

HIGH COURT DECISION MAY POSE NEW CHALLENGES TO JULIAN ASSANGE PROSECUTION

The British High Court today issued a ruling provisionally giving Julian Assange permission to appeal his extradition on three grounds. But before he can do that, the US has an opportunity to give assurances on those grounds to address specific concerns.

The court put everything on hold, then, for 55 days to allow that reassurance process to happen.

We adjourn the renewed application for leave to appeal on grounds iv), v) and ix). The adjournment is for a period of 55 days until 20 May 2024, subject to the following directions:

i) The respondents have permission to file any assurances with the court by 16 April 2024.

ii) In the event that no assurances are filed by then, leave to appeal will be granted on grounds iv), v) and ix).

iii) In the event that assurances are filed by 16 April 2024, the parties have permission to file further written submissions on the issue of leave to appeal, in the light of the assurances, such submissions to be filed by the applicant by 30 April 2024, and by the respondent and the Secretary of State by 14 May 2024.

iv) In the event that assurances are filed by 16 April 2024, we will consider the question of leave to appeal at a hearing on 20 May 2024.

One of those three grounds – that he might become eligible for the death penalty – will be easily dispensed with, as the US easily dispenses with similar concerns in terrorism cases.

When I first read the judgment, I assumed the other two issues would be similarly dispensed with easily (and the judges certainly seem inclined to grant extradition if they get appropriate assurances).

The third ground for appeal, after all, pertains to whether Assange will be treated as a *defendant* like an American would be. And since the Espionage Act doesn't allow for content-based defenses, Assange would be no worse situated than any other Espionage Act defendant – arguably including Donald Trump (whose 2010 attacks on Assange were one basis for raising concerns about the death penalty).

But the second basis for appeal may be more tricky for the US to issue assurances.

It has to do with whether the First Amendment gives Assange equal protection to what he'd get under Article 10 of the European Convention on Human Rights.

The judges seem inclined to adopt Baraitser's analysis that, so long as Assange can rely on the First Amendment, it would (and therefore that if the US says he can do so, the extradition can be approved).

However, we agree with the judge that extradition of the applicant would not involve a flagrant denial of his article 10 rights. In summary, that is because:

i) The First Amendment gives strong protection to freedom of expression, which broadly reflects the protection afforded by article 10 of the Convention. On the assumption that the applicant is permitted to rely on the First Amendment, it is not arguable that extradition will give rise to a real

risk of a flagrant denial of his article 10 rights.

ii) Counts 1 to 14 and 18 concern conduct which is contrary to the criminal law and which does not directly concern free expression rights. The prosecution of such conduct does not involve a flagrant denial of article 10 of the Convention.

iii) Counts 15, 16 and 17 concern the publication of the names of human intelligence sources. There is a strong public interest in protecting the identities of human intelligence sources, and no countervailing public interest justification for publication has been identified.

iv) There were strong reasons, as the judge found, to conclude that the applicant's activities did not accord with the "tenets of responsible journalism".

But as I noted here, that analysis is fine for the extradition question. It's fine to rule that Assange would get at least the same protections as he would in Europe.

It's another thing altogether for use in a US courtroom.

That's because the First Amendment *doesn't include a balancing test* of privacy versus public interest present in the ECHR.

Rather, in language that would apply equally to Assange's indiscriminate publication of the DNC and Podesta emails (as well as the publication of the Turkish and Saudi emails), Baraitser argued that Assange's publication in bulk was not protected because it did not and could not properly weigh the risk to others.

This part of the ruling, in particular,

would not translate into US law. There is no such privacy balance in the US outside of much weaker defamation laws. And so this part of the ruling does not offer much comfort with regards the existing charges as precedent in the US context.

Whereas in Europe, you have to act like a journalist to get protections as one (which Baraitser said Assange did not, especially not with respect to the three counts of publishing the identities of US and Coalition sources, which had little public interest value to counterweigh the harm he did to those whose names he published), in the US one does not have to adhere to journalistic principles to be protected by the First Amendment.

The US may have real concerns about giving assurances sufficient to meet this particular concern. If they do, Assange would be able to argue that the US was unfairly applying prior restraint to him in a way it doesn't others – including Cryptome's John Young, who has repeatedly tried to intervene in Assange's case in various ways, each time on the basis that he published the State cables without punishment.

All that may be for the best. Faced with such a choice, the US might choose to drop the case entirely (or drop the three most damaging charges, if they are able to do that). I doubt they would drop it entirely, but they could.

They could also pursue the misdemeanor plea the WSJ recently reported, though as reported that seemed like mostly Assange-derived fluff.

Or they could limit the kinds of evidence they use on these charges. One thing that distinguishes Assange from journalists – and from Young – for example, is that *prior to* publishing all the cables without adequate redaction, he first shared a subset of them with Israel Shamir, who then gave them to (at least) Belarus. At least for the state cables,

prosecutors could prove the dissemination charge *without relying on publication* altogether. Doing so would not only mitigate the damage this precedent would cause, but would get to the real damage that releasing those identities did, willfully giving dictators advance notice to retaliate against US sources before the US could take mitigating measures.

Finally, the might just note that *Bartnicki* does not apply because Assange allegedly was involved in the theft of the documents in question. Who knows. Depending on what happens with the Project Veritas investigation associated with Ashley Biden's diary, DOJ might soon have a US citizen being prosecuted in a similar situation.

I imagine the US would have no problem assuring the Brits that Assange would have the same stinky content-based First Amendment rights as other Espionage Act defendants. The question is whether they'd be willing to allow Assange to argue that his prosecution amounted to prior restraint.