

The Assange Case: A Flicker of Hope in the UK High Court

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It was faint, but there was more than just a flicker of hope. In the tormented (and tormenting) journey the WikiLeaks founder and publisher, Julian Assange, has endured, May 20, 2024 provided another pitstop. As with many such stops over the years, it involved lawyers. Many of them.

The occasion was whether the UK High Court of Justice would grant Assange leave to appeal his extradition to the United States to face 18 charges, 17 hewn from the monstrous quarry that is the Espionage Act of 1917. He is wanted for receiving and publishing classified US government materials comprising diplomatic cables, the files of those detained in Guantanamo Bay, and the wars in Iraq and Afghanistan. Any computed sentence, glacially calculated at 175 years, would effectively spell his end.

News on the legal front has often been discomfiting for Assange and his supporters. The US has been favoured, repeatedly, in various appeals, chalking up the lion's share of victories since successfully overturning the decision by Judge Vanessa Baraitser to bar extradition in January 2021 on mental health grounds. But Justice Johnson and Dame Victoria Sharp of the High Court of Justice in London promised to keep matters interesting.

A key sticking point in the proceedings has been whether the First Amendment would protect Assange's publishing activity in the course of any trial in the US. The attitude from the central US prosecutor in the extradition proceedings, Gordon Kromberg, and former Secretary of State and ex-CIA director Mike Pompeo, has been one of hearty disapproval that it should.

Pompeo's remarks in an infamous April 2017 [address](#) as CIA director to the Center for Strategic and International Studies openly branded WikiLeaks "a hostile intelligence service" that proselytised in the cause of transparency and aided such powers as Russia. Assange "and his kind" were "not in the slightest bit interested in improving civil liberties or enhancing personal freedom. They have pretended that America's First Amendment freedom shield them from justice." They were "wrong" to have thought so.

On January 17, 2020, Kromberg [submitted an affidavit](#) to the UK district court that was eye opening on the subject. The following remains salient:

"Concerning any First Amendment challenge, the United States could argue that foreign nationals are not entitled to protections under the First Amendment, at least as it concerns national defense information, and even were they so entitled, that Assange's conduct is unprotected because of his complicity in illegal acts and in publishing the names of innocent sources to their grave and imminent risk of harm."

In March 2024, the High Court curtly dismissed six of the nine arguments submitted by Assange in part of his effort to seek a review of the entire case. The judges, anchoring themselves in the initial reasoning of the district court judge, refused to accept that he was being charged with a political offence, something barred by the US-UK Extradition Treaty, or that the CIA had breached lawyer-client privilege in having spied on him in the Ecuadorian embassy in London, not to mention the [serious thought given](#) to abduction and assassination.

The judges [gave](#) the prosecution a heavy olive branch, implying that the case for extradition would be stronger if a number of assurances could be made by the US prosecution. These were, in turn, that Assange be offered First Amendment protections, despite him not being deemed a journalist; that he not be prejudiced, both during the trial and in sentence, on account of his nationality, and that he not be subject to the death penalty. The insistence on such undertakings had a slightly unreal, woolly-headed air to them.

On April 16, the US State Department filed the fangless assurances in a diplomatic [note](#) to the Crown Prosecution Service (CPS).

"Assange will not be prejudiced by reason of nationality with respect to which defenses he may seek to raise at trial and at sentencing." If extradited, he could still "raise and seek to rely upon at trial (which includes any sentencing hearing) the rights and protections given under the First Amendment of the Constitution of the United States. A decision as to the applicability of the First Amendment is exclusively within the purview of the US Courts."

The US authorities further undertook to avoid seeking or imposing the death sentence. "The United States is able to provide such assurance as Assange is not charged with a death-penalty eligible offense, and the United States assures that he will not be tried for a death-eligible offense." This can only be taken as conjecture, given the latitude the prosecution has in laying further charges that carry the death penalty should Assange find himself in US captivity.

In court, Edward Fitzgerald KC, representing Assange, [explained](#) with cold sobriety that such an assurance made no guarantee that Assange could rely on the First Amendment at trial.

“It does not commit the prosecution to take the point, which gave rise to this court’s concerns, i.e. the point that as a foreign citizen he is not entitled to rely on the First Amendment, at least in relation to a national security matter.” In any case, US courts were hardly bound by it, a point [emphasised in the statement](#) given by defence witness and former US district judge, Professor Paul Grimm. It [followed](#) that the assurance was “blatantly inadequate” and “would cause the applicant prejudice on the basis of his nationality.”

Written submissions to the court from Assange’s legal team also [argued](#) that discrimination “on grounds that a person is a foreigner, whether on the basis that they are a foreign national or a foreign citizen, is plainly within the scope of the prohibition [against extradition under the UK Extradition Act 2003]. ‘Prejudice at trial’ must include exclusion on grounds of citizenship from fundamental substantive rights that can be asserted at trial. On the US argument, trial procedures could discriminate on grounds of citizenship.”

In response, the US submitted arguments of a headshaking quality. Through James Lewis KC, it was submitted that the High Court had erred in its March judgment in equating “prejudice on grounds of foreign nationality with discrimination on grounds of foreign citizenship”. The UK Extradition Act mentions “nationality” in preference to “citizenship”. These terms were not “synonymous”.

According to Lewis, Article 10 of the European Convention of Human Rights (ECHR) protecting journalists and whistleblowers [was qualified](#) by conduct “within the tenets of reasonable and responsible journalism”. One factor in this context “whether it is reasonable and responsible is where the publication took place - inside a member state’s territory or outside a member state’s territory.”

The prosecution’s written submissions [summarise](#) the points. The First Amendment’s applicability to Assange’s case depended on “the components of (1) conduct on foreign (outside the United States of America) soil; (2) non-US citizenship; and (3) national defense information”. Assange, Lewis elaborated, “will be able to rely on it but that does not mean the scope will cover the conduct he is accused of.”

The prosecution suggested that former US Army whistleblower Chelsea Manning, a vital source for WikiLeaks, had been unable to rely on the First Amendment, limiting the possibility that its protections could extend to covering Assange.

Mark Summers KC, also representing Assange, [was bemused](#).

“The fact that Chelsea Manning was found in the end to have no substantial First Amendment claims tells you nothing at all. She was a government employee, not a publisher.”

He also [made the point](#) that “You can be a national without being a citizen [but] you cannot be a citizen without nationality.” It followed that discrimination arising out of citizenship would result in discrimination based on nationality, and nothing adduced by the prosecution in terms of case law suggested otherwise.

Unconvinced by the prosecution’s contorted reasoning, Dame Victoria Sharp agreed to grant leave to Assange to appeal on the grounds he is at risk of discrimination by virtue of his nationality, in so far as it affects his right to assert protections afforded by Article 10 of the ECHR and the First Amendment.

It remains to be seen whether this legal victory for the ailing Australian will yield a sweet harvest rather than the bitter fruit it has. He remains Britain’s most prominent political prisoner, held in unpardonable conditions, refused bail and subject to jailing conditions vicariously approved by those in Washington. In the meantime, the public campaign to drop the indictment and seek his liberation continues to ripen.

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