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Letter from London: Worrying Turn in Assange Case

By Alexander Mercouris
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In my previous letter I discussed how Julian Assange's case had taken a strange and worrying twist. The results of Wednesday's High Court hearing is even more troubling for the WikiLeaks publisher.

The High Court in July granted the U.S. government permission to appeal the Jan. 4 decision of **District Judge Vanessa Baraitser** to refuse the U.S. government's request for Assange's extradition to the United States, where he faces charges under the Espionage Act 1917 and for conspiracy to commit computer intrusion.

The grant of permission was however limited to essentially a single ground: whether Baraitser erred by failing to provide the U.S. government with an opportunity to provide her with 'assurances' about the conditions of detention in which Assange would be held if he were extradited and convicted in the United States.

Permission to appeal on another ground, whether Baraitser was right to base her assessment of Assange's health, and of the risk that he might commit suicide if he were to be kept in rigorous conditions of confinement in the United States, on the evidence of Professor Michael Kopelman, was however refused.

The U.S. government would not accept this decision, and in a most unusual step, obtained a hearing in the High Court on Wednesday in order to appeal that part of the High Court's decision which had refused permission to challenge the part of the appeal which concerned the issues of Assange's health and the evidence of Professor Kopelman.

As previously reported by Joe Lauria, at this hearing the High Court reversed its earlier decision to refuse the U.S. government permission to appeal the matter of Assange's health.

This means the U.S. government has now obtained permission to appeal on all the grounds it has sought. The full appeal will be heard by the High Court on Oct. 27 and 28.

In my previous letter I said that both grounds of appeal looked threadbare.

There had been nothing to prevent the U.S. government from giving its 'assurances' (that it would not put Assange in special confinement and would let him serve his sentence in

Australia) to Baraitser at the substantive hearing last September.

Its attempt to do so now, months after Baraitser's decision had been made, was an attempt to use the appeal process in order to introduce the 'assurances' as new evidence in the case, so as to change a decision which had already been made. This makes the 'assurances' new evidence, which is normally inadmissible on appeal.

As for Baraitser's decision to base her assessment of Assange's health and of his potential risk of suicide on the evidence of Professor Kopelman, that was an assessment for her to make as the trial judge in the case, and there is no reason why the High Court on appeal should seek to interfere in it. **Mr. Justice Swift**, the High Court Judge who refused the U.S. government permission to appeal on this ground in July, was of precisely this view.

Holroyde's Reasons for Extending Permission to Appeal

It is this decision of Swift which the High Court at Wednesday's hearing has reversed. In doing so, the High Court admitted it is highly unusual for an appeal court to question a trial judge's assessment of the evidence. However in this case supposedly it is 'arguable' that it should do so.

Lord Justice Holroyde, a Court of Appeal Judge senior to Mr. Justice Swift, explained the decision in this way:

> "I bear very much in mind that the District Judge saw and heard from all the expert witnesses and made her assessment of Professor Kopelman with that advantage, which an appellate court cannot share. I accept that, in general, this court rightly takes a cautious approach when considering the findings of fact. They may consider challenges to findings of fact, including assessments made by the judge below. It is however, very unusual for an appellate court to have to consider the position of an expert witness whose written evidence have been found to be misleading, but whose opinion has nonetheless been accepted by the court below. The general approach does not operate as a complete bar for this court to find that the judge below was wrong in her assessment of the evidence. I have come to the conclusion that it is here at least arguable that the present case is one in which such a power may operate."

Holroyde then went on to say that in his opinion Baraitser might have given a "more critical consideration" of Professor Kopelman's evidence.

> "For those reasons, I respectfully disagree with Mr Justice Swift. I would grant the appeal on ground three. It will be for the court in the appeal hearing to determine the admissibility of the initial evidence on which the appellant seeks to revive."

No Mention of Assange Relationship

This issue has arisen because of an omission of a fact in Professor Kopelman's first witness statement. In that statement Kopelman omitted to mention the fact that Assange was in a relationship with Stella Moris, with whom he has had two children.

Kopelman omitted this fact from his witness statement because of Moris's understandable anxiety for privacy for her children. Kopelman, sympathetic to Moris's anxiety but conscious of his duty to the Court, consulted Assange's lawyers. They apparently agreed with him that the fact of Moris's relationship with Assange, and the fact that they had had two children

together, could be kept out of the witness statement without this diminishing its evidential value, and without this detracting from Kopelman's duty to the Court.

It was quickly realised that this was a mistake, and in a second witness statement, which is Kopelman's full expert report to the Court, he disclosed Assange's relationship with Moris, and the fact that they had had two children together. This second witness statement was provided to the Court last year, before the start of the substantive hearing in the autumn, and was seen by Baraitser before the hearing began.

Baraitser accordingly made her decision to refuse extradition in the full knowledge that Kopelman's first witness statement was incomplete, and that at the time when it was made Kopelman was concealing the existence of Assange's relationship with Moris, and of the fact that the two had had children together. She was also aware of the reasons why this was done. In her judgment Baraitser both acknowledged the fact of the concealment, and excused it:

> "In my judgment, professor Kopelman's decision to conceal [Assange and Moris's] relationship was misleading and inappropriate in the context of his obligations to the court, but an understandable human response to Ms. Moris's predicament…..In short, I found Professor Kopelman's opinion to be impartial and dispassionate; I was given no reason to doubt his motives or the reliability of his evidence."

Holroyde and the High Court now say that this approach of Baraitser's was 'arguably' wrong, and that Baraitser should have taken a 'more critical consideration' of Kopelman's evidence than she did.

Open Route for U.S. to Give 'Assurances'

At the October hearing, the question of the state of Assange's health, and of the degree to which he really is a suicide risk, will be reconsidered. At that hearing the U.S. government can give its 'assurances' to the Court, which it did not previously give to Baraitser. Assuming the Court accepts the 'assurances', an order for Assange's extradition to the U.S. may be made. If an appeal of that order to the Supreme Court is refused, Assange can be handed over to the United States, and the British authorities can wash their hands of the matter.

This is not a foregone conclusion. The High Court at the hearing in October is not bound to follow the opinions expressed by Holroyde at the hearing on Wednesday. His forthright comments show that he will not be part of the appeal panel which will hear the appeal in October.

However, though Holroyde was careful to say that the final decision is for the appeal panel in October to make, his words strongly imply that he thinks Baraitser should have handled Kopelman's evidence differently.

The fact that Kopelman sought advice from Assange's lawyers, who are technically officers of the Court, to my mind show that he did not intend to mislead the Court. As Baraitser put it, his actions, and those of the lawyers, were "an understandable human response to Ms. Moris's predicament". No harm was intended or done. Though a mistake was made, it was corrected shortly after, and at the time of the hearing Baraitser was in possession of all the facts.

Baraitser, as the trial judge, was therefore in a position to assess the evidence, which

Holroyde admits it was her right to do. Having assessed the evidence, and in full knowledge of all the facts, including those of the so-called “concealment.” she chose to give weight to the evidence of Kopelman, which she found to be “impartial and dispassionate”. There is no reason why an appeal court would want to interfere with such an approach, and as Holroyde admits, and as Swift found, ‘normally’ it would not do so.

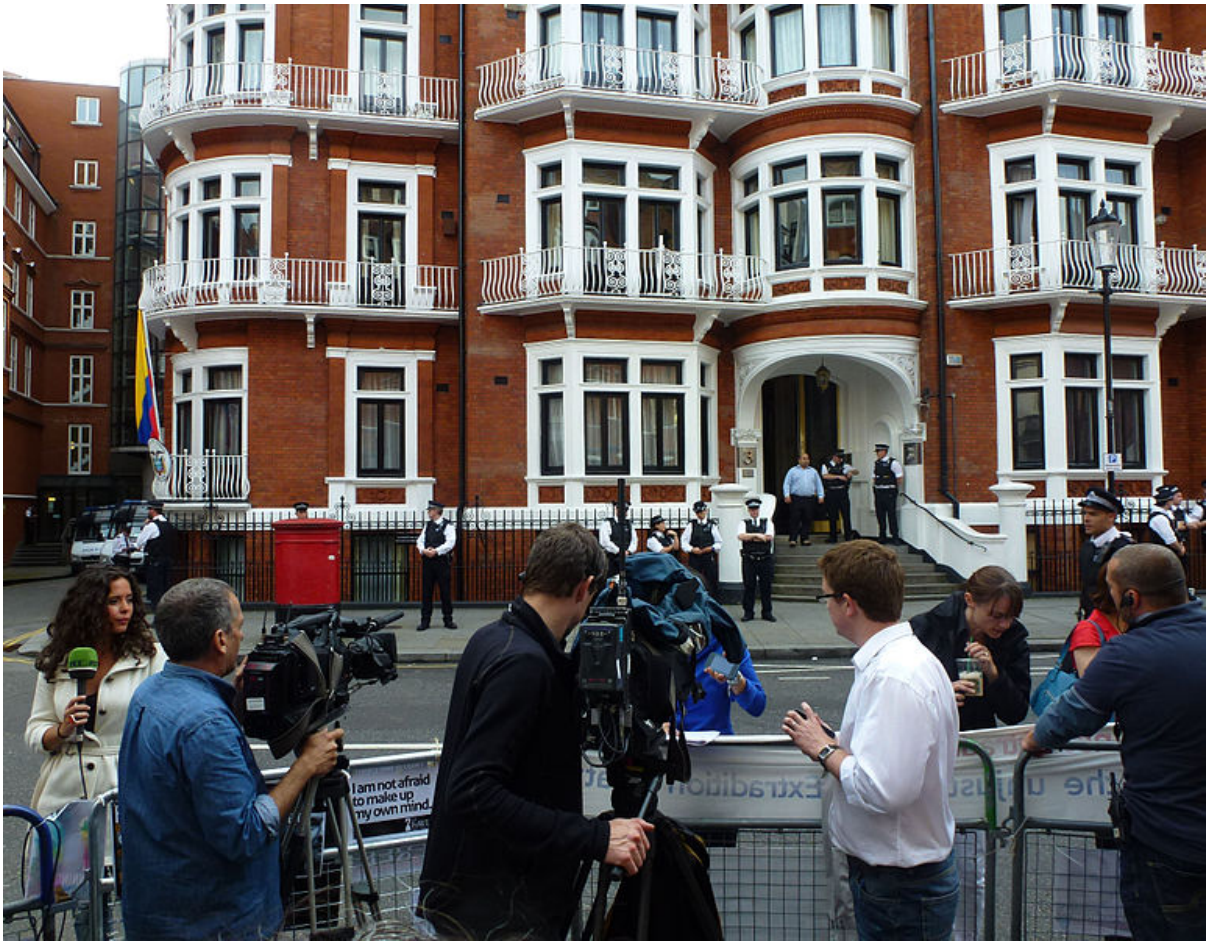
In fact, Holroyde admitted that the High Court on appeal cannot itself revisit the evidence. An appeal court is not a trial court. Its only purpose is to decide whether or not Baraitser was wrong. If it does decide on appeal that Baraitser was wrong – and it hasn’t done so yet, though Holroyde clearly thinks it should – it has two options:

(1) Send the issue back to the Westminster Magistrates’ Court, who would then decide the health issue all over again at a fresh hearing this time disregarding or placing little weight on Kopelman’s evidence; or

(2) Decide the issue of Assange’s health itself, at the same hearing as the hearing of the appeal, and directly after the appeal has been heard and decided, accepting Baraitser’s other findings of fact, but excluding or placing little weight on the evidence of professor Kopelman.

The proper course is (1) but I would not be at all surprised (if the appeal goes badly for Assange) that the High Court chooses (2).

Privacy of the Family an ECHR Protected Human Right



Ecuadorian embassy in London where Julian Assange took asylum. (Wikipedia)

There is moreover an absurd dimension to this whole affair. Assange, at the time when he began his relationship with Moris, was the target of round-the-clock surveillance by the U.S. and British authorities, who were spying on him in the Ecuadorian embassy, even to the point where they were observing his interactions with his lawyers.

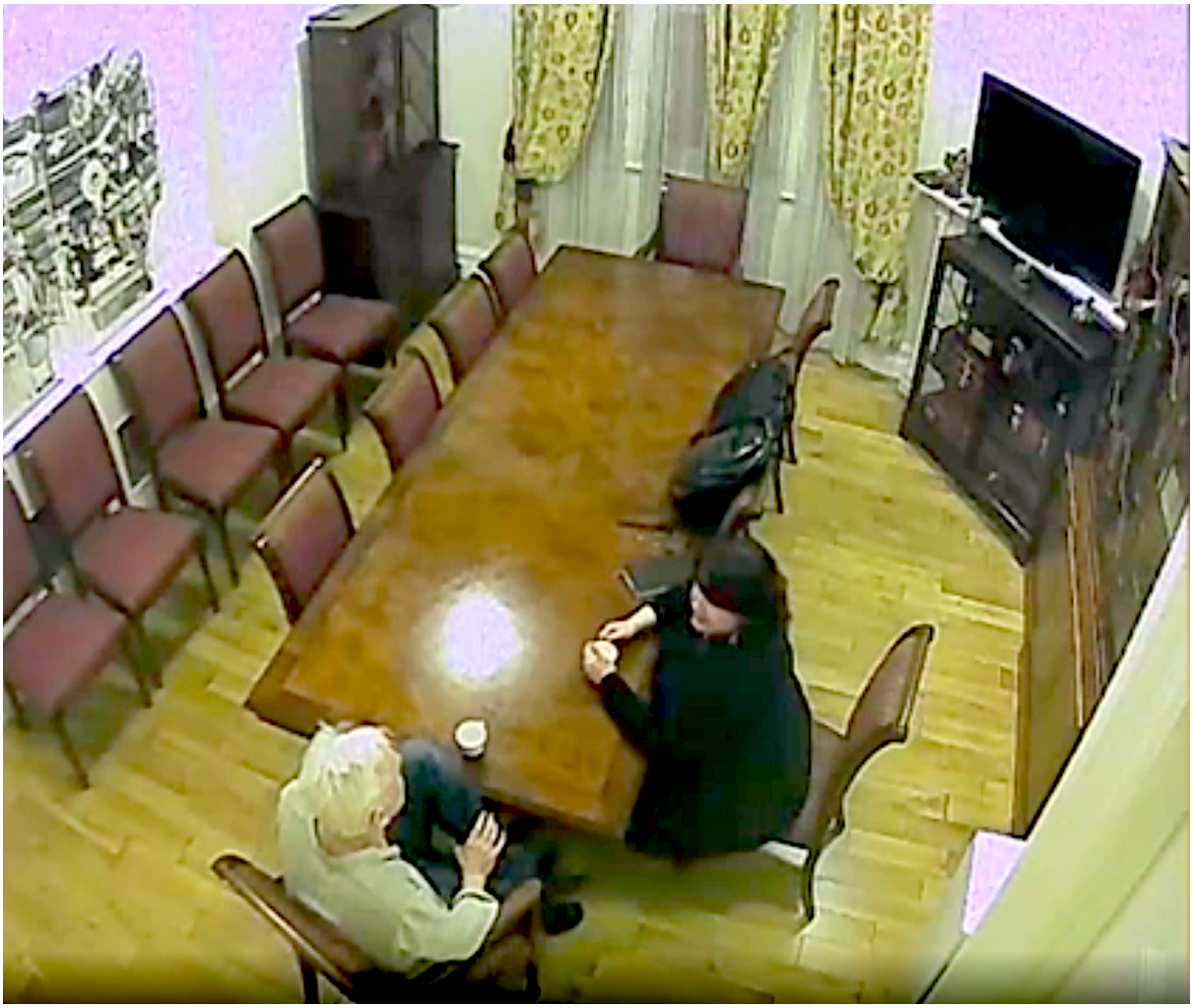
It beggars belief that the U.S. and British authorities were unaware of Assange's relationship with Moris, or of the fact that he had had two children by her.

At the time Kopelman drafted his first witness statement the extent to which Assange had been under placed under surveillance was known to Assange's lawyers, and to Assange and Moris themselves. They would have known, or at the very least guessed, that the U.S. and British authorities were aware of Assange's relationship with Moris, and of the fact that he had had two children by her. This is borne out by the testimony in a Spanish court last year that U.S. intelligence officers ordered the confiscation of one of the children's nappies to prove Assange's paternity by testing the DNA.

That makes it impossible that the omission of a reference to the relationship between Assange and Moris in Kopelman's first witness statement was intended to conceal this relationship from the U.S. and British authorities, and from the Court, and that there was any intention to mislead the Court. Had such an attempt to conceal the relationship and the existence of the children from the Court been made, it would have failed, with catastrophic consequences for Assange's case.

Obviously the concealment was intended, not to mislead the Court, but to conceal the existence of the relationship from Britain's notoriously salacious tabloid press, who are able to access Court documents, such as Kopelman's witness statement, which are documents of public record.

In other words it was intended to protect the family's privacy, just as Kopelman, the lawyers, and Moris, say that it was.



Julian Assange in Ecuadorian embassy in London shot on UC Global surveillance tape.

The way it was done was certainly a mistake, but one made, as Baraitser says, for understandable human reasons, and clearly intended as a temporary measure to protect the privacy of the family until the moment came for full disclosure to the Court. This took place at a bail hearing in April 2020, months before the substantive hearing before Baraitser in the autumn of that year, and months before the U.S. filed its second superseding indictment, which was the indictment actually before the Court when the case was tried.

As Baraitser rightly says, the fact that these steps to protect the privacy of the family were taken, (privacy being a human right pursuant to Article 8 of the European Convention on Human Rights, which is part of British law) does not mean that Kopelman is not an "impartial and dispassionate" witness, even if some of the steps which were taken were wrong. It is wrong to say otherwise.

A Dark Turn and a Clouded Prospect

In my previous letter I wrote of the relentless way in which the U.S. government has pursued Julian Assange. Moreover its refusal to take no for an answer, and its readiness to resort to unusual procedural devices in order to get its way, looks from the latest decision to be starting to bear fruit. I doubt any other party would be able to bend events to its will in such a way.

Regardless, the case has taken a dark turn, and the prospects in October are clouded.

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***Alexander Mercouris** is a legal analyst, political commentator and editor of The Duran.*

Featured image: The High Court at the Royal Courts of Justice. (David Castor/Wikimedia Commons)
