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Assange's Lawyers Considering a Cross Appeal

If this happens, the hearing at the High Court in London will acquire epochal importance, writes Alexander Mercouris.

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Julian Assange's *lawyers are considering bringing a cross appeal to the High Court in London disputing parts of District* ***Judge Vanessa Baraitser's*** *Jan. 4 judgment not to extradite Assange to the United States, according to a report by journalist Tareq Haddad.*

Baraitser refused the U.S. request on narrow grounds, saying Assange's extradition would put his life and health at risk. But Baraitser sided with the U.S. on every other point of law and fact, making it clear that in the absence of the life and health issues she would have granted the U.S. request.

That opens the way for the U.S. government to seek the extradition of other persons, including journalists, who do the same things as Assange did, but who cannot rely on the same life and health issues.

It also means that if the U.S. wins the appeal it filed last Friday in High Court it can try Assange in the U.S. on the Espionage Act charges that went unchallenged by Baraitser. If Assange's lawyers counter the U.S. appeal with one of their own in the High Court against Baraitser's upholding of the espionage charges, it would be heard simultaneously with the U.S. appeal.

Stella Moris, Assange's partner, has written that Assange's lawyers are indeed considering a cross appeal:

> "The next step in the legal case is that Julian's legal team will respond to the US grounds for appeal. Julian's lawyers are hard at work. Julian's team has asked the High Court to give them more time to consider whether to lodge a cross appeal in order to challenge parts of the ruling where the magistrate did not side with Julian and the press freedom arguments. A cross appeal would provide an opportunity to clear Julian's name properly.
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> Although Julian won at the Magistrates' Court, the magistrate did not side with him on the wider public interest arguments. We wanted a U.K. court to properly quash the extradition and refute the other grounds too. We wanted a finding that the extradition is an attempt to criminalise journalism, not just in the U.S. but in the U.K. and the rest of the world as well; and that the decision to indict Julian was a political act, a violation of the treaty, a violation of his human

> rights and an abuse of process. Julian's extradition team is considering all these issues, and whether they can be cross-appealed."

The Question of a Political Offence

During Assange's extradition hearing, the prosecution and the defence clashed about whether the court should adhere to the U.S.-U.K. extradition treaty or the Extradition Act, which made the treaty part of British law.

Article 4 of the treaty prohibits extradition for a political offence, as British law for centuries has done. The Act mysteriously omitted this. Assange's attorneys clearly argued for the treaty to be followed, but Baraitser cited the Act.

In his article, Haddad pointed to comments by British MP and former Cabinet Minister **David Davis** to the House of Commons on Jan. 21.

Davis, who as the Conservatives' shadow home secretary played a central role in the parliamentary debates which resulted in the 2003 Extradition Act becoming law, told the House of Commons:

> "Although we cannot, of course, discuss the substance of the Assange judgment here today, the House must note the worrying development more generally in our extradition arrangements – extradition for political offences. This stems from an erroneous interpretation of Parliament's intention in 2003. This must now be clarified.
>
> Article 4 of the U.K.-U.S. extradition treaty provides that extradition will not be granted for political offences. In the U.K., the treaty was implemented in the Extradition Act 2003. It has been claimed that, because the Act does not specifically refer to political offences, Parliament explicitly took the decision to remove the bar when passing the Act in 2003. That is not the case — Parliament had no such intention.
>
> Had it intended such a massive deviation from our centuries-long tradition of providing asylum, it would have been explicit…."

In making these points Davis cited reassurances given to the House of Commons during the parliamentary debates which took places before the 2003 Extradition Act was voted into law. Davis specifically referred to certain comments made by the British Minister Bob Ainsworth. According to the official record of the debates in Hansard, Ainsworth told the House of Commons:

> "The Bill will ensure that no one can be extradited where the request is politically motivated, where the double jeopardy rule applies or where the fugitive's medical condition— an issue raised by my hon. Friend the Member for Leyton and Wanstead (Harry Cohen) — would make it unjust. On conviction in absentia cases, we will extradite only where the fugitive can be sure of a retrial. We will not extradite unless we are certain that the death penalty will not be carried out. Finally and very importantly, extradition cannot take place where it would be incompatible with the fugitive's human rights**.**" (Emphasis added)

British courts do not usually weigh comments made in parliament when considering how to interpret an Act of Parliament. The British legal tradition is to interpret an Act of Parliament strictly on the basis of its own wording. British courts do not generally look at what was said during parliamentary debates about an Act, even by ministers who propose it. However there have been numerous exceptions, and it is not a hard and fast rule.

British appeal courts also are generally reluctant to look at evidence, such as Davis's comments, which come about after the judgment that is being appealed. That too, however, is not a hard and fast rule.

One should be cautious about the idea of a cross appeal to the High Court on Assange's behalf. Despite the fact that Baraitser sided with the U.S. government on most of the contentious issues of law and fact in the case, she did in the end refuse the U.S. government's request for Assange's extradition. The normal practice in an appeal is to uphold a judgment made in one's favour, not to challenge it by bringing a cross appeal, which could serve to undermine it. That often means going along with things in the judgment with which one is unhappy.

There is however nothing normal about Assange's case. As Moris' comments show, one has to be aware, perhaps more than in almost any other case, of the overriding and even transcendent issues of media freedom and human rights that arise.

It may be that Assange's lawyers will decide that Ainsworth's comments to the House of Commons in 2003; Davis's recent comments about parliament's intentions at the time when the 2003 Extradition Act was passed into law; and any other points of law or fact that carry sufficient weight, justify bringing a cross appeal, despite the attendant risks.

If Assange's lawyers do decide to bring a cross appeal, then the High Court hearing of that and the U.S. appeal will acquire epochal importance.

Baraitser's finding, that the 2003 Extradition Act allows extradition to the U.S. of individuals who face political charges because the Act does not expressly prohibit such extraditions, was her way of getting around the many contradictions and lapses of logic with which the U.S. case against Assange was littered, as I discussed in my previous Letter from London.

In my view the omission in the Act of the prohibition on extradition on political grounds does not in fact do away with that prohibition. There is far too much case law confirming the prohibition exists, for it to be simply done away with by silence. As Davis said, if parliament had really wanted to do away with that prohibition, the Act would have expressly said so.

If the High Court were to follow this reasoning and decide — as Ainsworth told the House of Commons in 2003 and as Davis says now — that the absence of any reference to this prohibition in the Act does not mean that the extradition of individuals facing political charges is now allowed; and that the British tradition of prohibiting such extraditions is in fact still in place (even if not expressly mentioned in the Act), then the entire basis of Baraitser's reasoning collapses and is shown to be wrong.

That would be a huge victory for the rights of journalists, for free expression generally, for the rights of refugees, and for people facing extradition on political charges.

If that happens, the U.S. would almost certainly appeal the High Court's decision to the U.K. Supreme Court for the authoritative and final decision. It would potentially be as influential

and important a decision as the Pinochet case.

Middlesex Guildhall in London's Parliament Square, home of the Supreme Court of the United Kingdom. (Christine Smith, CC BY-SA 4.0, Wikimedia Commons)

On the other hand, were Assange's lawyers to cross appeal, the High Court could decide on the political offence question that, under the doctrine of Parliamentary Sovereignty, the British Parliament has unlimited power to pass legislation and is entitled to pass whatever legislation it deems fit. It is not bound to follow an international treaty.

Moreover, since Parliament is sovereign the laws it enacts take precedence within the U.K. over any other laws, including international law. So if the British parliament enacts a law which contradicts international law or an international treaty, the British courts will administer the law enacted by parliament and will generally disregard international law or the international treaty.

This is the classic British constitutional doctrine of the sovereignty of parliament. Over the last 50 years it has gradually eroded, however. Whilst Britain was a member of the European Union, parliament accepted that EU law took precedence over whatever law parliament enacted. Also in 1998 parliament passed into law the Human Rights Act, which says (and still says) that the European Convention on Human Rights takes precedence over any British law.

But in the vast majority of situations the doctrine of parliamentary sovereignty still applies, and Britain's withdrawal from the EU has recently reinforced it.

But why is Assange even in this position? After all, as Davis reminded the House of Commons, the British tradition has always been to refuse to extradite individuals who face political charges. What changed to make it possible for a judge like Baraitser to say that

this centuries-old tradition no longer applies and that it's now possible for Britain to extradite someone who faces political charges?

Bush's War on Terror

Briefly, the silence on this point in the 2003 Extradition Act, which was used by Baraitser to support her reasoning, is another malign consequence of the George W. Bush administration's disastrous "War on Terror," which the British government, led at that time by Prime Minister Tony Blair, enthusiastically joined in.

In 2003 the Blair government deleted from the 2003 Extradition Act the traditional prohibition on extraditing individuals who faced political charges because it wanted to make it easier for the British government to extradite and dispose of people who the U.S. and British governments said were "terrorists." It did not want to have these people, who it said were "terrorists," defeating extradition requests by saying that the charges which had been brought against them were politically motivated. So it removed the traditional prohibition of extradition on politically motivated charges from the text of the 2003 Extradition Act.

Though the treaty was also signed after the War on Terror had begun, treaties are negotiated by civil servants and the government of the day usually does not become involved until the negotiation is over. That would likely explain why the prohibition against political extraditions remains in the treaty and was only removed in the Act.

As I very well remember, this, together with much else about this vague and poorly drafted Act, gave rise at the time to very serious concerns, which comments like those of Ainsworth were intended to allay.

Davis refers to all this in the same debate in the House of Commons:

> "Since we agreed the U.K.-U.S. extradition treaty in 2003, it has been abundantly clear that the British government of the day struck a truly dreadful deal. Asymmetric, ineffective and fundamentally unfair on British citizens, it is a terrible flaw in our own justice system. The previous Labour administration approached the treaty as though their duty was first and foremost to support the wishes of our American friends, not to safeguard the rights of U.K. citizens.
>
> Perhaps that was understandable in the context of the terrorism sweeping the world at that time, but friends must be honest with each other, and now we must say, 'Enough is enough.'
>
> The 2003 treaty paved the way for British citizens to be handed over to the U.S. authorities, with minimal safeguards against injustice…."

If a cross appeal is brought we will then see what all those assurances made in 2003, including the one which Ainsworth made to the House of Commons, are really worth. We will also see how the High Court, and ultimately the U.K. Supreme Court, decide on this issue.

In the meantime, if it does nothing else, this case yet again shows that compromising ancient protections in order to deal with an emergency or an apparent emergency can store up problems for the future, and that willfully throwing away important due-process protections in order to deal with a crisis of the moment is something which will be repented

at leisure.

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Featured image: The Royal Courts of Justice on the Strand, home to the High Court in London. (Sjiong, CC BY-SA 2.0, Wikimedia Commons)
