, Second Supplemental Declaration at CB7 § setting out statements by Assange's lawyers and by Assange as to his seeking asylum in Ecuador because he believed there was a sealed case against him in the United States) lived in an embassy for some seven years, for the express purpose of avoiding the very prosecution he now faces. According to Assange, he took this action because he knew that he might face these allegations and was prepared to go to extraordinary lengths in an attempt to avoid prosecution. It is simply not open to him to suggest that he has suffered any prejudice as a result of taking this course. Is it seriously to be suggested that if Assange had known of the charges sooner, that he would have left the Embassy or better prepared his defence.

77. To the extent that Assange relies on changes in personal circumstances which have arisen during the period that he lived at the embassy then the only changes known to the prosecution are that he has had two children. Again, any decision Assange made to establish a family life when, on his own case he faced prosecution and was living in an embassy expressly so as to avoid extradition, was a decision made in the full knowledge of how precarious the foundation of that family life was.

VII. HUMAN RIGHTS

A. Flagrant Denial of the Right to Free Speech

1. *Introduction*

78. The defence submissions on Article 10 are unclear. They appear to depend in large part upon the Court embarking upon the impermissible exercise of testing the prosecution allegations as against Assange's version of events. It is only at paragraph 208 of the defence submissions that it is eventually submitted that US law does not comply with Article 10. This submission will focus on Article 10 as it is relevant in the extradition context.

79. Article 10 is a qualified right and the only Convention right to specify that it carries with it duties and responsibilities.

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

80. It is perhaps an obvious point but extradition itself would not result in any direct interference with Assange's right to freedom of his expression. He is, after all, not being extradited for any other reason than to face the lawful process of a trial. The defence case is put [at 50] in these terms: "*In this jurisdiction, this prosecution would be (and extradition here facilitates) a flagrant violation of Article 10 ECHR*" or at [208] that United States law does not comply with Article 10.

81. These submissions would not succeed at their highest but in this case are entirely contingent upon the fundamental mischaracterisation of the prosecution case and upon the defence submission that Assange is being prosecuted for being no more than a journalist publishing or reporting on classified materials provided to him by another and treating those materials with journalistic responsibility. This is misconceived.

82. Assuming, *arguendo,* even if Assange was a publisher in this sense, it is clear, as a matter of domestic law, that he could nonetheless be prosecuted pursuant to section 5 of the

Official Secrets Act 1989 (to which there is no defence of justification). The law in the United Kingdom is much stricter than in the United States of America; and journalist may be prosecuted for publishing damaging classified material even if they acquired it passively.

83. This Court is not however not concerned with prosecution in this jurisdiction. The sole issue that arises is whether extradition to face the allegations in the request could amount to a flagrant breach of Article 10 rights such as to nullify the right altogether. As is clear, the considerations that apply to whether a qualified Convention right is breached in the domestic context is not the test which is applied in the extradition context.

84. The successful invocation of Convention rights in the extradition context requires the satisfaction of a stringent test. Where qualified rights, are concerned, it is necessary to show that there would be a flagrant denial or gross violation of the right, so that it would be completely denied or nullified in the destination country; see *Ullah [2004] 2 AC 323* at 24; paragraph 37 of Norris by Lord Phillips.

85. It follows that it is not open to the Court to examine whether US law operates in precisely the same way as English law or confers precisely the same protections. The Court is only concerned (to the extent that arises) with whether extradition would result in a flagrant breach of Article 10 so the right is nullified.

86. The starting point for this submission is threefold:

    (1) Assange is not being prosecuted for mere publication or reporting;

    (2) Article 10 cannot be deployed as a defence to proceedings for any equivalent offence in the UK; it cannot be deployed so as to stop a prosecution and it cannot be deployed, post conviction, so as to demonstrate that a prosecution was incompatible with Article 10; and

    (3) extradition would, in any event, only be barred on the basis that any right to freedom of expression would be completely nullified in the United States.

2. *Assange is not being prosecuted for mere publication*

87. This point is set out in detail in the introductory section of this skeleton argument and in original affidavit in support of extradition [CB1] and in the Supplemental Declaration in support of the request [CB2]. It is not repeated here.

88. As regards, Assange's role in obtaining classified materials, the request explains that this went far beyond the mere setting up of a dropbox or other means of depositing classified materials. Thus in *general* terms: "Assange encouraged sources to (i) circumvent legal safeguards on information; (ii) provide that information to Wikileaks for public dissemination and (iii) continue the pattern of illegally procuring and providing protected information to Wikileaks for distribution to the public [Dwyer at CB2§11].

89. As regards Assange's complicity in criminality, in specific terms (related to Manning):

    (1) Manning responded to Assange's solicitation of classified materials [Dwyer at CB2§19].

    (2) Throughout the period of time that Manning was providing information to Wikileaks, Manning was in direct contact with Assange who encouraged Manning to steal classified documents and to provide them to Wikileaks [Dwyer at CB2§24 and 31].

    (3) In furtherance of this Assange agreed to assist Manning in cracking an encrypted password hash stored on US Department of Defense computers. [Dwyer at CB2§25 and 28].

    (4) Following direction and encouragement from Assange, Manning continued to steal documents from the US [Dwyer at CB2§25 and 28].

90. As regards the disclosure of the names of sources, in specific terms:

    (1) The only instances in which Assange is charged with the distribution of classified material is "explicitly limited" to his distribution of documents classified up to the secret level containing the names of individuals in Afghanistan, Iraq and elsewhere around the world, who risked their safety and freedom by providing information to the United States and its allies [Dwyer at CB1§20]

91. As regards Assange's complicity in criminality, in specific terms (related to computer hacking by individuals other than Manning):

    (1) Assange sought to recruit and worked with other hackers to conduct malicious computer attacks for the purpose of benefiting Wikileaks. [Kromberg declaration in support of the second superseding indictment [CB 8 §14].

(2) Assange sought out and worker with other hackers to unlawfully obtain information [for example CB 8 §§24/ 55/ 56]

3. *Article 10*

92. Consideration of how Article 10 applies in domestic law provides some context against which to judge whether extradition could ever constitute a flagrant breach of Article 10.

93. The English courts have considered how Article 10 intersects with offences which are directed at free speech on a number of occasions. The consistent approach has been to look at the offence created by the criminal provision in question and to ask whether that *offence* is proportionate to the aim of the legislation.

94. In short, Article 10 cannot, in domestic proceedings: (i) be relied upon as a defence in individual cases; (ii) in order to halt a prosecution properly brought and in respect of which there is sufficient evidence to put to a jury and (iii) to found a submission that a conviction based upon such a provision is incompatible with Article 10.

95. The general approach, in domestic law, where it is recognised that an offence may interfere with Article 10, is thus directed at an overview of the provision itself; Attorney General's Reference (No 4 of 2002) [2005] 1 AC 264, Lord Bingham of Cornhill, with whom Lord Steyn and Lord Phillips of Worth Matravers MR at 54.

> "In penalising the profession of membership of a proscribed organisation, section 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by article 10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of "profess". Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear. I would incline to hold subsection (1) to be proportionate, for article 10 purposes, whether subsection (2) imposes a legal or an evidential burden. But I agree with Mr Owen that the question does not fall to be considered in the present context, and I would (as he asks) decline to answer this part of the Attorney General's second question."

96. In R. v Choudary [2018] 1 W.L.R. 695, the defendants, were charged with offences of inviting support for a proscribed organisation ("ISIL"), contrary to section 12(1) of the Terrorism Act 2000. 12. The Crown's case, was that defendants invited support for ISIL in talks and by posting an oath of allegiance posted on the internet (in which they declared their allegiance to a caliphate, or Islamic State, declared by ISIL on 29 June 2014, and to its leader, or caliph, Abu Bakr Al-Baghdadi). In an appeal of a preliminary ruling, the defendants sought to challenge whether the trial judge's interpretation of the offence

accorded with Article 10. The Court of Appeal's ruling demonstrates that the question is not whether the prosecution is compatible with Article 10 but the narrow question of the provision (under which the prosecution is brought) comports with Article 10.

97. The Court thus accepted that a prosecution for an offence contrary to section 12(1) of the 2000 Act engaged article 10 of the Convention, to the extent that it limited the right of an individual to express himself in a way that amounted to an invitation of support for a proscribed organisation. It also accepted that article 10 was engaged on the facts of the case [Sharp LJ at 66]:

> "[66] However, the right to freedom of expression is not absolute. Interference with that right may be justified, if it is prescribed by law, has one or more of the legitimate aims specified in article 10.2 , is necessary in a democratic society for achieving such an aim or aims (where necessity implies the existence of a pressing social need) and is proportionate to the legitimate aim or aims pursued.
>
> And at [68]
>
> [68]. The starting point in relation to an offence under section 12 is the fact of proscription. In other words, section 12 , like sections 11 and 13 , is concerned with activities associated with an organisation that has already been proscribed in accordance with the process laid down in the legislation, following a determination by the Secretary of State that it is concerned with terrorism, as defined. The terms of section 12(1)(a) itself are clear (see paras 50–52 above), and in our view the requirement that the interference must be prescribed by law is met. Further, section 12(1)(a) , like section 11 , is a measure that is clearly directed to a number of legitimate ends: preserving national security, public safety, the prevention of disorder and crime and the rights and freedoms of others.
>
> And at [70]:
>
> 70. When considering the proportionality of the interference, it is important to emphasise that the section only prohibits inviting support for a proscribed organisation with the requisite intent. It does not prohibit the expression of views or opinions, no matter how offensive, but only the knowing invitation of support from others for the proscribed organisation. To the extent that section 12(1)(a) thereby interferes with the rights protected under article 10 of the Convention, we consider that interference to be fully justified.

98. The same approach was taken in Pwr and Others v Director of Public Prosecutions [2020] 2 Cr. App. R. 11 whereby the Court of Appeal rejected an argument that the Crown Court was required by s.3 of the Human Rights Act 1998 to construe section 13 of the Terrorism Act 2000 in a manner consistent with Article 10. The Court also rejected that because the offence was one of strict liability, it was incompatible with art.10 (because it permitted conviction of a serious offence without knowing illegality). The issue was whether the offence created by the provision was justified:

> 73. For those reasons I am satisfied that the s.13 offence is compatible with art.10 . It imposes a restriction on freedom of expression which is required by law: is necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights of others; and is proportionate to the public interest in combating terrorist organisations.

99. Nor has the Court of Appeal accepted that there is any ability to make a submission that a prosecution is incompatible with Article 10 once evidence has been called or post-conviction. Both points were rejected in R. v Choudary (Anjem)(No.2) [2017] 4 W.L.R. 204 (Sharp LJ , William Davis J , Judge Stockdale QC) having regard to the Court of Appeal's prior judgment on the limits of reliance on Article 10 [27]:

> "….We would emphasise that consistent with the Court of Appeal's ruling, there is no room, or jurisdiction, to be more precise, for a judge to decide that although there is sufficient evidence on which a jury, properly directed, could convict of an offence contrary to section 12(1)(a), the prosecution should be halted, because on the judge's assessment of the facts, a conviction would be a disproportionate interference with a defendant's right to freedom of expression. This would be to go behind the decision of the Court of Appeal."

100. The Court of Appeal also rejected an argument that post conviction, a defendant could still argue that his prosecution none the less violated articles 9 and 10 of the Convention (and sections 3 and 6 of the Human Rights Act 1998):

> "The Court of Appeal did not simply decide that section 12 may consistently with article 10 of the Convention, criminalise invitations of support for proscribed organisations, even if they do not incite or are not liable to incite violence. The Court of Appeal decided by reference to the judge's broader interpretation of inviting support, that section 12 was compatible with articles 9 and 10 of the Convention: see further, *R v Choudary and Rahman* at paras 61–90. The jury in this case were properly directed on the law. If the jury concluded that as a matter of fact the defendant whose case they were considering, had knowingly invited support for ISIS, then he was guilty of an offence contrary to section 12(1)(a) of the 2000 Act. There was no room in those circumstances for a freestanding argument that such a conviction was none the less incompatible with articles 9 or 10 of the Convention."

101. This approach has been applied in the context of the Official Secrets Act in terms which are directly relevant to this case. In R v Shayler, it was ruled as a preliminary matter that that no public interest defence was open to a defendant in a prosecution pursuant to sections 1 and 4 of the Official Secrets Act 1989 and that the absence of such a defence was not incompatible with Article 10.

102. The House of Lords held that the absence of a public interest defence was not incompatible with Article 10, Lord Bingham at [23]:

> "In the present case there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression. There can equally be no doubt but that the restriction was directed to objectives specified in article 10(2) as quoted above. …"

103. As regards the aims pursued, Lord Bingham point to the overarching requirements of national security:

> " There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the

> service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 , 118C, 213H–214B, 259A, 265F; Attorney General v Blake [2001] 1 AC 268 , 287D–F. In the Guardian Newspapers Ltd (No. 2) case, at p 269E–G, Lord Griffiths expressed the accepted rule very pithily:
>
> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

104. Lord Bingham also pointed [at 27] to there being no absolute ban on disclosure insofar as a former crown servant could also, make disclosure to a Crown servant for the purposes of his functions as such or make a disclosure to the staff counsellor (thus seeking authority to make a wider disclosure). The House of Lords also pointed to the obvious fact that authorisation was unlikely to be. given where it would be liable to disclose the identity of agents or compromise the security of informers [30].

105. The House of Lords was thus satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the convention.

106. In these extradition proceedings, the prosecution has identified that Assange's conduct would amount to offences including aiding and abetting an offence under Section 1 of the 1989 Act or conspiracy to commit it. It has also been identified as constituting an offence pursuant to section 5 of the Official Secrets Act.

107. Section 5 of the Official Secrets Act (*Information resulting from unauthorised disclosures or entrusted in confidence*) expressly applies to individuals who are not the original leaker of the information. In other words, it applies to individuals who disclose materials which are protected from disclosure under section 1-3 of the Official Secrets Act 1989. It applies to those who are provided with materials by those to whom sections 1-3 apply, per section 5(3):

> (3) In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—
>
> (a) the disclosure by him is damaging; and
>
> (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging;
>
> and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

108. The request sets out in detail not just the damaging nature of the disclosures but also that Assange knew that the dissemination of the names of individuals endangered them [see Dywer at CB2 at 44].

109. The rationale for the section 5 offence is set out in the White Paper which underpinned the 1989 Act (Reform of Section 2 of the Official Secrets Act 1911 (1988) Cm 408, para 55). It was premised upon the view that an unauthorised disclosure committed by a newspaper could be just as harmful as the disclosure of the same information by a Crown servant [54]:

> "The objective of official secrets legislation is not to enforce Crown service discipline – that is not a matter for the criminal law – but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the unauthorised disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence". [Emphasis added]

110. The White Paper concluded, in cases involving someone who is not a Crown servant, the that there ought to be a burden on the prosecution to prove not only that the disclosure would be likely to result in harm, but also that the person who made the disclosure knew, or could reasonably have been expected to know, that harm would be likely to result. Section 5 gives effect to this intention.

111. There is no public interest defence to this section and nor could Article 10 be pleaded as a defence to it. Rather, the offence is predicated upon the disclosure being damaging and that the defendant made it knowing, or having reasonable cause to believe, that it would be damaging. It complies with Article 10 because it is intended to criminalise the disclosure of knowingly harmful material.

112. The defence point [Skeleton 2 at 50] that the Official Secrets Act has never been deployed to prosecute the act of publishing (as opposed to leaking) classified information is nothing to the point; domestic legislation specifically foresees and protects against the disclosure of damaging material in precisely the sort of circumstances of this case.

113. Likewise, the defence suggestion [at 75] that it is recognised that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom is plainly no authority for the suggestion that *illegal* information gathering or complicity in criminal acts such as theft or computer misuse is protected.

114. To the contrary, the European Court considers (when conducting an *ex post facto* consideration of whether a prosecution of a journalist comported with Article 10) is (i) whether the journalist was engaged in responsible journalism and (ii) whether the

journalist was a party to illegality; see Gîrleanu v Romania 2019) 68 E.H.R.R. 19 at [84] and [91]:

> [84] However, the protection afforded by art.10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of art.10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.
>
> And:
>
> [91]. The Court further notes that the applicant did not obtain the information in question by unlawful means and the investigation failed to prove that he had actively sought to obtain such information. It must also be noted that the information in question had already been seen by other people before the applicant."

115. The above demonstrates the limits to which Article 10 can be applied in any individual domestic prosecution. It also demonstrates that, per the approach of the European Court, to the extent to which Article 10 confers any protection upon a journalist it is premised upon the journalist acting in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism.

116. The defence case thus appears to rest upon demonstrating that United States law is not compliant with Article 10 because it does not provide a public interest defence and therefore has a blanket ban on publication.

117. Setting again to one side that Assange is not being prosecuted for publication *simpliciter*, the defence accepts as it is bound to, that neither does United Kingdom domestic law afford a public interest defence to any offence under the Official Secrets Act 1989. Thus, the defence suggests that extradition would be incompatible with Article 10 because under the Official Secrets Act regime there is provisions for leakers to raise concerns about the matters which they seek to disclose or makes provision for authorisation to be sought in order to make a disclosure.

118. This submission is fanciful. That Shayler proceeded on this basis (and took into account that such avenues existed having regard to Article 10) that potential leakers (within the Services) could raise concerns and to seek permission to make specific disclosures does not address Assange's position. He is accused of complicity in criminal activity in terms of the obtaining of the material from Manning (the person in a position to raise concerns internally should he have wished). As was also made clear in Shayler, such a process would (obviously) not likely authorise the revelation of names of sources.

119. There is air of complete unreality about this defence submission. Such a process foresees concern about specific information held by a leaker who thinks that it ought to be disclosed. What is at issue here is the leaking by Manning and Assange of what the United States describes as a *vast* amount of classified material and the publication to the public at large of the names of sources. This is very far removed from the sort of leaks envisaged to be the subject of such a process in Shayler or which might be the subject of consideration by the Ministry of Defence or Secret Service pursuant to an application by one of its servants or a former servant to disclose information. The unreality of the defence case crystallises at Skeleton 2 at paragraph 214:

> "In short, had these events occurred in the UK, Mr Assange would never have been in the position of receipt of classified information because Manning would have had other (article 10-compliant) avenues open to her to serve the public interest."

120. In short, no process envisaged by Shayler, would have authorised the indiscriminate publication of a vast amount of classified material or the publication of the names of sources. The suggestion that a court upon judicial review might sanction it, is absurd.

121. It is respectfully submitted that the defence case does not raise even an arguable point that extradition would constitute a flagrant denial or gross violation of Assange's Article 10 right, so that they would be completely denied or nullified.

B. Flagrant Denial of the Right Not to be Punished without Law

122. Assange invites the Court to analyse United States law and to determine that it does not comport with the requirement, per Article 7 of the Convention, that offences must be clearly defined by law and meet requirements of accessibility and foreseeability.

123. In essence, Article 7(1) reflects the principle, found in other provisions of the Convention in the context of requirements that interferences with or restrictions in the exercise of fundamental rights must be "in accordance with law" or "prescribed by law", that individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible — an individual must have an indication of the legal rules applicable in a given case — and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of the criminal law. SW v United Kingdom (1996) 21 E.H.R.R. 363 [Commission§44].

124. Domestic legal provisions, meet this requirement where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable; Del Río Prada v. Spain [GC], no. 42750/09, §§ 77-80 and 91, ECHR 2013; S.W. v. the United Kingdom , 22 November 1995, §§ 34-35, Series A no. 335-B; and C.R. v. the United Kingdom , 22 November 1995, §§ 32-33, Series A no. 335-C).

125. In the context of "prescribed by law" the European Court sets the standard of foreseeability to that of reasonable certainty: The Sunday Times v. United Kingdom (A/30): 2 E.H.R.R. 245 at. §49.

> "… a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.."

126. In common law systems like those of the United Kingdom and the United States, the European Court recognizes that the law may be developed by the Courts and applied to circumstances not foreseen when a provision was enacted (or when, as a matter of common law, it first developed): SW v UK (Judgment at 36/34):

> "There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

127. Thus in SW, the European Court upheld that the defendant could be prosecuted for raping his wife despite that as a matter of English common law, prior to the date of the offence, a husband had been immune from prosecution for the rape of his wife on account of the consent to sexual intercourse that was thought to be inherent in the contract of marriage. The law was found to comply with Article 7 notwithstanding that the change in common law immunity had been steadily decreased by virtue of a series of judicial decisions making the immunity subject to an increasing number of exceptions, and had eventually disappeared altogether.

128. This demonstrates that in a common law system, any requirement for certainty must be fashioned having regard to the role that the Court plays in refining the ambit of criminal law: Kafkaris v Cyprus (2009) 49 E.H.R.R. 35 at [142]

> "Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".

129. The overarching aim of Article 7 is to ensure effective safeguards against arbitrary prosecution, conviction and punishment; see Kafkaris at 138.

130. It is submitted on behalf of Assange that US law is incompatible with Article 7 [skeleton 1 para 9]: **First** because key components of the offence under 18 USC §793 (espionage) are so broad, vague and ambiguous that they do meet the minimum standard of accessibility and foreseeability required by Article 7. **Second**: because the Computer Fraud and Abuse Act is similarly broad, vague and vulnerable to political manipulation. **Third**: the wording and the manner in which it has been applied, Mr Assange could not reasonably have foreseen that the acts which he is alleged to have committed would have involved the commission of an offence.

131. As already stated above, the role of the extradition court is not to require that United States law meets the requirements of European Convention law. The extradition court is only concerned with the question of whether extradition is incompatible with Convention rights. As is apparent from the above cited cases, where is said that the law has been extended excessively so as to encompass behaviour previously not criminal (per SW), the European Court considers closely the evolution of the law. It also has regard to the findings and analysis of the domestic court as to the content of its own law (and accords a degree of deference to that judgement). In the extradition context, a domestic court cannot replicate that exercise.

132. It does not matter here because what is being contended for is that Assange did not know or could not have foreseen that assisting Manning's criminal activity, going so far as to attempt to crack a password, and then disclosing the names of informants to the world at large might be against the criminal law. This is unsustainable.

133. Whether the test is a real risk that Assange's prosecution will be arbitrary because US law lacks certainty and foreseeability or whether the test is whether extradition will expose him to a flagrant breach of Article 7 is academic. On neither test is his extradition

incompatible with Article 7 (aside the point that the conduct of which he is accused is obviously criminal, by any standard):

134. First, the defence case appears to aimed at demonstrating in general terms that 18 USC §793 and the CFAA are too uncertain in their application. This court cannot make a determination of foreign law. Moreover, the issue whether the US law was so vague that Assange could not foresee to a degree that was reasonable in the circumstances, that his acts might be contrary to criminal law (so his extradition is incompatible with Article 7) is obviously wrong.

135. Second: reliance upon allegations of over classification or on assertions these laws have not been used to publish journalists do not assist the analysis conducted for the purposes of Article 7. It is the nature of criminal law that it will be applied in a range of factual circumstances *and that some will be novel* – the question is whether the application of law to the given facts is consistent with the essence of the offence and could reasonably be foreseen.

136. The short answer to this is yes. Again, Assange is not being prosecuted for publishing or reporting. Under US law, journalists have no rights to steal or engage in criminal activity [Kromberg at CB2 at 7];

> "Like Assange numerous people have been charged in the United States for conspiracy to commit computer hacking even though they engaged in that hacking purportedly to obtain newsworthy information for political purposes. [Kromberg at CB2 at 7].

137. Nor (if it really needs to be said) does US law permit the outing of the names of sources . [Kromberg at CB2 at 9].

138. The CFAA's basic prohibition against gaining access to a computer without authorization is "common throughout the world" [Kromberg at CB2 at 169].

139. Assange has been charged, under the CFAA, with attempting to crack an encrypted password hash in order for a co-conspirator to access an account without authorisation. That falls squarely and uncontroversially within the terms of the CFAA. [Kromberg at CB2 at 171].

140. Overarchingly and a complete answer to this point, Assange is not at risk of being prosecuted on the basis of an arbitrarily uncertain criminal law because he is protected by the "void for vagueness" protections under the Fifth Amendment to the US Constitution. "*A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages*

seriously discriminatory enforcement" [Kromberg at CB2 at 69]. This protection appears to extend beyond that which is protected under Article 12.

C. Flagrant denial of the right to a fair trial

141. It is submitted on behalf of Assange that he would suffer a flagrantly unfair trial in America. It is noted that, notwithstanding the apparent concerns expressed by defence witnesses as to:

    (i) Access by the defence to evidence and classified material in the trial process [Lewis, core bundle tab 3, §§24-35, Pollack core bundle tab 19 §13-16, Durkin core bundle tab §16 §§9 - 13]; and

    (ii) The discovery procedure and the "unprecedented volume of material" [Pollack, core bundle tab 19 §13, Durkin, core bundle tab 16 §§14 to 16].

    there is now no argument that any of these issues would lead to a breach of the defendant's fair trial rights.

142. This is presumably because, as set out in the request and accompanying affidavits, the defendant would be able to participate in the trial process and his fair trial rights will be upheld to a high degree:

143. The government will be required to permit inspection and copying of all material in the government's possession if it is material to preparing a defence [Kromberg (1) §108].

144. The government must produce information that is exculpatory, even if it is classified [Kromberg (1) §108]. The prosecution expects to provide defence counsel (either with security clearance or appointed "cleared counsel") with classified information [Kromberg (1) §109].

145. The government may apply to withhold classified information from the defence, but this will be granted only if the Judge agrees it is "not relevant and helpful" to the defence [Kromberg (1) §112]. This is a stricter test than that which applies in the equivalent public interest immunity procedure in England and Wales in which relevant or helpful material may be withheld from the defence provided the overall trial remains fair [R v. H [2004] UKHL 3], this including material relating to national security . Whilst "special counsel" may be appointed in the English Courts, this is exceptional (H [supra] at §22] and special counsel are independent of the defendant, unable to take full instructions or report to their client. They attend at for the purpose introducing an adversarial element to the PII application. By contrast, in the US the defendant will benefit from the availability of

cleared counsel, or defence counsel with clearance, to inspect classified information. The defendant will benefit from a greater degree of access to sensitive material than he would in the UK courts.

146. Given that the issues of access to classified material, discovery and access to evidence are not relied on as establishing an article 6 breach, there will be no cross examination of defence witnesses on these subjects. This should not be taken as a concession of the accuracy of the defence evidence on the topics.

147. Four matters are particularised in an attempt to make good the article 6 argument [defence skeleton part 1 §§9.1-9.7]:

(1) Plea bargaining;

(2) The jury pool;

(3) Public denunciations;

(4) Unjust sentencing procedure;

1. *The legal framework*

148. By virtue of section 87 of the 2003 Act extradition may not take place if it is incompatible with the defendant's human rights as set out in the Human Rights Act 1998 (and by extension the European Convention on Human Rights).

149. Article 6 of the convention protects the individual's right to a fair trial. It provides:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

150. In extradition or other expulsion cases, a requested person must risk a 'flagrant' denial of the right to a fair trial before extradition can be resisted on article 6 grounds [see R (Ramda) v. Secretary of State for the Home Department [2002] EWHC 1278 (Admin) at §10 and Soering v. UK (1989) 11 E.H.R.R 439 at §113]. In RB (Algeria) v Secretary of State for the Home Department [2009] 2 WLR 512 Lord Phillips of Maltravers confirmed that:

> 'A different approach will, however, be appropriate in an extradition case. There it is the prospective trial that is relied on to justify the deportation. If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the likely consequences of the unfair trial.'
>
> RB [supra] as per Lord Phillips of Maltravers at §139

151. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, Ahorugeze v Sweden (2012) 55 EHRR 2, at §§114-115). It constitutes a breach that is so fundamental it amounts to a nullification or destruction of the very essence of the right guaranteed by Article 6 (Othman v United Kingdom (2012) 55 EHRR 1 at §§258-260).

152. None of the issues raised by the defence, considered individually or cumulatively, raise any tenable concern as to the propriety of the trial process in America. Even at the height of the defence case, there can be no issue of a flagrant breach. The issue is, simply, unarguable.

2. *Plea bargaining*

153. Plea bargaining does not give rise to any breach of article 6 per se: see the ECtHR in Babar Ahmad v United Kingdom (2010) 51 E.H.R.R, but rather would only raise an issue under article 6 if "the plea bargain was so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear to be the only possible way of avoiding a sentence of such severity as to breach art.3" [Ahmad §168]. Even if entered into before the extradition proceedings, plea bargaining is not abusive: McKinnon v USA [2008] UKHL 59 [§33].

154. The evidence before the Court establishes that a plea will only be accepted by the US Courts if it is made voluntarily, knowingly, and intelligently, with awareness of the likely consequences [Kromberg 1 §179]. Any plea entered will be scrutinized by the Court to

ensure that it is made voluntarily and not as the result of force, threats or promises [Kromberg 1 §§180-1]. The defendant will "not be allowed to plead guilty unless he agrees he is guilty, and a district judge finds a trustworthy basis for his guilty plea" [Kromberg 1 §181].

155. There can be no suggestion, in light of the above, that any potential plea bargain would be so coercive as to vitiate the defendant's right against self-incrimination. The system of plea bargaining, in this case, would not amount to a nullification of the very essence of the defendant's article 6 rights.

3. *Jury Pool*

156. The defence submits [defence skeleton, part 1 §9.3] that a "jury pool comprised almost entirely of government employees and/or government contractors is guaranteed". This submission is fundamentally flawed:

157. As a matter of fact, the prospect of jury selection from a pool of government employees is remote. Mr. Kromberg cites, by way of example, that more than 1,100,000 people live in Fairfax County alone. Fairfax County is one division of the Eastern District of Virginia in which the defendant will be tried [Kromberg 1 §77]. The jury could also be drawn from Faira County, Fauquier County, Loudoun County, Prince William County, and Stafford County [Prince, bundle E §7]. The defence evidence does not establish – as is claimed – that a jury pool of government contractors is "guaranteed". At its height it establishes that four defence related government agencies are among the top fifty employers in the area [Bundle E, Prince §9]. Others include the public school system, the area transit authority, local government, the department of agriculture, the Coca Cola Bottling Company, the postal services, and food and catering companies [Bundle E, Prince exhibit 2].

158. In any event, the defendant will benefit from a wide range or procedural guarantees to ensure the impartiality of the jury. This right is guaranteed by the sixth amendment to the constitution [Kromberg 1 §§72 to 81]. The trial Judge will conduct a voire dire to ensure that each juror can lay aside any impression or opinion and return a verdict based on the evidence in court [Kromberg 1 §§74-5, 78]. Only those jurors found to be capable of "fair and impartial jury service" after a "careful voire dire" will be able to serve. A similar process will be undertaken to ensure no bias on the basis of a juror's employment by the US government or a government contractor [Kromberg 1 §§79-80]. The defendant can challenge any juror for good cause, and ten jurors with no cause at all [Kromberg 1 §75].

The guarantees set out above, and in particular the ability to challenge jurors without cause affords the defendant more by way of procedural rights than would be available in this country.

159. Furthermore, and in any event, the submission proceeds on the misconceived basis that those employed by the government are not capable of considering the case impartially or serving properly on a jury. On this basis, large swathes of society including the civil service, or teachers, would be barred from sitting on a jury considering the defendant's case. Such a submission is, for obvious reasons, misconceived. The key point is that the Court should monitor the potential for bias, and exclude any juror unable to return a verdict based on the evidence. This will be done.

4. *Public denunciations*

160. The defendant relies on Allenet de Ribemont (1996) 22 E.H.R.R 582 as "clearly establishing" that "intemperate public denunciations violate the presumption of innocence" [part 1 §9.5]. In fact, (1996) 22 E.H.R.R 582 is the reference for a different De Ribemont case concerning whether a sum awarded as just satisfaction could be paid to an applicant free of attachment. The relevant case is De Ribemont (1995) 20 E.H.R.R 557. In that case, a press conference held by a high-ranking police officer in which the applicant was described as a murderer, was found to violate the presumption of innocence pursuant to article 6(2) [see §41].

161. The modern approach was set out by the domestic courts (in the context of abuse of process submissions considering the fairness of an accused's trial) by the Privy Council in Montgomery v. HM Advocate [2003] 1 A.C 641 PC and by the Court of Appeal in R v Abu Hamza [2007] 2 W.L.R 266.

162. In Montgomery the Privy Council noted [673B-H] that:

> "It needs to be emphasised, as was pointed out in Pullar v United Kingdom 22 EHRR 391, that the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact. It does not require the issue of objective impartiality to be resolved with mathematical accuracy. It calls instead for "sufficient" guarantees or safeguards and for the exclusion of any "legitimate doubt": Pullar v United Kingdom, pp 402-403, 405, paras 30, 40
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> ….
>
> The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge."

163. In Abu Hamza the Court of Appeal adopted the approach in Montgomery, noted the inherent strengths of the jury system [§90] and added:

> "89. In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. The position was summarised by Lord Taylor of Gosforth CJ in R v West [1996] 2 Cr App R 374 , 385–386 as follows:
>
> "But, however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In Kray (1969) 53 Cr App R 412 , 414, 415, Lawton J said: 'The drama … of a trial almost always has the effect of excluding from recollection that which went before.' That was reiterated in Young and Coughlan (1976) 63 Cr App R 33 , 37. In Ex p The Telegraph plc [1993] 1 WLR 980 , 987, I said: 'a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'"
>
> …
>
> 92. …The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial."

164. In Abu Hamza, the Court of Appeal considered a case in which the defence provided 600 pages of newspaper reports, articles and comments as "samples of a sustained campaign against the defendant, almost entirely hostile to him and some of it couched in particularly crude terms" [§96]. The publicity was described by the Court as a "barrage of adverse publicity, some of which treated the appellant as an ogre". The Court of Appeal nonetheless upheld the Judge's decision that the defendant could have a fair trial.

165. Abu Hamza also attempted to raise the issue of prejudicial reporting in the context of his article 6 rights when facing extradition to America [see Ahmad [supra] at §166]. The complaint related to a press release accompanying a US Department of Treasury freezing order describing him as a legal officer for the Islamic Army of Aden, an organisation responsible for the kidnapping of foreigners and tourists, who had sought support for jihad against the Yemeni regime and a return to Islamic law. It stated that Abu Hamza had endorsed the killing of non-Muslim tourists visiting Muslim countries. The ECtHR considered the argument "manifestly ill-founded":

> "In any trial in the United States it would remain for the prosecution to prove the charges against the applicant to the appropriate standard of proof and for the trial judge to direct the jury to try the case on the basis of the evidence alone. It cannot be said that a press release dating from 2002 would

render such a trial unfair, still less give rise to the flagrant denial of justice required in an extradition case."

166. The issue was considered more recently still in by the ECtHR in Ali v UK (2016) 62 E.H.R.R. 7, at §§89-91:

> "89. Even in cases involving jury trials, an appropriate lapse of time between the appearance of any prejudicial commentary in the media and the subsequent criminal proceedings, together with any suitable directions to the jury, will generally suffice to remove any concerns regarding the appearance of bias. In particular, where the impugned newspaper reports appeared at a time when the future members of the jury did not know that they would be involved in the trial process, the likelihood of any appearance of bias is all the more remote, since it is highly unlikely that the jury members would have paid any particular attention to the detail of the reports at the time of their publication. In such cases, a direction to the jury to disregard extraneous material will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial press campaign. It is essential to underline in this respect that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary."
>
> 90. In some cases concerning adverse press publicity, the Court has looked at whether the impugned publications were attributable to, or informed by, the authorities. However, it is important to emphasise that the fact that the authorities were the source of the prejudicial information is relevant to the question of the impartiality of the tribunal only in so far as the material might be viewed by readers as more authoritative in light of its source. The question whether public officials have prejudged a defendant's guilt in a manner incompatible with the presumption of innocence is a separate issue to be considered under art.6(2) , with the focal point being the conduct of those public officials and not the impartiality of the tribunal itself. Thus, while the authoritative nature of the published material may require, for example, a greater lapse of time or most robust jury directions, it is unlikely in itself to lead to the conclusion that a fair trial by an impartial tribunal is no longer possible. In particular, allegations that any disclosure of prejudicial material by the authorities was deliberate and was intended to undermine the fairness of the trial are irrelevant to the assessment of the impact of the disclosure on the impartiality of the trial court.
>
> 91. It can be concluded from the foregoing that it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible. Indeed, the applicant has not pointed to a single case where this Court has found a violation of art.6 on account of adverse publicity affecting the fairness of the trial itself. As noted above, the trial judge, when invited to consider the effect that an adverse media campaign might have on a "tribunal", has at his disposal various possibilities to neutralise any possible risk of prejudice to the defence and ensure an impartial tribunal. In cases involving trial by jury, what is an appropriate lapse of time and what are suitable directions will vary depending on the specific facts of the case. It is for the national courts to address these matters—which, as the Law Commission observed in its 2012 consultation paper, 26 are essentially value judgments—having regard to the extent and content of the published material and the nature of the commentary, subject to review by this Court of the relevance and sufficiency of the steps taken and the reasons given."

(a) *The factual basis*

167. The defence skeleton argument does not identify the particular comments relied on, or why those comments would lead to a flagrantly unfair trial. A schedule "overview timeline of political statements" has been provided [bundle F tab 10] together with some press reports [Bundle E tabs 11 – 41].

168. Many of the comments identified date back as far as 2010. The most recent material relied on dates to September 2019. There will therefore be a lapse between the commentary

complained of and the trial. This is a relevant factor to the fairness of the trial (see Abu Hamza, & Ali [both supra]).

169. Furthermore, many of the comments are anodyne or entirely unobjectionable. Some are even favourable to the defendant or WikiLeaks. It is unsurprising that the media, and indeed government, have commented on the actions of the defendant and of WikiLeaks. There can be no objection to, for example, to Attorney General Holder declaring in 2010 that there was an "active ongoing criminal investigation into WikiLeaks" and that "to the extent that we can find anybody who was involved in the breaking of American law, who put at risk the assets and the people I have described, they will be held responsible". Nor could there be any objection to Attorney General Sessions declaring in 2017 that Mr. Assange was a "priority" and that "whenever a case can be made, we will seek to put people in jail" for serious criminal conduct. Similarly, the announcements accompanying the release of the superseding indictment are unremarkable.

170. The defence submissions also ignore entirely the rights, and the checks and balances, available to the defendant in challenging jurors, and in ensuring their impartiality (set out above). These are important. There is no prospect of any statements made by public officials impacting on the fairness of the trial, let alone flagrantly so.

171. To the extent that there has been comment on the defendant and his activity, in the press and even from individuals in government, this is perhaps hardly surprising given his profile. However, the defendant will face trial before an impartial tribunal, after a lapse of time and will be tried on the basis of the evidence alone. There is no basis on which it could be said that pre-trial publicity would lead to a breach of article 6, let alone a flagrant breach.

5. *Unjust sentencing regime*

172. This exact same argument by Mr Fitzgerald, upon the same evidence of Mr Eric Lewis, was recently rejected as unarguable by the Grand Court of the Cayman Islands in MacKellar v United States of America No. 06385/2017 at paragraphs [64] to [76]. Mr Justice Dobbs concluded " I find that the ground has no reasonable prospect of success and accordingly leave is refused". Notwithstanding that trenchant rejection of the same argument, the defence repeat it in this court.

173. The defendant asserts that the sentencing court will consider conduct outside the extradition request when sentencing. This is, in reality, a submission as to the specialty

arrangement between the UK and the USA. Indeed, the source material relied on by the defendant (Durkin, core bundle tab 16, §19 to 24) specifically relates to "the rule of specialty". This is a matter which should properly be raised before the Secretary of State pursuant to s.95 of the 2003 Act and not before this court.

174. Mr. Durkin asserts that the Federal Criminal Code permits sentencing courts in America to take into consideration conduct for which the defendant has not be prosecuted. This assertion is of general application. Were this to amount to a flagrant denial of the right to a fair trial, it would prevent extradition to America wholesale, and would mean that the regular return of fugitives to America pursuant to extradition arrangements between the UK and US has been misconceived for years.

175. No conduct is identified, in this case, which it is said the defendant would be sentenced for, outside the conduct set out in the request.

176. 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. The ruling in Welsh included consideration of the case of US v. Watts, cited by Mr. Durkin at §21 of his affidavit. In short, the Divisional Court:

    (1) Noted that whilst American courts "can take a broader approach to what is relevant to sentencing than the UK courts might do, and adopt a different procedure for determining facts, does not mean that there is a breach of specialty. They are still punishing the defendant, and certainly on their legitimate perception, for the offence for which the defendant has been tried, the extradition offence in an extradition case" [§113].

    (2) Considered that, as there have been longstanding extradition arrangements between the UK and the US, over several treaties, "if this sentencing practice was seen by the United Kingdom or other countries as breaching treaty obligations, there would have been a clarification in the superseding treaties, but instead there is nothing which excludes that practice" [§137].

    (3) Noted that, whilst the US Courts "appear to range more widely than would the United Kingdom", nonetheless UK sentencing practice permits sentences to be aggravated on account of factors which could have been charged as separate offences.

(4) Accordingly, found that US sentencing law, comprehensively considered on this point, did not amount to a breach of specialty.

177. Welsh is determinative that US sentencing practice does not breach specialty. It is perhaps of note that neither applicant in that case even suggested that a flagrant breach of article 6 arose. The defence argument in this case must be that the whilst the sentencing practice conforms with the statutory provision which addresses the issue of specialty directly, it nonetheless also amounts to such an egregious breach of specialty as to nullify his fair trial rights. This inconsistent argument is untenable.

6. *Other complaint – availability of Manning as a witness*

178. As to the defence contention that he would be unable to call Chelsea Manning in his defence [part 1 §9.4], this is no different to the familiar situation in which a defendant is tried after the conviction of a co-defendant. There is no evidence that the defendant would not have the power to compel relevant witnesses to give evidence at his trial. The fact that Ms. Manning appears unwilling to testify to the government, does not mean she will prove equally recalcitrant if invited to give evidence for the defendant. In any event, the fact that a witness is willing to undergo contempt or commitment proceedings rather than testify does not render the trial of the defendant, or the legal framework in which it would take place, flagrantly unfair .

179. Accordingly, no issue of article 6 breach arises.

VIII. ARTICLE 3: MENTAL HEALTH AND CONDITIONS OF DETENTION

180. It is submitted on behalf of Mr Assange that the conditions of his detention, taken with his mental health problems (in conjunction with a diagnosis of Asperger syndrome) means that his detention in the United States would amount to inhuman treatment. The prosecution has requested that all those defence witnesses who give evidence about conditions of detention and make diagnoses as to psychiatric health give oral evidence.

181. It suffices to note here that all of the conditions of detention that the defence rely upon, to demonstrate a breach of Article 3 rights, have already been the subject of detailed factual findings by the European Court of Human Rights and by the High Court. Both Courts either found that the effect of SAMs or conditions at ADX (taken separately or in combination) were not as severe as suggested or that they were not incompatible with

Article 3. The European Court also concluded that detention at ADX was not incompatible with Article 3 rights in the cases of defendants suffering from depressive illness or who were on the Autistic spectrum.

182. The defence seeks to reopen the entirety of these findings on the basis that since these cases were decided, there have been developments at ADX which "change" the position; see defence skeleton argument 1 at 13.15. The evidence cited does not demonstrate any change related to the findings of the European Court or the High Court. This Court remains bound by them.

183. It follows that many of the facts that Professor Kopelman's reports rely upon (to demonstrate what Assange's detention might be like in the United States) do not reflect the facts found already about SAMs and ADX Florence in other cases. This submission will thus set out the approach of, and the facts found, by the High Court and the European Court on the issues of mental health (especially suicidality; Special Administrative Measures and possible detention at ADX Florence).

1. *Mental Health: the general approach*

184. The overarching observation is made that it will be an exceptional course to determine that an individual cannot be extradited owing to his mental health. Serious mental health problems are endemic amongst prisoners in this jurisdiction. Such problems are only very rarely a basis for not subjecting an individual to trial in this jurisdiction or for detention in a high security hospital like Broadmoor. Even where there is evidence that an individual is not fit to plead, the general approach remains, per Warren v SSHD and Crown Prosecution Service (acting for the United States of America) [2003] EWHC 1171 (Admin), that it is not unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. Even if the inevitable result would be that he would be found unfit, there may nonetheless be countervailing circumstances that warrant return (for example where there was a process akin to that in the UK whereby a defendant who is unfit may be found to have committed the acts of the offence); Hale LJ as then at §42.

185. A explained by Professor Fazel's report, the United States has a very considerably *lower* rate of suicide within its prisons than the UK and other European states. The prosecution has provided detailed information about the standard of care and the sort of provision made for prisoners in the United States. It is not accepted that this is significantly different to what might be provided in the United Kingdom.

186. This submission will not deal the evidence of defence witnesses in significant detail but rather set out the principles upon which the Court must determine whether extradition would be incompatible with Article 3 having regard to conditions of detention and mental health.

187. To be clear, the prosecution does not accept that Assange's extradition would be incompatible with Article 3 (or meet the threshold for section 91) even if the Court took the defence *medical* evidence at its highest (and accepted that Assange also had Asperger's syndrome).

188. The observation is made at the outset that Assange's condition is obviously not one that precludes his detention in this jurisdiction; it is not one that requires that Assange be detained in medical facility within prison; it is not one that requires any form of "in-patient" care and is not even one that appears to necessitate any particularly onerous or complex treatment. It appears that Mr Assange has lived most of his adult life (save for a single episode in his early twenties for which he was hospitalised for a week) without a formal psychiatric history. In short, it appears that it is threatened extradition which has precipitated a downturn in his mental health and which it is said will precipitate a further more severe downturn.

189. As is clear from the extradition request and all of the defence evidence served on Assange's behalf (which explains Assange's running of Wikileaks) neither mental health problems, nor Asperger syndrome prevented Assange's solicitation of, and orchestration of, the leaking of materials from the highest levels of government and state agencies, apparently on a global scale; his running of Wikileaks (again as a global enterprise); his public speaking; his co-ordination of various media outlets (again across the globe) in dealing with and disclosing the materials stolen via Manning; or even (as conveyed in one of the books Professor Kopelman cites as having read (for the apparent purpose of looking for indications that Assange is on the autistic spectrum)) presenting a television chat show in 2011 ("*The Julian Assange Show*") for the TV program Russia Today.[5]

190. That said, according to Professor Kopelman's report Assange regarded himself as being in solitary confinement for a year in the Embassy: "*In his last year in the embassy, Mr Assange told me that he was effectively in solitary confinement for 60 hours a week, and even the toilet and bathroom were bugged, resulting in a recrudescence of the PTSD symptoms. Dr Michael Korzinski, a psychologist who assessed Mr Assange while in the*

[5] Leigh and Harding, Wikileaks, Inside Julian Assange's War on Secrecy, page 258.

embassy, diagnosed 'complex PTSD'; this could be viewed as a form of 're-traumatisation' well described in the clinical literature…" [para 6 at page 18]. Clearly Assange was willing to endure these conditions so as to avoid extradition.

191. Certainly, neither his being in the Embassy nor any mental condition nor Asperger syndrome prevented his establishing a family whilst living in the Embassy or continuing to run Wikileaks (note for example Assange's account to Dr Blackwood contained in his psychiatric report at §38 – "*He did not expect a similar pardoning process to Chelsea Manning, even if the Democrats were to regain power in the next Presidential election, given that he had antagonised them through Wikileaks' release of Democratic party campaigning information from the Hilary Clinton presidential bid*.")As is public record, these leaks were made in the run up to the presidential election in November 2016.

192. Assange's mental health condition is patently not so severe so as to preclude extradition. Rather what appears to be suggested by Assange (and conveyed by Professor Kopelman) is that it is extradition which trigger a downturn :

> "Confronted with imminent (or actual) extradition in this context, it remains my view that Mr Assange will act upon his suicidal impulse, driven by his psychiatric disorders. I say that the risk is 'very high' because of the reported high rates of suicide in U.S. single-cell, segregated facilities; because of the abundance of risk factors in Mr Assange's case; because of the intensity of his suicidal preoccupation, and the extent of his planning and preparation; and also because of his acute awareness of the prospect he faces (segregation, social isolation, sensory deprivation, a lifelong/indefinite sentence). I also say 'very high' risk, relative to other extradition cases I have assessed, some of whom were very high profile. I am as confident as a psychiatrist ever can be that Mr Assange will find a way to suicide, borne directly out of his clinical depression, exacerbated by his anxiety syndrome and his PTSD, and executed with the single-minded determination of his ASD/Asperger's.

193. As is thus plain, Professor Kopelman's opinion is premised upon speculation as to variables such as the length of sentence that Assange will receive and the conditions of his detention which may or may not eventuate.

194. The principles to be applied to the question of whether a mental health condition is such to make extradition incompatible with Convention rights, are well established and coterminous with the criteria applied where mental health is relied upon for the purposes of section 91 of the Extradition Act 2003.

195. These principles were summarised in <u>*Turner v Government of the United States of America*</u> [2012] EWHC 2426 (Admin) (Aiken LJ para 28) (emphasis added):

> "(1) The court has to form an overall judgment on the facts of the particular case …
>
> "(2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him …

> "(3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a 'substantial risk that [the appellant] will commit suicide'. The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression …
>
> "(4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition …
>
> "(5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression? …
>
> "(6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide? …
>
> "(7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind …"

196. In *McIntyre v USA* [2015] 1 W.L.R. the Court accepted, for the purposes of Article 3 that the appellant was suffering from PTSD and that he would be at a real risk of suicide when a final decision to extradite him was communicated to him. In determining whether extradition was precluded as being incompatible with Article 3, the Court applied the tests set out in *Turner* at three stages, namely whilst the appellant was in the UK pending extradition, during transfer to the USA and when in the USA.

197. The Court considered that it was necessary that [at paragraph 63]:

> "The Home Secretary or those responsible for the appellant ensure that full and proper steps are taken to put proper preventive measures in place to address the risk of suicide from the time a decision to extradite him is communicated to him. We would have had no doubt that such steps could be taken prior to the decision being communicated to him. We would have therefore restricted the manner in which this draft judgment could be used and we so restrict it, but give liberty to apply immediately if the intervention of the court is required.
>
> We note the concerns that have been expressed by Mr Sickler about transfer to the USA; such concerns have been expressed in other cases and have not always been addressed by the US authorities. It must be and is the responsibility of the Home Office (or other UK authorities acting on behalf of the Home Office) to satisfy themselves that in the arrangements made for transfer from the UK to the USA proper preventive measures are in place to address the risk of suicide during the journey to the USA and that the medical records and reports accompany the appellant. This is not a matter solely for the US authorities. We would therefore have been satisfied that the issues on transfer could have been addressed and will be addressed by the Home Office.
>
> After arrival in the USA, we do not consider the evidence before us would have given rise to a real risk of inhuman or degrading treatment in the US of such severity as to put the United Kingdom in breach of its obligations to the claimant under article 3. The evidence does not establish either that the risk of suicide cannot be properly addressed by the US authorities or that the treatment that will be afforded to him would fall below a standard that might put the UK in breach of its obligations under article 3."

198. The Secretary of State notes that in the case of *Turner* the Court also proceeded on the basis that there was a substantial risk that Ms Turner *would* attempt suicide upon extradition. Amongst the factors which the Court considered relevant was the distinction

between the risk of suicide because of a mental health condition and the risk of suicide because of extradition [paragraph 44]:

> "44. Thirdly, Dr Hayes has found no psychotic symptoms. He has concluded that the cause of the appellant's anxiety is closely associated with the fatal road accident in which she was involved. As I read Dr Hayes' reports, although he regards the risk of Ms Turner attempting to commit suicide as substantial or high, he does not say that this risk is one that is brought about by her mental condition or her depressive illness; rather it is brought about by the fact that she might be extradited. Although Ms Turner's mental condition evidences clinical depression and some features of post traumatic disorder, she appears to remain rational. Any decision to make an attempt to take her life will, on the evidence, be taken because Ms Turner has decided to make a choice to do so. As Ms Turner told Dr Hayes when he interviewed her on 17 July, she would make a choice between extradition and wanting to be alive: see para 5.6 of that report. That position has not changed since Ms Turner's admission to the Michael Carlisle Centre.

199. The Court reiterated this at paragraph 49

> "…..However, ultimately, Ms Turner's current delicate mental state has as its cause the fact that she was involved in a fatal road accident in which she received little or no physical injury and that her extradition is sought to stand trial on charges which result from that accident. It seems to me, at least on the evidence of the present case, that it cannot be said that Ms Turner's current mental condition which flows from the consequences of the accident and the request for her extradition, even if that includes a substantial risk of further attempts at suicide by her, will give rise to the extradition being either unjust or oppressive by reason of **that** mental condition. In that sense, all the evidence that is now before this court is not "decisive". [Emphasis added]

200. In short, Assange does not fall into the category of individual so mentally ill that he has no capacity to resist extradition. The defence suggests that he might he in the future; that is entirely speculative and premised upon a number of variables that may or may not ever eventuate.

2. *Special administrative measures / ADX Florence*

201. There has been exhaustive consideration of Special Administrative Measures (SAMs) within in the extradition context in a series of high profile cases. The defence witnesses suggest the effect of SAMs is essentially to be detained in solitary confinement and on an indefinite basis. A number of defence witnesses also suggest that a requirement to exhaust remedies within the BOP system prior to seeking judicial relief essentially frustrates judicial control. None of these contentions are correct.

202. Consideration of SAMs often intersects with consideration of ADX Florence, this is also considered in this section of the skeleton argument.

203. It is important to be clear as to what are SAMs. Mr Kromberg indicates that if SAMs were to be imposed in Mr Assange's case, it would be pursuant to 28 Code of Federal Regulations ("CFR") 501.2 in other words they would be authorised on the basis of risk to national security. This provides:

§ 501.2 National security cases

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or national security. The inmate shall sign for and receive a copy of the notification.

I Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for a period of time as determined by the Director, Bureau of Prisons, up to one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, but only if the Attorney General receives from the head of a member agency of the United States intelligence community an additional written certification that, based on the information available to the agency, there is a danger that the inmate will disclose classified information and that the unauthorized disclosure of such information would pose a threat to the national security. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

I Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.

204. In other words, such measures can only be applied, upon the certification by the head of a member agency of the United States intelligence community that (i) the unauthorized disclosure of classified information would pose a threat to the national security and (ii) that there is a danger that the inmate will disclose such information. Contrary to the impression given by the defence evidence, this is a step taken exceptionally and applied rarely. For example, in Ahmad and others v UK (2013) 56 E.H.R.R. 1 the Court referred [§89] to there being 41 prisoners in the entire US prison system who were subjected to special administrative measures.

205. As is clear, CFR 501.2 does not require that the inmate be subject to any particular measure. It does not require they be detained in segregated detention but rather refers to administrative detention (this does not mean segregation). The position is very much more nuanced than the defence experts (or Professor Kopelman) state: see U.S. v. EL-HAGE 213 F.3d 74 (2000). As is apparent (and which demonstrates the defence claims that there is no judicial oversight of SAMs to be wrong) El Hage's application for rescission or for

substantial modification of the Special Administrative Measures (S.A.M.) of his confinement, was determined pre-trial, first by the District Court and then on appeal.

206. El-Hage was charged with six conspiracies to kill United States citizens and destroy United States property abroad, 20 counts of perjury based on his grand jury testimony, and three counts of false statements. The charges against El-Hage arose from his alleged participation in conspiracies led by Usama Bin Laden. Specifically, he was charged with being a key participant in al Qaeda. The indictment included his complicity in the bombing of the United States embassy in Nairobi, Kenya causing more than 212 deaths and injuring 4,500 people, and the bombing of the United States embassy in Dares Salaam, Tanzania that caused 11 deaths and injuries to 85 people.

207. The Judgment of the United States Court of Appeals, Second Circuit records the following information as regards the risks he posed:

> "Defendant was one of Bin-Laden's trusted associates, privy to al Qaeda's secrets and plans, served as Bin Laden's personal secretary, travelled on his American passport on Bin Laden's behalf, moved Bin Laden's money, and worked in Bin Laden's factories in the Sudan—factories which served as a cover for the procurement of chemicals and weapons.
>
> Documents found on El-Hage's computer seized at his home in Nairobi, Kenya in 1997, the affirmation continues, details El-Hage's role and his overall dangerousness. Other evidence, apart from this computer record, confirms El-Hage's role in conveying military orders from Bin Laden including the direction that the East African cell (which later carried out the embassy bombings) "militarize," and that defendant had a role in providing false passports and in seeking weapons including Stinger missiles for al Qaeda members. Passport photographs of al Qaeda members who participated in al Qaeda's efforts against American troops in Somalia were also recovered in the Kenya files.
>
> The accused clearly has the ability to flee. El-Hage has been a frequent traveller who lived in Afghanistan, Pakistan and the United States in the 1980's, eventually moving to the Sudan in 1992 and Kenya in 1994, before returning to the United States in 1997. By his own admission, while living in the Sudan and Kenya, he travelled to Tanzania, Somalia, Italy, Slovakia, Russia, Afghanistan, Pakistan, England and other countries. He has demonstrated access to false travel documents."

208. Even El Hage did not spend his entire pre-trial period in solitary confinement:

> "He was subject to solitary confinement for the first 15 months of his detention, but before the January 10, 2000 hearing, he was permitted to have a cellmate. In addition, the government has revised El-Hage's S.A.M. conditions to give him seven extra minutes of time in each phone call to his family and to provide him with a plastic chair so that he can review documents more comfortably. He is also permitted three calls per month to his family, rather than the one call per month usual for inmates in administrative detention."

209. The compatibility of SAMs with Convention rights was first raised Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America [2006] EWHC 2927 (Admin). The High Court considered three points relating to SAMs. (1) By the imposition of SAMs each appellant would be "punished, detained or restricted in his personal liberty by reason of his … religion" and so there would be a bar to extradition under s.81(b) of

the 2003 Act. (2) They would also be prejudiced in the preparation and/or conduct of their defence, principally by inhibitions placed upon communication with their legal advisers, and so there would be violations of ECHR Article 6 quite apart from s.81(b) . (3) And there would be violations of ECHR Article 3 given that SAMs involve or may involve solitary confinement.

210. On Article 3, the Court concluded (per Laws LJ):

> "93. It is convenient to deal first with ECHR Article 3. I did not understand Mr Fitzgerald to press this aspect as part of the forefront of his case. It is clear from the jurisprudence of the European Court of Human Rights that solitary confinement does not in itself constitute inhuman or degrading treatment. Regard must be had to the surrounding circumstances including the particular conditions, the stringency of the measures, its duration, the objective pursued and its effects: McFeeley v UK 3 EHRR 161 , paras 49–50. Applying this approach, the evidence before us does not begin to establish a concrete case under Article 3. The argument on SAMs is really about the other two points."

211. The High Court rejected the other points. It further found that SAMs are open to judicial scrutiny citing [95] US v Reid 369 F. 3 d 619 (1st Circuit 2004) ; US v Ali; E.D. Va Oct 24, 2005 ; US v El-Hage 213 F. 3d 74 (2nd Circuit 2000).

212. The Court also rejected the submission that attorney/client privilege would not be honoured and referred to there being no challenge to the specific finding that [§97]:

> "there is judicial control to see that communication passing between the defendant and his lawyers, although monitored, does not reach the eyes and ears of those prosecuting". In an affidavit of 13 March 2006 Maureen Killion, of the Office of Enforcement Operations at the United States Department of Justice, says this (paragraph 13):"[T]he regulations [sc. The United States Code of Federal Regulations] require the Government to employ specific safeguards to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy. 501.3(d)(3) [of the Regulations]. These protective requirements are designed to safeguard a prisoner's legitimate need to communicate with his or her attorney, while also helping to safeguard human lives."

213. Lord Justice Laws concluded [§97]:

> "In my judgment the evidence does not begin to show that the imposition of SAMs, were that to occur (as it may), would mean that either appellant would be "prejudiced at his trial" (s.81(b) of the 2003 Act), or that it would violate the appellants' rights under ECHR Article 6 , not least given that a flagrant denial of justice has to be shown. Nor, for good measure, does it show (what Mr Fitzgerald must I think establish) that the United States authorities would knowingly perpetrate a violation of the Sixth Amendment to the American Constitution."

214. The issue of SAMs was not pursued in Mustafa Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America, Secretary of State for the Home Department [2008] 1 W.L.R. 2760, (PQBD) and Sullivan J at [65] given the Judgment in Aswat and Ahmad. Contrary to the thrust of the defence evidence that the United States has, in some breached an obligation to the United Kingdom, in respect of the detention of Abu Hamza at ADX Florence, no undertaking was given as regards him.

215. Rather, the evidence of Warden Wiley (the then Warden of ADX Florence) was "..that he has been advised by the chief of health programmes for the FOB that if, after a full medical evaluation "it is determined that (the appellant) cannot manage his activities of daily living, it is highly unlikely that he would be placed at the ADX but, rather, at a medical centre"; see PQBD and Sullivan J at [65].

216. The Court also made these observations:

> "69. We must add two footnotes. First, the constitution of the United States of America guarantees not only "due process", but it also prohibits "cruel and unusual punishment". As part of the judicial process prisoners, including those incarcerated in Supermax prisons, are entitled to challenge the conditions in which they are confined, and these challenges have, on occasions, met with success. Second, although Mr Wiley's evidence does not constitute the kind of assurance provided by a Diplomatic Note, we shall proceed on the basis that, if the issue of confinement in ADX Florence arose for consideration, a full and objective medical evaluation of the appellant's condition, and the effect of his disabilities on ordinary daily living and his limited ability to cope with conditions at ADX Florence would indeed be carried out. This would take place as soon as practicable after the issue arises for consideration, so that the long delay which appears to have applied to another high profile convicted international terrorist, who is now kept at an FOB medical centre because of his ailments would be avoided.

217. In R (On the Application of Adel Abdul Bary and Khalid Al Fawwaz) v The Secretary of State for the Home Department [2009] EWHC 2068 (Admin) was a judicial review of the Secretary of State's decision that the Claimant's extradition was not compatible with Convention rights having regard to the possibility that they would be subject to SAMs and detained in ADX Florence.

218. In coming to her decision, the Secretary of State had regard to the treatment of El Hage, referred to above. The High Court set out her conclusions [Scott Baker LJ at §9]:

> (a) There is substantial evidence of close judicial oversight of the prison conditions in which Mr El Hage was detained. For example, the trial judge personally inspected those conditions.
>
> (b) The Trial Judge specifically dealt with Mr El Hage's complaint that he was subjected to unnecessary strip searches. The Trial Judge conducted an inquiry into the reasons and justifications for the strip searches to which Mr El Hage was subject and was satisfied that there were good penological reasons for the strip searches.
>
> Further, many of the complaints which were made by Mr El Hage and which have been substantially adopted by (the claimants) as to the conditions in which he and his co-defendants were held have to be viewed against the background, as the trial judge found, that two of Mr El Hage's co-defendants had inflicted a life threatening injury on a prison guard and that there was a general concern that the attack in question (using a concealed weapon) had been planned over a considerable period of time. As such, stringent security measures were justified. The extent to which (the claimants) might be subject to similar security measures would depend, in part, on (their) behaviour and that of (their) fellow inmates at the facility in which they were detained.
>
> (d) When Mr El Hage complained that by reason of prison conditions his mental condition had deteriorated to the extent that he was no longer able to participate in the trial or assist in the preparation of his defence, the trial judge ordered that he be examined by three independent medical experts. All three concluded that Mr El Hage was malingering and deliberately fabricating amnesia and that, contrary to his claims, he was able to assist in the preparation of his defence and participate in his trial."

219. The High Court also considered at very considerable length, and having regard to voluminous defence evidence, the conditions of detention in ADX Florence. The Court cited the description given by the then Warden Wiley, as to the stratified housing in ADX Florence [Scott Baker LJ at §§30-32]:

> "30. Warden Wiley's evidence is that the ADX has nine housing units which allow a phased housing unit/privilege system. The stratified system of housing inmates is used to provide inmates with incentives to adhere to the standards of conduct associated with the maximum security programme. As the inmates at the ADX demonstrate periods of clear conduct and positive institution adjustment, so they may progress from the 'general population' units (with the most restrictive regime) through intermediate and transitional units to the pre-transfer unit with increasing degrees of personal freedom and privileges at each stage. The types of privilege are determined by the type of housing unit to which the prisoner is assigned. It will take an inmate a minimum of 36 months to work his way through the layered housing system. It is the goal of ADX to transfer inmates to less secure institutions when the inmate demonstrates that a transfer is warranted and he no longer needs the control of the ADX.
>
> 31. The claimants rely on the fact that a prisoner may be deferred from the step down unit programme for "longer periods of time" "due to the very serious nature of the original placement factor". In short, the point that is made is that because of the very grave crimes for which (if convicted) the claimants will be incarcerated, there is every prospect that they will be held in ADX Florence indefinitely."

220. The High Court concluded that neither SAMs nor the prison conditions at ADX Florence, nor a combination of both, in the context of a whole life sentence constituted a breach of Article 3 [see §97].

221. The applicants in the above cases applied to the European Court of Human Rights on a number of issues which included SAMs and detention at ADX. The applicants were Ahmad ("the first applicant"); Aswat ("the second applicant"); Ahsan ("the third applicant") and Abu Hamza ("the fourth applicant").

222. The detailed admissibility decision is important because it demonstrates all of the points which the European Court of Human determined were inadmissible. The following parts of the admissibility decision relevant to this case may be summarised as follows:

> §122: Ahsan emphasised the fact that he had bipolar disorder and had been diagnosed in June 2009 with Asperger syndrome. He produced two reports from consultant psychiatrists to that effect. The first report predicted a serious risk of suicide if the third applicant were placed in solitary confinement for a long period. The report also stated that, if he became severely depressed before trial, the third applicant would be unable to do justice to himself at trial, to give instructions to his lawyers and actively participate in his defence. The second report stated that Ahsan was suffering from a severe episode of depressive disorder, including persistent thoughts of self-harm and suicide. This had been adversely affected by his detention pending extradition in conditions of high security at HMP Long Lartin and was forecast to deteriorate further. The report concluded that, by virtue of his Asperger syndrome and depressive disorder, Ahsan was an extremely vulnerable individual who would be more appropriately placed in a specialist service for adults with autistic disorders. Ahsan argued that his conditions of detention at HMP Long Lartin were relatively benign compared with the severity of a regime of special administrative measures and so, if he were extradited, there would be a greater risk of suicide or deterioration in his mental health.

§123. The Court was informed that Aswat had been diagnosed with schizophrenia and a deterioration in his condition had necessitated his transfer to Broadmoor Hospital, a high-security psychiatric hospital, where he remained under the care of a consultant psychiatrist.

§128. In respect of the stringency of special administrative measures, pre-trial, the Court considered that the experiences of Mr Al-Moayad, Mr Hashmi and Mr Kassir were instructive (i.e other US prisoners subject to SAMs). None of the three men was deprived of all human contact during their detention at the Metropolitan Correctional Center. Whilst subjected to special administrative measures, they enjoyed regular access to their attorneys. Communications with family members were restricted but not completely prohibited. Mr Al-Moayad and Mr Kassir were also allowed visits from consular officials. In Ramirez Sanchez (2007) 45 E.H.R.R. 49 at [131]–[135], the Grand Chamber considered that twice-weekly visits from a doctor, a monthly visit from a priest and frequent visits from the applicant's lawyers were sufficient for it to conclude that the applicant had not been in complete sensory isolation or total social isolation and that his isolation was "partial and relative". Previously, in Öcalan v Turkey (2005) 41 E.H.R.R. 45 at [194], where the applicant's lawyer and family members were able to visit once a week, the applicant was able to communicate with the outside world by letter and had books, newspapers and a radio at his disposal, the Grand Chamber considered that the applicant had not been kept in sensory isolation. The Court reached a similar conclusion in respect of the special prison regime laid down in s.41 bis of the Italian Prison Administration Act, where prisoners were not allowed to make calls, were limited to a one-hour visit per month and were prohibited from contact with prisoners under a different prison regime (Argenti v Italy (56317/00) November 10, 2005 at [22]; Bastone v Italy (59638/00) July 11, 2006 ; Messina v Italy (25498/94) June 8, 1999). The Court considers that the limitations on contact which were imposed on Mr Al-Moayad, Mr Hashmi and Mr Kassir are analogous to these cases and it found no reason to suppose that the four applicants would be subject to more stringent limitations on contact.

§129. In respect of the duration of the special administrative measures (pretrial), the Court also found that no issue would arise under art.3.

§130. As to the objective pursued by special administrative measures, the Court readily understood, particularly in terrorist cases, that prison authorities would find it necessary to impose extraordinary security measures (see Ramirez Sanchez (2007) 45 E.H.R.R. 49 at [125]; Öcalan (2005) 41 E.H.R.R. 45 at [192]). In the present case, the United States authorities are best placed to assess the need for such measures and there was no evidence they do so lightly or capriciously. There is also no risk of arbitrariness in the decision to impose special administrative measures. The decision was made with reference to established criteria. It was one that must be made by the Attorney-General personally. He must make specific findings and give reasons for his decision. The decision is subject to annual review and judicial challenge.

§131. Ahsan provided evidence that his mental health would be adversely affected if he were to be subjected to special administrative measures. The Court was prepared to accept that the imposition of special administrative measures would have a greater effect on all three applicants than detainees who were in good mental health. However, was is not convinced that any adverse effect would automatically mean that the very imposition of such measures would entail a violation of art.3 . It was not been suggested that, prior to extradition, the United Kingdom authorities would not advise their United States counterparts of the applicants' mental health conditions or that, upon extradition, the United States authorities would fail to provide appropriate psychiatric care to them. It was not been argued that psychiatric care in United States federal prisons was substantially different to that provided at HMP Long Lartin and there was also no reason to suggest that the United States authorities would ignore any changes in the applicants' conditions or that, if they did present any suicidal tendencies or symptoms of self-harm, they would refuse to alter the conditions of their detention to alleviate any risk to them. For Aswat (who was being cared for at Broadmoor Hospital), the Court did not doubt that the United States authorities would allow transfer to an equivalent high security hospital should that need arise after extradition.

§133 (as regards fair trial issues) **First**: the Court found there was no evidence that special administrative measures were coercive (in terms of forcing defendants to plead guilty). Neither Mr Al-Moayad nor Mr Kassir decided to plead guilty despite being subjected to such measures. It was also highly unlikely that a United States District Court would accept a guilty plea

where there was evidence of coercion. **Second**: Art.6 and the Eighth Amendment to the Constitution of the United States were strikingly similar. There was every reason to believe that the trial judges in the applicants' trials would ensure proper respect for their rights under the Eighth Amendment. Moreover, it was clear from the affidavit of Ms Killion (that, even in the unique context of special administrative measures in terrorism cases, there has only been one case of monitoring of attorney–client conversations and for wholly exceptional reasons. **Third**: There would be some adverse affect on their well-being if they were to be subjected to special administrative measures pre-trial. However, it was not established that this would impair significantly the preparation of their defence in the sense that it would render them unable to provide any kind of instructions to their lawyers. If, during the preparation of their defence or in the course of the trial, the applicants' lawyers felt that there was a significant impairment of their work, it would be open to them to bring their concerns to the attention of the trial judge. There would be the possibility of an appeal against any ruling the trial judge made. The Court also finds that the same considerations must apply in respect of the third applicant's submission that, if his mental health worsened as a result of special administrative measures, he would be unable to do justice to himself at trial.

223. Consequently, the imposition of special administrative measures before trial would not violate Art.6 .

3. *ADX Florence*

224. The European Court did admit the Application insofar as it related to detention in ADX Florence, post – trial (including detention with SAMs). It also added Bary ("the fifth applicant") and Al Fawwaz ("the sixth applicant").

225. The Court sought detailed information from the United States about the length of time that prisoners in ADX Florence took, for example, to transition through, the levels of detention which became progressively less restrictive. §§ 83- 86; 88 and 93-97. It also took into account evidence from Dr Terry Kupers [§ 99] (who Professor Kopelman also relies as a source of evidence about solitary confinement in ADX Florence).

226. As regards the European Court's general approach, the following parts of the Judgment may be summarised as follows:

> § 177.The European Court agreed with Lord Brown's observation in Wellington that the absolute nature of art.3 did not mean that any form of ill-treatment would act as a bar to removal from a Contracting State. As Lord Brown observed, this Court had repeatedly stated that the Convention did not purport to be a means of requiring the Contracting States to impose Convention standards on other states. That being so, treatment which might violate art.3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art.3 in an expulsion or extradition case.
>
> § 178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, had been decisive in the Court's conclusion that there has been a violation of art.3 :
>
> the presence of premeditation;
>
> that the measure may have been calculated to break the applicant's resistance or will;

an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;

the absence of any specific justification for the measure imposed;

the arbitrary punitive nature of the measure;

the length of time for which the measure was imposed; and

the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention

227. The Court also observed that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.

228. The Court agreed with Lord Brown, that it had been very cautious in finding that removal from the territory of a Contracting State would be contrary to art.3 of the Convention. It had only rarely reached such a conclusion since adopting the Chahal judgment. Save for cases involving the death penalty, it had even more rarely found that there would be a violation of art.3 if an applicant were to be removed to a state which had a long history of respect of democracy, human rights and the rule of law.

229. Applicants 1,3 and 5 also relied upon the following mental health diagnoses:

(1) Ahmad (the first applicant) had been diagnosed with post-traumatic stress disorder, which had worsened in the prison unit where he was detained[§193].

(2) Ahsan (the third applicant) had been diagnosed with Asperger syndrome, recurrent depressive disorder (with his current episode assessed as "mild" as opposed to previous, severe depressive episodes), and obsessive compulsive disorder in conjunction with other anxiety symptoms. The latter had worsened in detention, though his depressive symptoms had improved. Before his Asperger syndrome had been diagnosed in June 2009, a psychiatrist had predicted a high risk of serious depression leading to suicide if Ahsan was to be extradited and placed in solitary confinement for a long period. The third applicant also submitted a statement prepared by an American criminologist, detailing the heightened difficulties experienced by those with Asperger syndrome in federal prisons and the absence of proper facilities within the Bureau of Prisons to treat the condition.93]

(3) Bary (the fifth applicant) had a recurrent depressive disorder and had suffered several mental breakdowns while in detention in the United Kingdom. His most recent psychiatrist's report assessed his current episode as moderate to severe. The recommended treatment was medication with psychological treatment and support, including productive activity, opportunities for interaction with others and exercise.

230. As regards, the Court's key findings on ADX Florence (and SAMs), the Court determined that (emphasis added):

> "220. For the first, the Court finds no basis for the applicants' submission that placement at ADX would take place without any procedural safeguards. … Instead, it is clear from the declarations submitted by the Government, particularly that of Mr Milusnic, that the Federal Bureau of Prisons applies accessible and rational criteria when deciding whether to transfer an inmate to ADX. Placement is accompanied by a high degree of involvement of senior officials within the Bureau who are external to the inmate's current institution. Their involvement and the requirement that a hearing be held before transfer provide an appropriate measure of procedural protection. There is no evidence to suggest that such a hearing is merely window-dressing. Even if the transfer process were unsatisfactory, there would be recourse to both the Bureau's administrative remedy programme and the federal courts, by bringing a claim under the due process clause of the Fourteenth Amendment, to cure any defects in the process. Despite the third-party interveners' submission that recourse to the courts is difficult, the fact that Fourteenth Amendment cases have been brought by inmates at ADX shows that such difficulties can be overcome.
>
> 221. For the second complaint, ADX's restrictive conditions, it is true that the present applicants are not physically dangerous and that, as the Court has observed at above, it must be particularly attentive to any decision to place prisoners who are not dangerous or disorderly in solitary confinement. However, as the applicants' current detention in high-security facilities in the United Kingdom demonstrates, the United States' authorities would be justified in considering the applicants, if they are convicted, as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world. There is nothing to indicate that the United States' authorities would not continually review their assessment of the security risk which they considered the applicants to pose. As Ms Rangel has indicated, the Federal Bureau of Prisons has well-established procedures for reviewing an inmate's security classification and carrying out reviews of that classification in six-monthly programme reviews and three-yearly progress reports. Moreover, as the Department of Justice's most recent letters show, the United States' authorities have proved themselves willing to revise and to lift the special administrative measures which have been imposed on terrorist inmates thus enabling their transfer out of ADX to other, less restrictive institutions.
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> 222. The Court also observes that it is not contested by the Government that conditions at ADX Florence are highly restrictive, particularly in the General-Population Unit and in Phase One of the Special Security Unit.
>
> 222. It is clear from the evidence submitted by both parties that the purpose of the regime in those units is to prevent all physical contact between an inmate and others, and to minimise social interaction between inmates and staff. This does not mean, however, that inmates are kept in complete sensory isolation or total social isolation. Although inmates are confined to their cells for the vast majority of the time, a great deal of in-cell stimulation is provided through TV and radio channels, frequent newspapers, books, hobby and craft items and educational programming. The range of activities and services provided goes beyond what is provided in many prisons in Europe. Where there are limitations on the services provided, for example restrictions on group prayer, these are necessary and inevitable consequences of imprisonment. The restrictions are, for the most part, reasonably related to the purported objectives of the ADX regime.

> 222. The Court also observes that the services provided by ADX are supplemented by regular telephone calls and social visits and by the ability of inmates, even those under special administrative measures, to correspond with their families. The extent of those opportunities would be of considerable assistance to the applicants who would, by their extradition, be separated from their families in the United Kingdom.
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> 222. The Court finds that there are adequate opportunities for interaction between inmates. While inmates are in their cells talking to other inmates is possible, although admittedly only through the ventilation system. During recreation periods inmates can communicate without impediment. Indeed, as Mr Milusnic indicates, most inmates spend their recreation periods talking.
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> 222. In addition, although it is of some concern that outdoor recreation can be withdrawn for periods of three months for seemingly minor disciplinary infractions, the Court places greater emphasis on the fact that, according to Mr Milusnic, inmates' recreation has only been cancelled once for security reasons and that the periods of recreation have been increased from 5 to 10 hours per week.
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> 222. All of these factors mean that the isolation experienced by ADX inmates is partial and relative.
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> 223. The Court would also note that, as it emphasised in *Ramirez Sanchez* at [145], solitary confinement, even in cases entailing relative isolation, cannot be imposed indefinitely. If an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for a violation of art.3 . Indeed, this may well be the case for those inmates who have spent significant periods of time at ADX. However, the figures provided by the United States' authorities, although disputed by the applicants, show that there is a real possibility for the applicants to gain entry to the step-down or special security unit programmes. First, the Department of Justice's letter of September 26, 2011 shows that while there were 252 inmates in ADX's General-Population Unit, 89 inmates were in the step-down programme. The figures provided in that letter for the Special Security Unit programme, when compared with the November 2010 figures given by Mr Milusnic, demonstrated that inmates are progressing through that programme too. Secondly, Ms Rangel's declarations show that inmates with convictions for international terrorism have entered the step-down programme and, in some cases, have completed it and been transferred to other institutions. Ms Rangel's declaration is confirmed by the Rezaq v Nalley judgment of the District Court where the petitioners, all convicted international terrorists, had brought proceedings to obtain entry to the step-down programme but, by the time the matter came to judgment, had completed the programme and been transferred elsewhere.
>
> 224. Finally, to the extent that the first, third and fifth applicants rely on the fact that they have been diagnosed with various mental health problems, the Court notes that those mental-health conditions have not prevented their being detained in high-security prisons in the United Kingdom. On the basis of Dr Zohn's declaration, it would not appear that the psychiatric services which are available at ADX would be unable to treat such conditions. The Court accordingly finds that there would not be a violation of art.3 in respect of these applicants in respect of their possible detention at ADX.

231. After the Judgment of the European Court was delivered, each of the Applicants instituted judicial review proceedings, in part, on the basis that the European Court of Human Rights had misunderstood the defence evidence and that the European Court was wrong when it said that there was a real possibility for the Claimants to gain entry to the Step Down or Special Security Unit Programmes. (Hamza and others [2012] EWHC 2736 (Admin), (PQD and Ouseley J). This was rejected [58]:

> We are therefore entirely satisfied not only that the EctHR did not fall into the error alleged in its judgment, but also the judgment contains a careful and clear elucidation of the facts which correctly reflected the evidence before it.

232. The High Court considered it clear, that the court looked in detail, not at the overall time a person would spend at ADX Florence, but at the periods of time that were likely to be spent in the differing conditions of restricted confinement as part either of the General Population Programme or part of the Special Security Unit Programme. [60]

233. As this demonstrates, the European Court's consideration of whether detention at ADX Florence is incompatible with Article 3 was founded upon a detailed and careful analysis of the different types of confinement within ADX; entry to the step down programme and of the possibility of transfer to another prison.

234. To the extent that Assange's case (and medical evidence) proceeds on the basis that detention at ADX Florence (whether the individual is subject to SAMs or not) is consistent solitary confinement, unchanging and for the entirety of a sentence this is wrong.

235. In the judicial review following the decision of the European Court of Human Rights, the Applicant Bary also sought to challenge his extradition, again, on the basis of his psychiatric health. The High Court noted:

> "It is very clear from psychiatric reports which go back to 2004 that over a number of years Abdel Bary has experienced symptoms indicating a major depressive disorder which have been exacerbated by the very many years which he has spent in custody awaiting extradition.
>
> 111. In the course of the proceedings before this court in 2009, his psychiatric condition (which was summarised at paragraph 13 of its decision) was one of the significant factors relied upon in support of the contention that to order his extradition would entail a breach of his Article 3 rights, as ADX Florence, Colorado had no proper facilities for dealing with someone with his severe depressive condition.

236. Further evidence was put before the High Court to the effect that Bary continued to experience symptoms of a major depressive disorder and suggested that he was on suicide watch [113]. The report stated that the conditions at ADX would significantly increase the risk of suicide or irreversible psychological harm. The High also referred to a complaint brought before the US Federal District Court in Denver which set out in detail evidence that contradicted that of Dr Zohn and asserted that in practice there was no proper psychiatric care at the ADX facility [114]. The High Court concluded:

> "115. It is clear to us that there has been no material change in the psychiatric condition of Abdel Bary. The decision of this court in 2009 makes clear that there was a suicide risk then, but this court considered that there would be no breach of Article 3. The issue was again considered by the EctHR which again concluded that there would be no breach of Article 3. That court rejected the evidence of the claimants and preferred the evidence of Dr Zohn. That court therefore decided on the facts against all the claimants, including Abdel Bary, in relation to the provision of psychiatric care at the ADX facilities. As the conclusion of Dr Latham in his most recent report is not based on the findings made by the EctHR, it cannot form the basis of a significant material change of circumstances. The fact that Abdel Bary is now on suicide watch was said by Mr Cooper on his behalf to be the significant change. In the context of the claimant's history and the submissions presented in the past, we cannot agree."

237. It is clear that psychiatric disorders of the type suffered by Bary and Ahsan did not preclude their being detained in ADX Florence. Aswat's application to the European Court of Human Rights was considered separately (Aswat v UK (2014) 58 E.H.R.R. 1).

238. Aswat's health condition was such that he was transferred from HMP Long Lartin to Broadmoor Hospital because he met the criteria for detention under the Mental Health Act 1983 [§21]. His continued, compulsory detention in Broadmoor was authorised by the First-Tier Tribunal. It was concluded that he needed to be detained because he was suffering from paranoid schizophrenia [§22].

239. The European Court referred to the evidence before the Tribunal [§22] as to why Aswat needed to remain in hospital. It was the opinion of a psychiatrist that his mental disorder was of a nature that required his detention in hospital for medical treatment and that such treatment was necessary for his own health and safety."

240. A further psychiatric report dated 12 April 2012 described Aswat's condition as follows [§22]:

> "Mr Aswat suffers from an enduring mental disorder, namely paranoid schizophrenia, which has been characterised by auditory hallucinations, thought disorder, delusions of reference, grandeur and guarded and suspicious behaviour. Mr Aswat's condition is currently well controlled on amilsulpride (anti-psychotic medication). However, he has only partial insight into his illness and he would be likely to relapse if he ceased taking his medication…"

241. The starting point for the European Court's consideration of the Aswat case was that he was detained, under the Mental Health Act, in a hospital not a prison because his schizophrenia was of a nature that he needed to be detained for treatment.

242. Aswat's application was brought on the basis that his "uprooting for placement in an as yet unknown and unidentified future environment of which no detail had been provided to the Court, with a risk of placement in conditions of isolation, would not be compatible with art.3 of the Convention." [§39].

243. The European Court approached the case on the basis that whether extradition to the United States would breach art.3 of the Convention very much depended upon the conditions in which he would be detained and the medical services that would be made available to him there. However, any assessment of those detention conditions was hindered by the fact that it cannot be said with any certainty in which detention facility or facilities the applicant would be housed, either before or after trial. [§52]. The Court also pointed out that it did not have adequate information about where the applicant would or could be held, how long the applicant might expect to remain on remand pending trial; if

a competency assessment would extend this and what would happen if he was not fit to stand trial [§52].

244. The European Court noted the following [§53]:

> "[53]… with regard to detention following a possible conviction, the Department of Justice has informed the Court that after sentencing the Federal Bureau of Prisons would decide which institution the applicant should be housed in. The Bureau would assess the applicant within the first 24 hours and if there were concerns about his mental health at that time a doctoral level psychologist would be consulted. In any case, he would be referred to a doctoral level psychologist after 14 days for an evaluation. If the Bureau held a hearing, the applicant could present evidence and make an oral statement to the panel. In deciding which institution he should be housed in, the Bureau would consider any medical, psychiatric or psychological concerns that had been identified. While his mental disorder would not by itself preclude his designation to ADX Florence, the evidence suggested that most inmates with paranoid schizophrenia were not housed in maximum security facilities."
>
> 54. Moreover, according to the information provided by the Department of Justice, mental health services were available in all prisons, including ADX Florence, and both in-patient, residential and out-patient care was available. Conditions of confinement could also be modified if an inmate's mental health was to deteriorate and acutely mentally ill inmates could be referred to a Psychiatric Referral Centre for acute, in-patient psychiatric care. 18
>
> 55. The Court therefore accepts that if convicted the applicant would have access to medical facilities and, more importantly, mental health services, regardless of which institution he was detained in. Indeed, it recalls that in Ahmad it was not argued that psychiatric care in the US federal prisons was substantially different from that which was available at HMP Long Lartin. However, the mental disorder suffered by the present applicant was of sufficient severity to necessitate his transfer from HMP Long Lartin to a high-security psychiatric hospital and the medical evidence, which was accepted by the First-Tier Tribunal, clearly indicated that it continued to be appropriate for him to remain there "for his own health and safety".

245. The European Court however distinguished Aswat's case from those of other Applicants on account of the severity of his mental condition. It found that there was a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.

246. This did not ultimately preclude Aswat's extradition. He was extradited to the United States upon the United States giving assurances about his treatment; Haroon Aswat v Secretary of State for the Home Department [2014] EWHC 3274 (Admin).

247. Finally, in Pham v The United States of America [2014] EWHC 4167 (Admin) (Aikens LJ, Simon J) the submission, based on expert evidence, was that an order made to impose SAMs would restrict considerably all his non-legal contacts, both by telephone and directly, with family, friends and others [38]:

> "The evidence of Mr Dratel before the DJ was that detainees subject to SAMs can become fixated with the terms of their SAMs to the detriment of their defence at the forthcoming trial, thus leading to a breach of Article 6 rights. He goes so far as to suggest that the prospect of the imposition of

> SAMs on a detainee is a part of a "coercive process" which is either designed to or simply does have the effect of eliciting a guilty plea".

248. The Court disposed on this point in short terms [39]:

> "Once again, we regard this argument as speculative. It cannot be known to what SAMs the appellant will be subjected. We think it is fanciful to suggest that any resulting effect of the SAMs could amount to a "flagrant breach" of the appellant's Article 6 rights with regard to his trial in the USA. Similar arguments were raised on behalf of the applicants in the admissibility case before the EctHR of Babar Ahmad and others v United Kingdom . The EctHR found, first, that there was no evidence that SAMs were coercive. Secondly, it recognised that Article 6 and the Eighth Amendment to the US Constitution were "strikingly similar" and that there was every reason to believe that a trial judge would respect a defendant's rights under the Eighth Amendment. Thirdly, the Court found that even if being subject to SAMs would have an adverse effect on the well-being of a defendant, it was not such as to impair their Article 6 rights such as to amount to a "flagrant breach".

249. The Court also rejected a submission that monitoring of legal communications would constitute a breach of Article 6 [42].

250. As regards ADX Florence, the High Court referred to the findings of the District Judge (emphasis added) [45]:

> "45. The DJ made detailed findings of fact about the ADX and the conditions likely to be encountered there if the appellant were to be convicted. The DJ found that if the appellant were to be subjected to SAMs after conviction, then there was a "strong likelihood" that he would be housed at the ADX. The following is a summary of the DJ's findings: the ADX is a high security prison built in the 1990s. It contains a "Special Security Unit" or "H-unit" where the appellant would be likely to be housed. All prisoners have their own cell with shower and lavatory, have "ready access to books", and a television with access to 50 TV networks. <u>This compared very favourably with prison conditions in some Council of Europe states.</u>

251. The High Court rejected that there had been changes since Ahmad and others at the European Court which bore on Article 3. It pointed at [49] to the decision of the Federal Appeal Court decision in <u>Rezaq v Nalley</u> 677 F.3d 1001 (2012) as demonstrating that a placement in the ADX was not indeterminate. It was subject to periodic reviews which could be challenged administratively. <u>Therefore the situation set out in [223] of the EctHR's decision in Ahmad , viz. that if an applicant were at real risk of being detained "indefinitely" in the ADX, it would be possible for the minimum levels of severity to be reached to found a breach of Article 3 was not made out</u>.

252. In short, the European Court found (and the High Court agreed in <u>Pham</u>) that there were different forms of detention within ADX (that an inmate could work progressively through) towards release to another prison and that detention did not amount to an indefinite form of solitary confinement.

253. <u>Rezaq v Nalley</u> is an apt demonstration of this. The Plaintiffs in that case had been housed in ADX Florence. The gravamen of their index offences is apparent from the Court's description of the factual background to the claims:

> "The plaintiffs in these actions were all convicted of terrorism-related offenses. Rezaq was convicted on one count of aircraft piracy for his involvement in the 1985 hijacking of EgyptAir Flight 648, in which fifty-seven passengers were killed. *See United States v. Rezaq,* 134 F.3d 1121, 1125–26 (D.C.Cir.1998) (upholding conviction). Saleh, Elgabrowny, and Nosair were convicted of crimes arising out of their assistance in the 1993 bombing of the World Trade Center and related terrorist plots. *See United States v. Rahman,* 189 F.3d 88, 103 (2d Cir.1999) (upholding convictions)."

254. Each of the Plaintiffs in Rezaq was admitted to the stepdown programme and transferred out of the ADX.

4. *There is no evidence that there has been any change since 2014*

255. The defence suggest that is evidence since these cases were decided to show that there has been a change in circumstances at ADX Florence to warrant reconsideration of these issues.

256. This is a suggestion to be approached with caution. As is set out in all of the judgments. The High Court and the European Court of Human Rights considered these issues in enormous detail and with substantial underlying evidence. All that the defence points to as evidence of change are the following:

(1) An Amnesty International report from 2014 at page 12.

(2) The report of Allard Lowenstein International Human Rights Center Report on SAMs – 'The Darkest Corner: Special Administrative Measures and Extreme.

(3) The example of an individual who spent 17 years in ADX whilst he had a mental health illness.

(4) The Abu Hamza case.

(5) The up to date report of Joel Sickler which deals with the situation as it is now and makes clear that "were Mr Assange to be given a SAM or sentenced to a CMU, his time in federal prison in the United States would be a de facto sentence of solitary confinement". (see paragraph 48).

(6) The lawsuit filed by a group of inmates at ADX Florence in the case of *Cunningham v BOP.*

257. In summary, as regards each of these:

(1) Insofar as Assange relies on page 12 of the 2014 report to demonstrate a change since the decisions cited above, it is clear that the change

considered had taken place many years beforehand. Page 12 describes how group exercise ceased in 2005 because two inmates were killed by other inmates (in separate incidents).

(2) The Lowenstein report is about SAMs and describes the conditions at ADX only at a high level of generality (as opposed to the detail considered by the European Court of Human Rights and the High Court).

(3) The position as regards the detention of mentally ill inmates at ADX Florence has only improved since 2014 as a result of the settlement of *Cunningham v. Bureau of Prisons*, U.S.D.C. (D. Col.). Case No. 1:12-cv-01570-RPM. The settlement of this case included that the District Court retained jurisdiction to enforce the terms of the agreement.

(4) Abu Hamza's case does not provide any evidence of changes to the nature of detention at ADX Florence.

(5) Mr Sickler's affidavit's does not provide any specific evidence which goes to demonstrating a change of circumstances at ADX since 2014. Plainly, Sickler's opinions or views based on materials which describe the same regime as the European Court considered is not adequate.

258. Far from assisting the defence case, the evidence demonstrates that the settlement reached in *Cunningham v. Bureau of Prisons* made significant changes to the detention of the mentally ill at ADX Florence and within the BOP more generally.

259. The defence suggest [skeleton argument 1 §13.13] that the evidence relied upon by the prosecution (the Wiley declarations) which were used in Ahmad (et al) litigation are "a decade out of date". Mr Kromberg refers to these declarations in his Declaration in Support of Request for Extradition, 17 Jan 2020 at §§16- 19 and updates the Court as to the developments in that decade to *improve* the situation.

260. These changes are part of the settlement process in Cunningham v BOP [explain]. They are part of a process of widening access to mental healthcare in other institutions [Kromberg at §18]. To that end the following have been set up:

(1) A secure mental health unit at the United States Penitentiary in Atlanta, Georgia.

(2) A second secure mental health unit at the United States Penitentiary in Allenwood, Pennsylvania.

(3) A secure Steps Toward Awareness Growth and Emotional Strength (STAGES) Program at the United States Penitentiary, at ADX, specifically designed for inmates with personality disorders.

261. Kromberg also states that since the last Wiley declaration, BOP has undertaken the initiatives to improve mental health treatment at BOP and, in particular, at the ADX [Kromberg at §19]:

(1) Developing and implementing behavior-related incentive programs for inmates housed at ADX;

(2) Using and enhancing an at-risk recreation program to identify inmates who are not participating in any recreation programs, attempting to educate them on wellness, and encouraging their participation in a structured recreation program;

(3) Constructing, maintaining, and employing facilities for group therapy at ADX;

(4) Constructing, maintaining, and employing areas for private psychological and psychiatric counselling sessions in all housing units at ADX;

(5) Allowing telepsychiatry sessions to take place in private without the presence of correctional officers;

(6) Screening all inmates housed at ADX as of August 2014, to determine, among other things, whether the inmates have a mental illness. This included a screening record review of all inmates and in-depth clinical interviews of approximately 130 inmates by outside psychiatrists and non-ADX Bureau psychologists;

(7) Clarifying that psychotropic medications are available to any inmate for whom such medication is prescribed, regardless of the inmate's housing assignment;

(8) Ensuring that inmates receiving psychiatric medications at the ADX are seen by a psychiatrist, physician, or psychiatric nurse every ninety (90) days, or more often as clinically indicated for, at a minimum, the first year;

(9) Ensuring that during the screening and classification process identifies inmates with mental illnesses, provides accurate diagnoses, and assesses the severity of the mental illness or suicide risk;

(10) Developing and implementing procedures to ensure that Health Services notifies the psychiatrist, psychiatric mid-level provider, psychiatric nurse, or physician and Psychology Services of inmates who refuse or consistently miss doses of their prescribed psychotropic medications;

(11) Requiring Health Services staff to take steps to ensure that psychotropic medications are prescribed so that they are distributed on pill line;

(12) Assessing all inmates at ADX periodically to determine whether mental illness has developed since the last screening;

(13) At the classification stage, using mental health care levels as defined in the Program Statement, *Treatment and Care of Inmates with Mental Illness*;

(14) Excluding certain inmates with a Serious Mental Illness, as defined in the Bureau's Program Statement 5310.16, *Treatment and Care of Inmates with Mental Illness*, from ADX, except when extraordinary security needs exist. When extraordinary security needs exist, ensuring those inmates are provided treatment and care commensurate with their mental health needs, which includes the development of an individualized treatment plan in accordance with the Policies;

(15) Taking steps to ensure the prompt identification of inmates who develop signs or symptoms of possible mental illness while incarcerated at ADX, to permit timely and proper diagnosis, care, and treatment;

(16) Taking steps to ensure the reasonable access to clinically appropriate mental health treatment for all inmates with mental illness at ADX;

(17) Considering a commitment order under 18 U.S.C. § 4245, or other applicable statute or regulation, for inmates who have a need for, but who do not agree to participate in, a Secure Mental Health Unit or for a treatment program at a Medical Referral Center. An inmate's refusal to be designated to a Secure Residential Mental Health Unit or Medical Referral Center, or a court's denial of a commitment order, is not grounds

or justification to house an inmate with a Serious Mental Illness at ADX. However, if a court denies commitment or determines that an inmate does not have a Serious Mental Illness, permitting that inmate to be placed at ADX if needed for security and safety reasons and providing treatment commensurate with his mental health care level;

(18) Housing certain inmates in need of inpatient psychiatric care at a Medical Referral Center;

(19) If an inmate with Serious Mental Illness who continues to be housed at ADX due to extraordinary security needs declines treatment consistent with his mental health care level, taking steps to develop and implement a treatment plan that includes regular assessment of the inmate's mental status, rapport-building activities, and other efforts to encourage engagement in a treatment process, and, at a minimum, a weekly attempt to engage the inmate;

(20) Offering inmates with Serious Mental Illness who continue to be housed at ADX due to extraordinary security needs between 10 and 20 hours of out-of-cell therapeutic and recreational time per week consistent with their individualized treatment plan;

(21) Taking steps to support inmates with mental illness through creation of wellness programs and recreational activities, specialized training of staff, and care coordination teams;

(22) Developing procedures for heightened review of requests and referrals for mental health services;

(23) Ensuring that any calculated use of force or use of restraints involving an inmate at ADX with a mental illness is applied appropriately to an inmate with such conditions, as set forth in the Policies;

(24) Excluding mental health clinicians from participation as a use of force team member in a calculated use of force situation, other than for confrontation avoidance.

(25) Merging BOP's Electronic Medical Record (BEMR) and Psychology Data System (PDS);

(26) Staffing and hiring four additional full-time psychologists at ADX, one psychiatric nurse, and one psychology technician, with one of the four additional full-time psychologist positions facilitating trauma-informed psychological programming (Resolve Treatment (Trauma) Coordinator);

(27) Ensuring that the ADX Care Coordination and Reentry (CCARE) Team meets monthly, pursuant to the applicable section ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(28) Ensuring that a Mental Health Transfer Summary is completed in BEMR/PDS every time an inmate with mental illness (CARE2-MH, CARE3-MH, and CARE4-MH) transfers out of ADX, pursuant to the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(29) Ensuring the collaboration of Psychology and Health Services staff, beginning no later than 12 months before an inmate's anticipated release with Community Treatment Specialist (CTS) regarding ADX inmates CARE2-MH or higher releasing to an residential re-entry center or home detention, pursuant to the applicable section of the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(30) Hiring a full-time Social Worker for FCC Florence, whose priority is those inmates housed at ADX and who provides Reentry Planning Services within 1 year of an inmate's projected release date, as appropriate, and pursuant to the applicable section of the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(31) Taking steps to ensure that discipline is applied appropriately to inmates with Serious Mental Illnesses or Mental Illness, as set forth in the Policies; and

(32) Enhancing mental health training provided to Bureau staff.

(a) *Application to this case*

262. Taking all of the above, the prosecution case may be summarised conveniently as follows:

(1) **First**, the starting position for consideration of this case is that Assange's mental condition is not of a type or nature that renders his extradition incompatible with Article 3. The defence evidence is orientated towards demonstrating that if extradited to face conditions like those described by Mr Sickler, there is a real risk Assange would become suicidal.

(2) **Second**, the defence argument is speculative as to the conditions that Assange would face. To say that SAMs would be imposed on him says nothing about the nature of the duration of those SAMs. His being subject to SAMs would only occur upon written certification to the Attorney General by the head of a member agency of the United States intelligence community (i) that was reasonably necessary to prevent disclosure of classified information; (ii) that the unauthorized disclosure of such information would pose a threat to the national security and (iii) that there is a danger that the inmate would disclose such information.

(3) **Third**, regardless of whether he was subject to SAMs or not, Assange's detention pre trial would not amount to solitary confinement (as analysed extensively by the High Court and the European Court). For example, it is clear that Assange would enjoy high levels of contact with his defence teams.

(4) **Fourth**, there is no evidence to demonstrate that pre-trial access to medical health breaches Article 3 standards. Even on the defence evidence, it is clear that there is access to hospitalisation for those suffering acute mental health breakdown. The sort of protocols described by Mr Kromberg for suicidal prisoners are akin to the sorts of measures taken by the UK authorities to meet their Article 2 obligations to prisoners [see Declaration in Support of Request for Extradition, 17 Jan 2020 at §§89- 93].

(5) **Fifth**, if convicted, it is possible that Assange could be assigned to ADX Florence. Conditions at ADX Florence meet Article 3 standards and meet them as regards prisoners who suffer from mental illness.

(6) **Sixth**, the case of Aswat v UK does not assist Assange. Aswat's psychiatric condition, at the time of Judgement, was of a wholly different order. The critical difference was, at the time, Aswat was judged to need hospital treatment and was being compulsorily detained at a hospital rather than a prison.

(7) **Seventh**, if he was assigned to ADX, Assange would assessed to see if a serious mental illness precluded detention there [Dr Luekefeld at §32]. As she notes, these assessments have been praised for their effectiveness during a two year monitoring period. Only 14 individuals out of the US prison population who have been found to have a serious mental illness are detained at ADX. That speaks of the exceptionality of this course being taken.

(8) **Eighth** settlement reached in the case of Cunningham v BOP demonstrates that the care of the mentally unwell at ADX Florence has improved since 2014 and has had effects beyond the care of those at ADX Florence.

(9) **Ninth,** ADX Florence marks the most severe conditions that Assange could be detained in. Conditions at other units that restrict communications between prisoners and the outside world do not reach the same level of severity. Housing in Communication Management Unit varies does not constitute solitary confinement; Declaration in Support of Request for Extradition, 17 Jan 2020 at §§104- 105].

IX. DUAL CRIMINALITY

A. The new defence argument

263. The defence argument may conveniently be summarised as follows:

(1) Were the defendant to be tried in England, the prosecution would "need to prove…that Mr. Assange's disclosures were not the result of duress of circumstance" [part 1 §12.2];

(2) The materials revealed by the defendant have exposed war crimes and "been of international importance in shifting US government policy away

from the use of rendition and torture" and have therefore "proven necessary to prevent both danger to life and serious injury" [part 2 §182];

(3) The US offences with which the defendant has been charged "contain nothing approaching a prosecutorial requirement to disprove…necessity" [part 2 §173];

(4) When conduct the dual criminality analysis, where the foreign offence lacks an essential ingredient of the corresponding English offence (for example dishonesty), the description of the conduct must necessarily imply that this ingredient is present [part 2 §§181 citing ***Cleveland v. USA* [2019] 1 WLR 4392**);

(5) To find dual criminality there must be "no possible argument" that the defence of necessity arises in the defendant's case [part 2 §183].

264. The new defence argument is fundamentally misconceived. There is no requirement for the prosecution to 'disprove' necessity. Possible defences are not to be considered at the extradition hearing. 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."

265. In any event the determination of dual criminality is limited exclusively to what is contained in the Request. See section 137(7A) of the 2003 Act. The Request does not raise the such a defence.

266. A similar argument, albeit on stronger grounds by reliance on a statutory defence was rejected by the Supreme Courtin the Canadian extradition case of M.M v United States of America [2015] 3 RCS 973. It held the extradition judge erred in law in weighing and relying on evidence of defences and other exculpatory circumstances. The court held "The extradition judge's role, like that of the preliminary inquiry justice, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden". It is clear beyond argument that Assange at least would bear an evidential burden if necessity was raised as a defence if not a persuasive burden. It follows, like the Canadian system such defence is irrelevant to the court's task here.

1. *Shayler and the defence of necessity*

267. Assuming, *arguendo,* necessity could somehow be raised, it would not apply. Shayler concerned a former member of the security service who, after leaving the service, disclosed a number of documents relating to security or intelligence matters to a national newspaper. This was in breach of an undertaken which he had signed prior to leaving his employment. He was prosecuted under ss1 and 4 of the 1989 Act.

268. At a preliminary hearing during the trial, the trial judge (Moses J as was) ruled that the defence of necessity or duress of circumstance was not open to the defendant, nor could he argue as a defence to the charge that his disclosures were in the public interest to avert damage to life or limb or serious damage to property. *Shayler* appealed this decision.

269. The Court of Appeal ([2001] 1 W.L.R 2206) ruled that the defence of necessity *was* available to a defendant (§§63-4) – provided:

    (1) That the offence was committed to avoid imminent peril of danger to life or serious injury;

    (2) That the injury or danger to life was to the defendant or towards individuals for whom he reasonably regarded himself as being responsible;

    (3) That it must be possible to describe those individuals "by reference to the threatened action which would make them victims" and "to show that the defendant had the responsibility for them because he was placed in a position where he was required to make a choice whether to take the action which it was said would avoid them being injured".

    (4) That the act done was no more than was necessary to avoid the harm feared and was not disproportionate.

270. On the facts of the *Shayler* case, there was no possibility he would be able to rely on the defence of necessity. This was because he could not "*identify any incident which is going to create danger to the member of the public which his actions were designed to avoid. Instead he* [was] *blowing the whistle on the past misconduct of individual members of, and MI5 as a whole…*" [§65]. The defendant's assertion that his disclosures were necessary to reform MI5, as its then operation created a danger to the public was insufficiently precise, and could only identify a risk to members of the public by hindsight.

Such a justification might have afforded a public interest were it available – but is it not [§§65-7].

271. The defence of necessity is precisely that – a defence which must be disproved by the prosecution *if it is raised* [§68]. There is an evidential or persuasive burden on the defendant.

272. The matter was referred to the House of Lords. In the House of Lords, the unavailability of a public or national interest defence was affirmed, as was the compatibility of ss1 and 4 of the 1989 Act with article 10 of the Convention. The House of Lords did **not** consider the issue of the defence of necessity, given that the defendant's case was that he was "appalled at the unlawfulness, irregularity, incompetence, misbehaviour and waste of resources in the service" and that this could not afford a defence of necessity [Lord Bingham at §17]. The ruling of the House of Lords was clear that the Court of Appeal should not have considered the defence of necessity and that the House should not be taken as endorsing the approach of the Court of Appeal on that issue [see Lord Bingham at §17 and Lord Hutton at §117 for example].

273. The position after the decision of the House of Lords in <u>*Shayler*</u> therefore was:

    (1) No public or national interest defence is available;

    (2) Sections 1 and 4 of the 1989 Act are compatible with article 10 of the Convention;

    (3) Whilst the Court of Appeal considered that a defendant might avail themselves of the defence of necessity, this did not apply on the facts to Shayler's case. Furthermore, the defence would be limited to the necessity to avoid imminent peril or danger to life to the defendant or those for whom he was responsible. The House of Lords did not consider the availability of this defence (which Moses J, as was, had decided was unavailable at first instance) but was at pains not to endorse the approach of the Court of Appeal. It is unclear therefore whether, in fact, the defence would be *available at all*. In any event, however, its availability or otherwise is an irrelevance in this case.

274. The defence contention (defence skeleton, part 2 §169) that "UK law – and in particular UK criminal law concerning the Official Secrets Acts" recognizes the "core principles" of a "right to truth" is wrong. The House of Lords in *Shayler* rejected the contention that a "public interest" defence existed, which would allow for disclosures of "unlawfulness"

(see above). Indeed, the House of Lords did not even endorse the existence of a defence of necessity. It was the Court of Appeal, in its obiter observations, that ruled on the availability of a defence of necessity which applies (if it does at all) in the limited form set out above.

B. The prosecution submissions

275. The prosecution submits that the defence argument as to dual criminality is misconceived in that:

(1) It seeks, impermissibly, to rely on material outside the extradition request;

(2) It elides an essential ingredient of the offence (which need be established as part of the dual criminality analysis) with disproving a defence that may be raised (which need not); and

(3) In any event, on the basis of the conduct alleged *in the request* no possible defence of necessity could arise.

1. *The relevant material*

276. As set out in the previous written submissions, the issue of extradition offences must be determined by reference to the request and accompanying papers and not by reference to any extraneous material: United States of America v Shlesinger [2013] EWHC 2671 (Admin), §§5, 11 and 12 and s.137(7A) of the 2003 Act. As a consequence, it is not permissible for this court to look to the material prayed in aid by the defendant. This material is irrelevant to the dual criminality exercise.

2. *Cleveland - Is it necessary to disprove a defence?*

277. Cleveland is authority for the proposition that where the foreign conduct lacks an essential element or ingredient of the equivalent domestic offence, "*that element may be inferred provided that it is an inevitable corollary of, or necessarily implied from, the conduct which will have to be established in that foreign jurisdiction*" (Cleveland §§59).

278. The lack of availability of a defence of necessity *is not an ingredient of the offence.* Rather, necessity is a defence which (if it can be raised at all) must be raised by the defendant and *thereafter* must be disproved by the Crown.

3. *In any event necessity could not arise*

279. In any event, the material provided by the requesting state – the only material which the Court is entitled to consider for this purpose – is demonstrative that no defence of necessity could arise.

280. Breaking the allegations down, count by count, the conduct set out in the request could not raise a proper basis for asserting a necessity defence. The defence would not be available to a defendant who, in the *hope* of uncovering official misconduct, *sought out* official secrets or classified information – obtained illegally through computer hacking or theft, and who received such information pursuant to a pre-existing agreement. It would not be available to a defendant who published unredacted names of sources, knowingly putting their lives at risk.

281. The indictment does not charge the defendant with passively receiving classified information or publishing stolen material which he received unsolicited. Nor does it charge the publication of the stolen material in bulk. Rather, the charges reflect:

    (1) Assange's complicity in *Manning's theft and unlawful disclosure* (counts 1, 3, 4, 9 to 14, 18 Kromberg 1 §19, by way of example). The defence of necessity could not arise here – the defendant was not *"placed in a position where he was required to make a choice whether to take the action*". He was not "responsible" for "victims" he might claim he was trying to protect. He sought the material out. The conspiracy to obtain, receive and disclose national defense information was formed before receipt of the material itself, and the aiding and abetting of Manning's unauthorized disclosures (counts 9 to 14) was as a consequence of discussions prior to the disclosure, at the behest of Assange, and was disclosure to Assange himself. There can be no defence of necessity to the *seeking out* of such information;

    (2) The defendant's *knowing and intentional receipt of national defence information from Manning* (counts 6 to 8, Kromberg 1 §19, Dwyer §70). These counts reflect the provision to Assange of Detainee Assessment Briefs (count 6), State Department Cables (count 7) and the Iraq Rules of Engagement Files (count 8). Again, where the knowing receipt of this information flowed, as it did, from solicitation by the defendant for classified information generally, this could not form the basis of a

necessity defence. It is not necessary for the defendant to *solicit or receive* information in order to prevent death or serious injury to, as yet unidentified, victims;

(3) The defendant's agreement to engage in computer hacking with Manning, and others, and to crack an encrypted password hash (counts 2 and 5, Kromberg 1 §19, Dwyer §§24-32). The defence of necessity plainly could not apply to any of this conduct. So far as the "password hash" allegation is concerned, necessity cannot conceivably justify an agreement to assist in hacking an encrypted password hash in order to allow Manning to access US military computers using a username that did not belong to her. Necessity is an irrelevance. Similarly there could be no issue of the defence of necessity justifying an agreement with a coterie of hackers [for example Jeremy Hammond, Sabu, Topiary], to hack, or to attack, parliamentary phone call audio recordings from a NATO country, or the computer of a former wikileaks associate [Teenager, Kromberg 5 §§24 – 30 and §33], the computer systems of a cyber security company [Gnosis/Teenager, Kromberg 5 §§36-38], 200 US and state government email accounts [Laurelai, Kromberg 5 §42], the computer systems of Intelligence Consulting Company [Sabu/Hammond, Kromberg 5, §51 - 54], and two US police associations [Hammond, Kromberg 5 §54].

(4) The only instances of *distribution* of material relate to and *are limited to* distributing classified information containing the names of individuals in Afghanistan and Iraq (the significant activity reports) and elsewhere (the cables) thus endangering their safety and freedom [counts 15 to 17, Kromberg 1 §20, Dwyer §§38 to 43, confirmed after it was labelled "provably false" by the defence in Kromberg 3 §25-33]. There could be no possible defence of necessity for the publication of such unredacted names, still less so by *knowingly putting lives at risk* [Kromberg 1 §25-64], Dwyer §§44-5, Kromberg 5 §§7, 11(b), 77-8]. This would be incompatible with a necessity defence.

282. For the avoidance of doubt the defence assertion at Part 2, [121] that any disclosure needs to be damaging for the United Kingdom offences unlike the US offence is wrong. The US offences also require proof of:

(1) The documents must relate to the nation's military activities, intelligence gathering or foreign policy;

(2) The documents must be closely held by the United States Government; and

(3) Disclosure of the documents must be potentially damaging to the United States or potentially useful to a foreign nation or enemy of the United States.

283. It follows, like the OSA 1989, there must be damage or likely to be damage by the disclosure.

X. THE INTERNATIONAL CRIMINAL COURT

284. This submission is as confusing as it is hopeless. The defence appears to mount a distinct submission that Assange's extradition ought be barred because his prosecution is "a continuation of US Government's long-standing efforts to preserve the impunity of US state officials involved in the crimes that WikiLeaks helped reveal." [Defence Skeleton Argument 2 at §222].

285. It is unclear what jurisdiction is invoked as the basis for this bar but it the premise of the point is that "*Mr Assange, could be expected to play a significant role in any ICC investigation*" [Defence Skeleton Argument 2 at §223]. The defence suggests that the criminal complaint against Assange was issued after a prosecutor submitted a request to the ICC to open an investigation into the United States.

286. It is assumed (although it is not clear), the defence alleges that this prosecution is a means to stop Assange assisting with any International Criminal Court Investigation. The defence does not say if the ICC has sought Mr Assange's assistance with its investigations (and if it hasn't, what assistance Mr Assange might possibly give).

287. The suggestion that Assange might have a *prominent role* in an investigation is almost risible. Assange may have disclosed materials that provide evidence of alleged wrongdoing but that does not make him a witness to such wrong doing (any more than any other individual who has seen or read the materials). Nor does his role make him an expert.

XI. ABUSE OF PROCESS

288. The prosecution has already served a comprehensive skeleton argument on abuse of process showing the defence application is misconceived. Those submissions dated 17 February 2020 are adopted in their entirety and accordingly not repeated here.

289. As stated above this very limited residual jurisdiction is not an excuse for shoring up defence failures on the bars to extradition.

(1) **First:** Much of what is relied upon to support the application falls outside the Court's implied abuse of process jurisdiction. The Court's abuse of process jurisdiction is regarded as a *residual* one because it covers misconduct not caught by the statutory scheme. Almost the entirety of what is alleged under the broader heading of abuse of process goes to bars to extradition.

(2) **Second**: if (as has previously appeared to be the case) the defence are to invite 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). This approach would lead the Court into basic error. The defendant is not permitted to sidestep that much of the evidence deployed goes to the bars to extradition. Nor 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.

(3) **Third**: The discretion focuses entirely upon whether the statutory regime in the Extradition Act 2003 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).

(4) **Fourth:** Although not required to, the United States has provided a further answer to the allegations made by the defendant. The comprehensive rebuttal is found in GK2 at paragraphs [5] to [13].

(5) **Fifth**: As regards the 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.

A. The heads of abuse

290. In the initial "particulars of abuse of process" document, 11 particulars of abuse were identified. This has now been reduced to seven (defence skeleton part 1 §5.2). They are:

(1) The prosecution and extradition request were initiated and influenced by ulterior, extraneous considerations rather than purely criminal justice reasons [§5.2(i)];

(2) The prosecution is pursued for political reasons and has been accompanied by prejudicial denunciations [§5.2(ii)];

(3) The superseding indictment was introduced for the improper motive of trumping competing criminal allegations in Sweden [§5.2(iii)];

(4) The prosecution and extradition request are for "political offences" which violates the express provision of article 4(1) of the Anglo-US treaty [§5.2(iv)];

(5) There has been a series of deliberate violations of the defendant's right to legal professional privilege [§5.2(v)];

(6) The course of conduct predating the extradition request involved a "violation of the sanctity of asylum" [§5.2(vi)]; and

(7) The history involving a resurrection of allegations dating to 2010 engages the passage of time bar but also "speaks loudly to bad faith and abuse" [§5.2(vii)];

291. 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".

292. 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".

293. 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.

294. 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).

295. 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.

B. Zakrzewski Abuse

296. The correct approach to Zakrzewksi abuse is set out in our earlier skeleton at section IV.

297. It is clear beyond argument that the defence approach is an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the request. The alleged inaccuracies are denied and are therefore trial issues. This court cannot determine contentious issues of fact upon which to ground an abuse of process.

298. There are three areas raised by the defence:

(1) The "passcode hash" allegation;

(2) The "most wanted list"; and

(3) Recklessness as to sources.

299. 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.

300. As a starting point, Gordon Kromberg has responded to the oral accusations made by counsel for the defendant at a hearing on 25th February 2020 to the effect that descriptions or allegations in the request are "knowingly false", "utter rubbish", and "lies, lies and more lies". These allegations are categorically denied [Kromberg 4, §3]. To maintain an allegation without probable cause, or to knowingly make a false statement or introduce false evidence would expose the Mr. Kromberg to professional sanction by the bar authorities and Department of Justice [Kromberg 4, §4].

1. *First Zakrzewski complaint: The most wanted list*

301. The submissions in our previous skeleton are repeated.

302. In relation 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.

303. The prosecution case is:

(1) On its website "Wikileaks expressly solicited classified information for public release" [Dwyer, §5 second superseding indictment §2];

(2) Evidence gathered shows that the most wanted list was intended by the defendant to "encourage and cause individuals to illegally obtain and disclose protected information, including classified information to wikileaks contrary to law" [Dwyer §§14-16, Kromberg 4 §19, §22]. It was intended to recruit individuals to hack into computers and/or illegally obtain and disclose classified information [second superseding indictment §3, Kromberg 5 §18]. This was accompanied by public declarations given by the defendant himself at, for example, conferences [Dwyer §16, second superseding indictment §§3-6]].

(3) Manning responded to the list. She performed searches which are directly related to material requested on the most wanted list [Kromberg 2 §12,

Dwyer §19-21], and the material provided by Manning was *consistent* with the list [Kromberg 2 §13].

304. The first defence submission is 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 [part 2 §88].

305. 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, Kromberg 4, §42]. Thereafter Ms. Manning refused to testify before a grand jury and has been found to be in contempt [§§145-156]. 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. The defendant's submissions as to this issue amount to an evidential dispute of the kind that is irrelevant in extradition proceedings.

306. Thereafter, the defence argument lists a series of points which are classically trial issues and classically **not** for this court to consider [part 2 §91]:

    (1) That the most wanted list is said to have been offline between January to March 2010;

    (2) That the "list" was not on wikileaks's homepage

    (3) That there is "no evidence that Manning ever searched for or accessed the 'list'".

307. Of course, no such "evidence" would be required to accompany an extradition request, nor would a court in this country ever request such evidence. Nonetheless, it is clear that the prosecution case is, as noted above, that Manning performed searches related to material requested on the list [Kromberg 2 §12, Dwyer §19-21], and that the material provided by Manning was consistent with the list [Kromberg 2 §13].

    (1) *That Manning in an "online confession" claimed an alternative motivation.* In the same way that the US prosecution need not be bound

by Manning's self serving and unchallenged evidence at her Court Martial, nor are they bound by a previous "online confession".

(2) *That the list was a collaborative page which could be edited by others* [part 2 §86]. The contrary was never alleged. The prosecution case is that the defendant used the list to encourage and cause individuals to illegally obtain and disclose information to Wikileaks [Dwyer §16, Kromberg 4 §19]. The defendant posted the list on Wikileaks and encouraged others to break the law and provide information in response [Kromberg 4 §19-20, Dwyer §16].

308. The fact that the Iraq and Afghan War Diaries, or the Guantanamo detainee assessment briefs, or the State Department cables were never on the list [part 1 §92] is an irrelevance. Indeed, it has never been asserted that they were [Dwyer §§15-6, Kromberg 4, §21].

309. In this regard, it is incorrect to suggest, as the defence do, that the allegation has "morphed" by reference to Mr. Kromberg's fourth affidavit [part 2 §95, by reference to Kromberg 4 §22]. It has not. Indeed, Mr. Kromberg repeats and explaind the allegation in his fourth affidavit by reference to Mr. Dwyer's original affidavit. The allegation is consistent.

310. This defence argument amounts to a simple disagreement with the prosecution case. Namely, a classic triable issue.

311. 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]). Indeed, Mr. Kromberg notes that the defendant would be able to ventilate his submission that the Most Wanted List did not solicit relevant databases, he can [Kromberg 4 §23].

2. ***Second Zakrzewski submission – the encrypted password hash***

312. It should be noted that the scope of new count 2 (previous count 18) has been broadened by the second superseding indictment. Count 18 now encompasses the defendant's agreement to recruit, and agreement with, other hackers in addition to Manning (Teenager, Jeremey Hammond, Sabu, Laurelai) to commit computer offences to benefit wikileaks. The Zakrzewski abuse relates only to one element of the count – the agreement to crack an encrypted password hash.

313. The submission on the encrypted password hash is also broken down into a number of individual criticisms. Taking each in turn.

Number and nature of messages – part 2 §100

(1) As to the apparently small number of messages in which the password hash was discussed [part 2 §100], this is irrelevant. It is nothing to any inaccuracy in the request. As to the apparent lack of discussion of the purpose to which the decrypted hash value might be put [part 2 §100], this is a pure evidential matter. Both these criticism are irrelevant to any Zakrzewski submission.

Hash value was insufficient to crack the password

(2) The defendant submits that the encrypted hash value was, without the encryption key, insufficient to be able to crack the relevant password [part 2 §101, Eller Tab 17 §§29-36]. Even if correct, this is irrelevant. It does not prevent it being an overt act evidencing the agreement as described in the request. It does not affect the accuracy of the request. The fact that the conspirators are said not to have possessed all the information they needed to crack the encrypted password does not mean that the agreement did not exist.

Indeed, as stated by Gordon Kromberg "the superseding indictment used the term "portion of a hash" to make clear that – ordinarily – one would need more than what Manning gave Assange in order to derive the password hash" [Kromberg 2 §8]. The US authorities do not, however, concede that the success of the conspiracy was impossible – nonetheless, this is irrelevant as a matter of US law [Kromberg 2 §9].

"Easier ways"

(3) That it is said there were "easier ways" to obtain the hash value [part 2 §101, Eller Tab 17, §§63-65] is, again, irrelevant. It has nothing to do with the accuracy of the request. It is a potential argument at trial ("if we had really meant to decrypt a passcode hash value we would have done it this way…"), but another irrelevance in these proceedings.

Logging into military computers using a username not belonging to Manning

(4) The defence contend that the allegation that the agreement to decrypt the passcode hash was in order for Manning to log into military computers

under a username which did not belong to her is "entirely misleading" as [§103]:

(i) *Using another ftp user account would not have provided Manning with any greater level of access than she already had*. This is irrelevant. There is no allegation that the passcode hash was to be decrypted to allow for a greater level of access.

(ii) *It is impossible for Manning to have downloaded data anonymously*. The request does not allege that this would be the case. Rather, the allegation is that "Had Assange and Manning been able to crack the password hash, Manning may have been able to log onto classified computers under a username that did not belong to her, *making it more difficult for investigators* to identify Manning as the source…" [Dwyer, §7, §29]. The allegation have never been that the purpose of the hash cracking agreement was to obtain anonymous access to the Net Centric Diplomacy database, or any other database [Kromberg 4 §11]. Rather, it is alleged that the conspiracy would assist in Manning acquiring and transmitting classified information (not from any particular named database) to wikileaks for onwards dissemination as Manning may have been able to log into a computer under a username that did not belong to her, which would make it more difficult for investigators to identify her as the source [Kromberg 4 §11]. Given the multi-step process undertaken by Manning, "access to computer or computer account not easily attributable to her could be a valuable form of anti-forensics" [Kromberg 4 §12]. Making it more difficult to identify Manning's was of use both in relation to the database from which the material was stolen but also the computer used to steal the documents. *Manning already had (informal) access to the accounts of other soldiers.* This is based on Eller's assertion [§57] that in an interview with a former supervisor of Manning's, it was stated that it was common for some Soldiers not to log out of the computers and permit other analysts to use the laptop without logging in. This is, again, an irrelevance. It does not prevent the agreement between Assange and Manning to decrypt the hash to have been for the purpose of making it more difficult to trace Manning. If anything it is a trial point.

(iii) *The only documents downloaded after the hash conversation were the state department cables which Manning already had authorisation to view.* Again, this is irrelevant and casts

no doubt on the accuracy of the request. Indeed, it has always been the US case that "at the time Assange agreed with Manning to crack the password hash, *Manning had already provided Wikileaks with hundreds of thousands of downloaded classified documents"* [Dwyer §7]. In any event, as noted above, it is not part of the prosecution case that the agreement to decrypt the hash code was in order to obtain greater access. It was, rather, with the purpose of making it more difficult to identify Manning as the source of the leaks.

(iv) *That the "true use" of the password hash conspiracy could have been directed towards "installing home videos"*. This is an irrelevance. It is a potential defence. It is not the case against the defendant. The defendant is well able to advance this defence at trial. To permit the defence to litigate such a suggestion perverts the abuse jurisdiction set out in Zakrezewski.

Bartnicki

(5) The defence submit (part 1, at §6.2, part 2 at §79) that "the passcode hash allegation is a necessary part of the US prosecution in order to escape the long held position that publishing state secrets of itself is lawful" unless the publisher was involved in the underlying theft, by reference to Bartnicki v. Vopper (2001) 532 US 514. This is pure desperation by the defence. First, the defence misstate the legal position and secondly it is clear evidence of the unlawful agreement. Furthermore, Bartnicki, the authority on which the defendant relies for his contention that publishing of classified information is illegal absent involvement in the underlying theft has "nothing to do with the publication or receipt of classified information" [§10]. It concerned a dispute between a school board and teacher's union. It did not touch upon classified national defense information which is generally not protected by first amendment rights. It is distinguishable from the present case in any event, and does not apply to classified information disclosures [Kromberg 2 §§10-11].

314. The second head of Zakrzewski abuse identified by the defendant must fail because, first, the particulars are not misleading; Secondly the court should not entertain rival constructions of US law under the heading of abuse of process, and thirdly because the facts relied on by the defendant are not clear beyond legitimate dispute. They raise a trial issue.

3. *Zakrzewsi argument 3: Recklessness as to sources*

315. This is the final head of Zakrzewski abuse. It is said, in short, that the allegation that the defendant published classified materials without redacting the names of sources, thus endangering the lives of those sources, is "wrong on a number of levels".

316. The second superseding indictment, in counts 15, 16, and 17 makes the allegation against Assange that he distributed the significant activity reports (counts 15 and 16) and State Department Cables (count 17) containing the named human sources not only on the internet but also directly to persons not authorized to received them [Kromberg 5 §11, second superseding indictment counts 15 - 17].

4. *Due diligence*

317. The issue of any due diligence undertaken by Assange, or steps he claims to have taken to edit the documents, or that wikileaks took the issue of redaction "seriously" [part 2 §115, 116 by way of example) is an irrelevance. The allegation, and the fact, remains that he published the names of local Iraqis and Afghans (in the significant activity reports, Kromberg 4 §33), and local sources in other countries (in the State Department Cables). That Assange would wish to assert that he or his associates in fact took care in redacting material would be part of his defence in America.

318. Also, to the extent that Assange argues that he, or wikileaks, formed "media partnerships" with others, in order to make decisions on what to publish and what to redact [part 2 §§114-5], this is irrelevant to the extradition process. It *may* be relevant at a future trial in America. It does not show that anything in the request is materially misleading or wrong.

5. *Harm*

319. Ultimately, this is yet another trial issue. The Indictment specifically avers he caused harm. Damage is a necessary ingredient in both jurisdictions. The affidavit in support of the Request shows harm was caused and that accords with common sense.

320. However, there is no doubt that the allegation against Assange is the publishing of unredacted classified information which put lives at risk. By way of example:

Activity reports – counts 15 and 16

(1) The significant activity reports (both Iraq and Afghanistan) were published by wikileaks and included the names of local Afghans and Iraqis who had provided information to the US and coalition forces [Kromberg 1 §25]. The publication created a grave and imminent risk to innocent people [Kromberg 1, §26], including in documents classified up to SECRET level [Kromberg 1 §39]. The documents were studied by Al-Qaeda and Osama Bin-Laden [Kromberg 1 §36];

(2) After the publishing of Afghanistan significant activity reports in July 2010 the US Department of Defense created a task force which identified hundreds of Iraqis and Afghans who were at risk [Kromberg §27];

(3) The Talbian announced in July 2010 that it was reviewing the wikileaks publications to identify "spies" to punish" [Kromberg §42]

State department cables – count 17

(4) The state department cables published by wikileaks included the names of persons throughout the world, including journalists, religious leaders and human rights activists [Kromberg 1 §25]. The publication created a grave and imminent risk to innocent people [Kromberg 1, §26], including people in Iran, China, and Syria [Kromberg 1 §§45-59];

(5) After the publishing of the cables a task force was created which identified hundreds more individuals facing "death, violence or incarceration" [Kromberg 1. §28]. Fifty people sought and received assistance from the US. The damage included loss of employment and freezing of assets in additional to physical risks, and arrest [Kromberg 1 §30-35];

321. The request does not mislead about this. It is entirely accurate. If Assange wishes to assert, by way of defence, that he did not do this, then this is a trial issue which Assange is free to litigate in America.

322. Assange contends that "no actual harm occurred". This is a classic evidential dispute of the kind which this court should not entertain. In any event, the material relied on by the defendant to show a lack of harm shows **no such thing**:

Significant activity reports

(1) The assertion that a US claim that 300 lives could be endangered by the publication was "later shown [to be wrong]: they had discovered the 300 names in their own copy of the documents" [part 2 §135] comes from two interviews with the **Assange himself** [Q3, and Q4]. In essence, the defendant's submission is "the prosecution claim harm was caused, I deny this, this amounts to a Zakrzewski abuse". For obvious reasons this is utterly untenable.

(2) The evidence of Dardagan, quoted at part 2 §135 is to the effect that "reliable reporting on the matter" has concluded that the US government has never been able to demonstrate a single individual has been harmed by the Iraq significant activity logs. This "reliable reporting" has never been identified. It is hearsay. The position of the US government, as reflected in this request, is clear.

(3) The evidence of Overton [tab 62 §13] that he has found no evidence of harm caused by the Iraq significant activity logs is immaterial. He does not, of course, have access to the evidence which will be relied on in this prosecution. He cannot, and does not, say that the publishing of the logs caused no harm, merely that he has found no evidence of such harm.

(4) It is **misleading** to state that the Senate Committee on Armed Services reported in August 2010 that "the review to date has not revealed any sensitive sources and methods compromised by disclosure [part 2 §135]. The letter also states, entirely consistently with the case as presented to this court, that "The documents do contain the names of cooperative Afghan nationals and the Department takes very seriously the Taliban threats recently discussed in the press. We assess this risk as likely to cause significant harm or damage to the national security interests of the United States and are examining mitigation options…". It is clear from the letter that, contrary to the defence case, the Afghan significant activity reports **did** contain the unredacted names of co-operating locals, who were put at risk.

Cables

(5) The statements of Disch-Becker and Gharbia [part 2 §135] simply confirm that they "know of no-one who was physically harmed in our respective countries (or in any country) as a result of the publishing of these leaks" [§9]. This is quite different to an assertion that no harm occurred. These witnesses are not in the same position as the US government to assess harm and do not have access to the evidence to be relied on at trial.

(6) The defendant relies on the evidence of Cockburn to the effect that the task force chaired by Brigadier General Carr had found no evidence of any source being harmed as a result of the publishing of the cables. Cockburn asserts that Brigadier General Carr's evidence at Manning's Court Martial revealed that "his team…hadn't been able to find a single person amount the thousands of American agents and sources in Afghanistan and Iraq, who could be shown to have died because of the disclosures" [§12]. The reference to Iraq and Afghanistan indicates that Cockburn is referring to the significant activity reports and **not** the State Department cables. In any event, his suggestion is undermined by the evidence before the Court - Brigadier General Carr told the Court Martial that the leak of the SARs included the names of co-operating locals and the Department of Defense notifications to try to mitigate harm to those individuals [Krombger 4 §28].

Prior publishing of the cables – count 17

(7) The defendant suggests that, due to the release of the password for an online, encrypted file containing the cables in a book written by Guardian reporter David Leigh, other websites including Cryptome and the Pirate Bay were able to release the cables in the period of 31st August 2011 to 1st September 2011, that is a day or two before the defendant. This is said to amount to a Zakrzewski abuse.

323. There is no Zakrzewski issue. There is nothing materially misleading or inaccurate in the extradition request. The defendant appears to accept having published, unredacted, the cables – he merely asserts that others had the opportunity to do so first.

324. The American prosecuting authorities have confirmed that the case against this defendant is that he *placed sources at risk of harm – regardless of whether other actors released the information a day or two before him* [Kromberg 4 §37]. This is especially so when it was the defendant who disseminated the file with the unredacted names in the first place. Indeed, Wikileaks itself claimed to have published over 130,000 of the cables on 29th August 2011, before Cryptome and the Pirate Bay, leading to expressions of concern and alarm from the media [Kromberg 4 §38].

325. Furthermore, as an indication that the defence theory in this regard is by no means widely accepted, Mr. Leigh and the Guardian have publicly disputed the defendant's version of events as a "complete invention" [Kromberg 4 §39].

326. Furthermore, the defence suggestion that others had published the cables in the days before wikileaks is relevant *only* to count 17. There is no evidence that the significant activity reports, which were published unredacted in July 2010 (Afghanistan) and October 2010 (Iraq), had been previously published so as to identify sources by anyone else. There is nothing to explain the justification of these publications.

327. Whilst the defence submit that Wikileaks published the activity reports after Der Spiegel and The Guardian [part 2 §116] relying on Goetz tab 31, Worthington tab 33] this submission is at misleading. The underlying evidence makes it clear that Wikileaks published different material to the Guardian and Der Spiegel:

    (1) Re: Goetz, the evidence is that there were no written agreements. The media partners and Wikileaks would publish at the same time, but would do "independent stories and our stories would refer to and link to the documents posted on the Wikileaks website" [Goetz §10]. The Guardian published a few hundred documents on their site before Wikileaks, Wikileaks had a technical delay and published a couple of hours after Der Spiegel [Goetz §10]. Goetz was not involved in the Iraq significant activity redaction process [Goetz §20], and cannot comment on it; and

    (2) Re: Worthington, Worthington speaks to the Guantanamo detainee assessment briefs and not the significant activity logs.

328. There is **no** Zakrewski argument as to the misrepresentation of the defendant's publication of the significant activity logs [counts 15 and 16].

329. The issue of recklessly revealing the identity of those named within the materials Wikileaks published is Mr Assange's defence; it is a trial issue *par excellence*.

330. It is of note that the five media partners with whom Wikileaks worked drew a distinction between their handling of the material and Wikileaks' 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).

331. The Guardian newspaper published on 2 September 2011[6] the following:

> "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."

332. The New York Times published on 25 July 2010[7]:

> "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.

333. The New York Times magazine published on 26 January 2011[8]:

> "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."

6 https://www.theguardian.com/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables
7 https://www.nytimes.com/2010/07/26/world/26editors-note.html
8 https://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html

> "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"
>
> "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."

No "key" human sources

334. The defence rely on the evidence of government officers that the Iraq and Afghan war diaries did not contain "key human sources" [part 2 §116]. As noted [Kromberg 4, §§26-7] this is not the same as containing *no* sources. The request has never stated that the publishing of the material endangered key sources, merely any sources. In any event, the evidence at Manning's Court Martial *did* reflect that the significant activity reports contained the unredacted names of local nationals who had provided information [Kromberg 4 §28]. No Zakrzeswki issue arises.

XII. CONCLUSIONS

335. For the reasons set out above all the defence submissions must fail.

James Lewis QC

Clair Dobbin

Joel Smith

2 September 2020