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Your Man in the Public Gallery: the Assange Hearing Day 6

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Global Research, September 08, 2020
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Region: Europe
Theme: Intelligence, Law and Justice

I went to the Old Bailey today expecting to be awed by the majesty of the law, and left revolted by the sordid administration of injustice.

There is a romance which attaches to the Old Bailey. The name of course means fortified enclosure and it occupies a millennia old footprint on the edge of London's ancient city wall. It is the site of the medieval Newgate Prison, and formal trials have taken place at the Old Bailey for at least 500 years, numbering in the hundreds of thousands. For the majority of that time, those convicted even of minor offences of theft were taken out and executed in the alleyway outside. It is believed that hundreds, perhaps thousands, lie buried under the pavements.

The hefty Gothic architecture of the current grand building dates back no further than 1905, and round the back and sides of that is wrapped some horrible cheap utility building from the 1930's. It was through a tunnelled entrance into this portion that five of us, Julian's nominated family and friends, made our nervous way this morning. We were shown to Court 10 up many stairs that seemed like the back entrance to a particularly unloved works canteen. Tiles were chipped, walls were filthy and flakes of paint hung down from crumbling ceilings. Only the security cameras watching us were new – so new, in fact, that little piles of plaster and brick dust lay under each.

Court 10 appeared to be a fairly bright and open modern box, with pleasant light woodwork, jammed as a mezzanine inside a great vault of the old building. A massive arch intruded incongruously into the space and was obviously damp, sheets of delaminating white paint drooping down from it like flags of forlorn surrender. The dock in which Julian would be held still had a bulletproof glass screen in front, like Belmarsh, but it was not boxed in. There was no top to the screen, no low ceiling, so sound could flow freely over and Julian seemed much more in the court. It also had many more and wider slits than the notorious Belmarsh Box, and Julian was able to communicate quite readily and freely through them with his lawyers, which this time he was not prevented from doing.

Rather to our surprise, nobody else was allowed into the public gallery of court 10 but us five. Others like John Pilger and Kristin Hrafnsson, editor in chief of Wikileaks, were shunted into the adjacent court 9 where a very small number were permitted to squint at a tiny screen, on which the sound was so inaudible John Pilger simply left. Many others who had expected to attend, such as Amnesty International and Reporters Without Borders, were simply excluded, as were MPs from the German federal parliament (both the German MPs and Reporters Without Borders at least later got access to the inadequate video following strong representations from the German Embassy).

The reason given that only five of us were allowed in the public gallery of some 40 seats was social distancing; except we were allowed to all sit together in consecutive seats in the front row. The two rows behind us remained completely empty.

To finish scene setting, Julian himself looked tidy and well groomed and dressed, and appeared to have regained a little lost weight, but with a definite unhealthy puffiness about his features. In the morning he appeared disengaged and disoriented rather as he had at Belmarsh, but in the afternoon he perked up and was very much engaged with his defence team, interacting as normally as could be expected in these circumstances.

Proceedings started with formalities related to Julian's release on the old extradition warrant and re-arrest under the new warrant, which had taken place this morning. Defence and prosecution both agreed that the points they had already argued on the ban on extradition for political offences were not affected by the superseding indictment.

Magistrate Baraitser then made a statement about access to the court by remote hearing, by which she meant online. She stated that a number of access details had been sent out by mistake by the court without her agreement. She had therefore revoked their access permissions.

As she spoke, we in the court had no idea what had happened, but outside some consternation was underway in that the online access of Amnesty International, of Reporters without Borders, of John Pilger and of forty others had been shut down. As these people were neither permitted to attend the court nor observe online, this was causing some consternation.

Baraitser went on to say that it was important that the hearing was public, but she should only agree remote access where it was "in the interests of justice", and having considered it she had decided it was not. She explained this by stating that the public could normally observe from within the courtroom, where she could control their behaviour. But if they had remote access, she could not control their behaviour and this was not in the "interests of justice".

Baraitser did not expand on what uncontrolled behaviour she anticipated from those viewing via the internet. It is certainly true that an observer from Amnesty sitting at home might be in their underwear, might be humming the complete soundtrack to Mamma Mia, or might fart loudly. Precisely why this would damage "the interests of justice" we are still left to ponder, with no further help from the magistrate. But evidently the interests of justice were, in her view, best served if almost nobody could examine the "justice" too closely.

The next "housekeeping issue" to be addressed was how witnesses should be heard. The defence had called numerous witnesses, and each had lodged a written statement. The prosecution and Baraitser both suggested that, having given their evidence in writing, there was no need for defence witnesses to give that evidence orally in open court. It would be much quicker to go straight to cross-examination by the prosecution.

For the defence, Edward Fitzgerald QC countered that justice should be seen to be done by the public. The public should be able to hear the defence evidence before hearing the cross-examination. It would also enable Julian Assange to hear the evidence summarised, which was important for him to follow the case given his lack of extended access to legal papers while in Belmarsh prison.

Baraitser stated there could not be any need for evidence submitted to her in writing to be repeated orally. For the defence, Mark Summers QC was not prepared to drop it and tension notably rose in the court. Summers stated it was normal practice for there to be “an orderly and rational exposition of the evidence”. For the prosecution, James Lewis QC denied this, saying it was not normal procedure.

Baraitser stated she could not see why witnesses should be scheduled an one hour forty five minutes each, which was too long. Lewis agreed. He also added that the prosecution does not accept that the defence’s expert witnesses are expert witnesses. A Professor of journalism telling about newspaper coverage did not count. An expert witness should only be giving evidence on a technical point the court was otherwise unqualified to consider. Lewis also objected that in giving evidence orally, defence witnesses might state new facts to which the Crown had not had time to react. Baraitser noted that the written defence statements were published online, so they were available to the public.

Edward Fitzgerald QC stood up to speak again, and Baraitser addressed him in a quite extraordinary tone of contempt. What she said exactly was: “I have given you every opportunity. Is there anything else, really, that you want to say”, the word “really” being very heavily emphasised and sarcastic. Fitzgerald refused to be sat down, and he stated that the current case featured “substantial and novel issues going to fundamental questions of human rights.” It was important the evidence was given in public. It also gave the witnesses a chance to emphasise the key points of their evidence and where they placed most weight.

Baraitser called a brief recess while she considered judgement on this issue, and then returned. She found against the defence witnesses giving their evidence in open court, but accepted that each witness should be allowed up to half an hour of being led by the defence lawyers, to enable them to orient themselves and reacquaint with their evidence before cross-examination.

This half hour for each witness represented something of a compromise, in that at least the basic evidence of each defence witness would be heard by the court and the public (insofar as the public was allowed to hear anything). But the idea that a standard half hour guillotine is sensible for all witnesses, whether they are testifying to a single fact or to developments over years, is plainly absurd. What came over most strongly from this question was the desire of both judge and prosecution to railroad through the extradition with as little of the case against it getting a public airing as possible.

As the judge adjourned for a short break we thought these questions had now been addressed and the rest of the day would be calmer. We could not have been more wrong.

The court resumed with a new defence application, led by Mark Summers QC, about the new charges from the US governments new superseding indictment. Summers took the court back over the history of this extradition hearing. The first indictment had been drawn up in March of 2018. In January 2019 a provisional request for extradition had been made, which had been implemented in April of 2019 on Assange’s removal from the Embassy. In June 2019 this was replaced by the full request with a new, second indictment which had been the basis of these proceedings before today. A whole series of hearings had taken place on the basis of that second indictment.

The new superseding indictment dated from 20 June 2020. In February and May 2020 the US government had allowed hearings to go ahead on the basis of the second indictment, giving no warning, even though they must by that stage have known the new superseding indictment was coming. They had given neither explanation nor apology for this.

The defence had not been properly informed of the superseding indictment, and indeed had learnt of its existence only through a US government press release on 20 June. It had not finally been officially served in these proceedings until 29 July, just six weeks ago. At first, it had not been clear how the superseding indictment would affect the charges, as the US government was briefing it made no difference but just gave additional detail. But on 21 August 2020, not before, it finally became clear in new US government submissions that the charges themselves had been changed.

There were now new charges that were standalone and did not depend on the earlier allegations. Even if the 18 Manning related charges were rejected, these new allegations could still form grounds for extradition. These new allegations included encouraging the stealing of data from a bank and from the government of Iceland, passing information on tracking police vehicles, and hacking the computers both of individuals and of a security company.

“How much of this newly alleged material is criminal is anybody’s guess”, stated Summers, going on to explain that it was not at all clear that an Australian giving advice from outwith Iceland to someone in Iceland on how to crack a code, was actually criminal if it occurred in the UK. This was even without considering the test of dual criminality in the US also, which had to be passed before the conduct was subject to extradition.

It was unthinkable that allegations of this magnitude would be the subject of a Part 2 extradition hearing within six weeks if they were submitted as a new case. Plainly that did not give the defence time to prepare, or to line up witnesses to these new charges. Among the issues relating to these new charges the defence would wish to address, were that some were not criminal, some were out of time limitation, some had already been charged in other fora (including Southwark Crown Court and courts in the USA).

There were also important questions to be asked about the origins of some of these charges and the dubious nature of the witnesses. In particular the witness identified as “teenager” was the same person identified as “Iceland 1” in the previous indictment. That indictment had contained a “health warning” over this witness given by the US Department of Justice. This new indictment removed that warning. But the fact was, this witness is Sigurdur Thordarson, who had been convicted in Iceland in relation to these events of fraud, theft, stealing Wikileaks money and material and impersonating Julian Assange.

The indictment did not state that the FBI had been “kicked out of Iceland for trying to use Thordarson to frame Assange”, stated Summers baldly.

Summers said all these matters should be ventilated in these hearings if the new charges were to be heard, but the defence simply did not have time to prepare its answers or its witnesses in the brief six weeks it had since receiving them, even setting aside the extreme problems of contact with Assange in the conditions in which he was being held in Belmarsh prison.

The defence would plainly need time to prepare answers to these new charges, but it would

plainly be unfair to keep Assange in jail for the months that would take. The defence therefore suggested that these new charges should be excised from the conduct to be considered by the court, and they should go ahead with the evidence on criminal behaviour confined to what conduct had previously been alleged.

Summers argued it was “entirely unfair” to add what were in law new and separate criminal allegations, at short notice and “entirely without warning and not giving the defence time to respond to it. What is happening here is abnormal, unfair and liable to create real injustice if allowed to continue.”

The arguments submitted by the prosecution now rested on these brand new allegations. For example, the prosecution now countered the arguments on the rights of whistleblowers and the necessity of revealing war crimes by stating that there can have been no such necessity to hack into a bank in Iceland.

Summers concluded that the “case should be confined to that conduct which the American government had seen fit to allege in the eighteen months of the case” before their second new indictment.

Replying to Summers for the prosecution, Joel Smith QC replied that the judge was obliged by the statute to consider the new charges and could not excise them. “If there is nothing proper about the restitution of a new extradition request after a failed request, there is nothing improper in a superseding indictment before the first request had failed.” Under the Extradition Act the court must decide only if the offence is an extraditable offence and the conduct alleged meets the dual criminality test. The court has no other role and no jurisdiction to excise part of the request.

Smith stated that all the authorities (precedents) were of charges being excised from a case to allow extradition to go ahead on the basis of the remaining sound charges, and those charges which had been excised were only on the basis of double jeopardy. There was no example of charges being excised to prevent an extradition. And the decision to excise charges had only ever been taken after the conduct alleged had been examined by the court. There was no example of alleged conduct not being considered by the court. The defendant could seek extra time if needed but the new allegations must be examined.

Summers replied that Smith was “wrong, wrong, wrong, and wrong”. “We are not saying that you can never submit a new indictment, but you cannot do it six weeks before the substantive hearing.” The impact of what Smith had said amounted to no more than “Ha ha this is what we are doing and you can’t stop us.” A substantive last minute change had been made with no explanation and no apology. It could not be the case, as Smith alleged, that a power existed to excise charges in fairness to the prosecution, but no power existed to excise charges in fairness to the defence.

Immediately Summers sat down, Baraitser gave her judgement on this point. As so often in this hearing, it was a pre-written judgement. She read it from a laptop she had brought into the courtroom with her, and she had made no alterations to that document as Summers and Smith had argued the case in front of her.

Baraitser stated that she had been asked as a preliminary move to excise from the case certain conduct alleged. Mr Summers had described the receipt of new allegations as extraordinary. However “I offered the defence the opportunity to adjourn the case” to give

them time to prepare against the new allegations. “I considered of course that Mr Assange was in custody. I hear that Mr Summers believes this is fundamental unfairness”. But “the argument that we haven’t got the time, should be remedied by asking for the time.”

Mr Summers had raised issues of dual criminality and abuse of process; there was nothing preventing him for raising these arguments in the context of considering the request as now presented.

Baraitser simply ignored the argument that while there was indeed “nothing to prevent” the defence from answering the new allegations as each was considered, they had been given no time adequately to prepare. Having read out her pre-prepared judgement to proceed on the basis of the new superseding indictment, Baraitser adjourned the court for lunch.

At the end of the day I had the opportunity to speak to an extremely distinguished and well-known lawyer on the subject of Baraitser bringing pre-written judgements into court, prepared before she had heard the lawyers argue the case before her. I understood she already had seen the outline written arguments, but surely this was wrong. What was the point in the lawyers arguing for hours if the judgement was pre-written? What I really wanted to know was how far this was normal practice.

The lawyer replied to me that it absolutely was not normal practice, it was totally outrageous. In a long and distinguished career, this lawyer had very occasionally seen it done, even in the High Court, but there was always some effort to disguise the fact, perhaps by inserting some reference to points made orally in the courtroom. Baraitser was just blatant. The question was, of course, whether it was her own pre-written judgement she was reading out, or something she had been given from on high.

This was a pretty shocking morning. The guillotining of defence witnesses to hustle the case through, indeed the attempt to ensure their evidence was not spoken in court except those parts which the prosecution saw fit to attack in cross-examination, had been breathtaking. The effort by the defence to excise the last minute superseding indictment had been a fundamental point disposed of summarily. Yet again, Baraitser’s demeanour and very language made little attempt to disguise a hostility to the defence.

We were for the second time in the day in a break thinking that events must now calm down and get less dramatic. Again we were wrong.

Court resumed forty minutes late after lunch as various procedural wrangles were addressed behind closed doors. As the court resumed, Mark Summers for the defence stood up with a bombshell.

Summers said that the defence “recognised” the judgement Baraitser had just made – a very careful choice of word, as opposed to “respected” which might seem more natural. As she had ruled that the remedy to lack of time was more time, the defence was applying for an adjournment to enable them to prepare the answers to the new charges. They did not do this lightly, as Mr Assange would continue in prison in very difficult conditions during the adjournment.

Summers said the defence was simply not in a position to gather the evidence to respond to the new charges in a few short weeks, a situation made even worse by Covid restrictions. It was true that on 14 August Baraitser had offered an adjournment and on 21 August they

had refused the offer. But in that period of time, Mr Assange had not had access to the new charges and they had not fully realised the extent to which these were a standalone new case. To this date, Assange had still not received the new prosecution Opening Note in prison, which was a crucial document in setting out the significance of the new charges.

Baraitser pointedly asked whether the defence could speak to Assange in prison by telephone. Summers replied yes, but these were extremely short conversations. They could not phone Mr Assange; he could only call out very briefly on the prison payphone to somebody's mobile, and the rest of the team would have to try to gather round to listen. It was not possible in these very brief discussions adequately to expound complex material. Between 14 and 21 August they had been able to have only two such very short phone calls. The defence could only send documents to Mr Assange through the post to the prison; he was not always given them, or allowed to keep them.

Baraitser asked how long an adjournment was being requested. Summers replied until January.

For the US government, Mark Lewis QC replied that more scrutiny was needed of this request. The new matters in the indictment were purely criminal. They do not affect the arguments about the political nature of the case, or affect most of the witnesses. If more time were granted, "with the history of this case, we will just be presented with a sleigh of other material which will have no bearing on the small expansion of count 2".

Baraitser adjourned the court "for ten minutes" while she went out to consider her judgement. In fact she took much longer. When she returned she looked peculiarly strained.

Baraitser ruled that on 14 August she had given the defence the opportunity to apply for an adjournment, and given them seven days to decide. On 21 August the defence had replied they did not want an adjournment. They had not replied that they had insufficient time to consider. Even today the defence had not applied to adjourn but rather had applied to excise charges. They "cannot have been surprised by my decision" against that application. Therefore they must have been prepared to proceed with the hearing. Their objections were not based on new circumstance. The conditions of Assange in Belmarsh had not changed since 21 August. They had therefore missed their chance and the motion to adjourn was refused.

The courtroom atmosphere was now highly charged. Having in the morning refused to cut out the superseding indictment on the grounds that the remedy for lack of time should be more time, Baraitser was now refusing to give more time. The defence had called her bluff; the state had apparently been confident that the effective solitary confinement in Belmarsh was so terrible that Assange would not request more time. I rather suspect that Julian was himself bluffing, and made the call at lunchtime to request more time in the full expectation that it would be refused, and the rank hypocrisy of the proceedings exposed.

I previously blogged about how the procedural trickery of the superseding indictment being used to replace the failing second indictment – as Smith said for the prosecution "before it failed" – was something that sickened the soul. Today in the courtroom you could smell the sulphur.

Well, yet again we were left with the feeling that matters must now get less exciting. This time we were right and they became instead excruciatingly banal. We finally moved on to

the first witness, Professor Mark Feldstein, giving evidence to the court by videolink for the USA. It was not Professor Feldstein's fault the day finished in confused anti-climax. The court was unable to make the video technology work. For ten broken minutes out of about forty Feldstein was briefly able to give evidence, and even this was completely unsatisfactory as he and Mark Summers were repeatedly speaking over each other on the link.

Professor Feldstein's evidence will resume tomorrow (now in fact today) and I think rather than split it I shall give the full account then. Meantime you can see these excellent summaries from Kevin Gosztola or the morning and afternoon reports from James Doleman. In fact, I should be grateful if you did, so you can see that I am neither inventing nor exaggerating the facts of these startling events.

If you asked me to sum up today in a word, that word would undoubtedly be "railroaded". it was all about pushing through the hearing as quickly as possible and with as little public exposure as possible to what is happening. Access denied, adjournment denied, exposition of defence evidence denied, removal of superseding indictment charges denied. The prosecution was plainly failing in that week back in Woolwich in February, which seems like an age ago. It has now been given a new boost.

How the defence will deal with the new charges we shall see. It seems impossible that they can do this without calling new witnesses to address the new facts. But the witness lists had already been finalised on the basis of the old charges. That the defence should be forced to proceed with the wrong witnesses seems crazy, but frankly, I am well past being surprised by anything in this fake process.

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