IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

DISTRICT JUDGE BARAITSER

EXTRADITION HEARING

THE UNITED STATES OF AMERICA

-v-

JULIAN ASSANGE ("Assange")

CLOSING SUBMISSIONS

ON BEHALF OF THE UNITED STATES OF AMERICA

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I. OVERVIEW

1. These closing submissions do not deal with the defence closing submissions point by point as it is submitted those submissions are repetitive and replete with misrepresentations of fact and law. The point is reiterated, on behalf of the United States, that this is not a trial. The defence asks the court to decide trial issues which are not relevant or admissible in an extradition hearing.

2. Consistently, the defence asks this court to make findings, or act upon the submission, that the United States of America is guilty of torture, war crimes, murder, breaches of diplomatic and international law and that the United States of America is "a lawless state". These submissions are not only non-justiciable in these proceedings but should never have been made. It is not the function of this court, and indeed would be unlawful, to make such findings or act upon them as if they were facts.[1] It is beyond argument that such acts of a foreign sovereign state cannot be adjudicated upon in a domestic court.

3. The defence then asks the court to make disputed findings of fact on American law and whether the United States of America has jurisdiction to prosecute Assange because it asserts he is a 'journalist' and opines on First Amendment rights. Again, this court cannot make determinations of American law as to the jurisdiction of the United States of America to prosecute Assange. That is a matter for the Requesting State. This court's role is to follow the statutory scheme.

4. Moreover, the defence case, even when it comes to reliance upon Convention rights, rests upon a wholesale mischaracterisation of the prosecution case. The case proceeds as though Assange is being prosecuted for mere publication, having been provided with the materials by Manning, as opposed to his being prosecuted for aiding and abetting, or conspiring with, Manning to unlawfully obtain them (with Manning undoubtably committing serious criminal offences in so doing) and then disclosing the unredacted names of sources (thus putting those individuals at grave risk of harm).

5. It is respectfully submitted that the correct, and only, approach for the court is to follow the scheme of Part 2 of the Extradition Act 2003 ("the Act") which provides for a complete code to the extradition hearing setting out each question this court must decide.

[1] The limited jurisdiction under section 81(a) of the act does not require findings of fact on these issues.

6. It follows these submissions will deal *seriatim* with the issue of extradition offence[2]; the bars to extradition[3], namely extraneous considerations[4] and passage of time[5]; human rights[6]; and health[7].

7. After consideration of the above matters, the residual jurisdiction of abuse of process will be considered. The separate issue of whether the treaty has application to the decision to extradite has already been extensively considered in earlier submissions made orally and in writing in February 2020 and accordingly is not repeated here.

II. EXTRADITION OFFENCE

8. Section 137(3) of the 2003 Act provides:

> 137 Extradition offences: person not sentenced for offence
> (1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person—
> (a) is accused in a category 2 territory of an offence constituted by the conduct, or
> (b) has been convicted in that territory of an offence constituted by the conduct but not sentenced for it.
> (2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
> (3) The conditions in this subsection are that—
> (a) the conduct occurs in the category 2 territory;
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
> (c) the conduct is so punishable under the law of the category 2 territory.
> ….
> (7A) References in this section to "conduct" (except in the expression "equivalent conduct") are to the conduct specified in the request for the person's extradition" [Emphasis added]

A. Introduction

9. Dual criminality may only be determined on the conduct specified in the request. Defence evidence on this point is inadmissible. The defence appear to concede as such at §24.15, page 247, of their submissions that "On dual criminality the Court is constrained to consider only the face of the request".

10. However, the defence erroneously goes onto to state "The *Zakrzewski* jurisdiction enables this court to ascertain the true facts, and to feed those true facts into the dual criminality

2 Section 78(4)(b) of the Act; there being no other issue raised by the defence under section 78 of the Act.
3 Section 79 of the Act.
4 Section 81(a) and (b) of the Act.
5 Section 82 of the Act.
6 Section 87 of the Act. In particular compliance with Articles 3, 6, 7 and 10 of the ECHR.
7 Section 91 of the Act.

machinery of s.137"[8]. This is legally misconceived and demonstrates the inability of the defence to make coherent legal submissions that have any merit.

11. Further, the defence having adduced defence evidence, says that this defence evidence "would render Mr Assange's actions lawful as a matter of UK law"[9] and argues that dual criminality is not made out. This material is not in the request and therefore the court cannot take notice of it on the dual criminality determination under section 137 of the Act. Again, the clear legal position that only material in the Request can be considered by the court is obfuscated by the contrary defence assertion at §13.44, page 174, that dual criminality has to be satisfied by the conduct set out at §13.43.

12. The prosecution has provided a list of draft charges. The conduct from which to determine whether an extradition offence is made out must come exclusively from the extradition request. It is beyond argument that the conduct set out in the request constitutes the conduct required to make good those draft charges. Indeed, no contrary argument is put forward on the material in the request constituting those charges, instead reliance is placed upon defence evidence, importing the defence of necessity and misconceived submissions on the 'right to the truth'.

13. No defence submissions are made that the conduct set out in the request is insufficient to constitute the charges identified (other than a misconceived complaint that the draft charges themselves (not necessary as part of the statutory scheme) are in some way incomplete). They are not, and they identify the corresponding offences as described in the prosecution Amended Opening Note at §§ [50] to [87]. Those submissions are incorporated here but not repeated for the sake of brevity.

14. While this is sufficient to dispose of the defence submissions on dual criminality, for completeness the following submissions are made.

B. The Defence argument

15. The defence argument may be summarised as follows:

8 Defence submissions at page 153, paragraph 12.80
9 Defence submissions at page 167

(1) Were the defendant to be tried in England, the prosecution would "need to prove…that Mr. Assange's disclosures were not the result of duress of circumstance" [defence skeleton §13.32];

(2) The materials revealed by the defendant have exposed war crimes and "been of international importance in shifting US government policy away from the use of rendition and torture" and have therefore "proven necessary to prevent both danger to life and serious injury" [§13.43];

(3) The US offences with which the defendant has been charged "contain nothing approaching a prosecutorial requirement to disprove…necessity" [§13.35];

(4) When conducting the dual criminality analysis, where the foreign offence lacks an essential ingredient of the corresponding English offence (for example dishonesty), the description of the conduct must necessarily imply that this ingredient is present [§13.41 citing *Cleveland v. USA* [2019] 1 WLR 4392);

(5) To find dual criminality there must be "no possible argument" that the defence of necessity arises in the defendant's case [§13.44].

16. This argument is fundamentally misconceived. There is no requirement for the prosecution to 'disprove' necessity. Possible defences are not to be considered at the extradition hearing. The words of Lord Templeman in *In re Evans* [1994] 1 W.L.R. 1006, 1013 -1015 setting out the role of the Magistrate in extradition proceedings are apposite:

> "The magistrate will first consider whether the equivalent conduct would constitute an offence against the equivalent law of the United Kingdom…The magistrate is not concerned with proof of the facts, the possibilities of other relevant facts, or the emergence of any defence; these are matters for trial.
> …Again the magistrate is not concerned with proof of the facts, the possibility of other relevant facts or the emergence of any defence; these are matters for trial in the foreign state."

17. In any event the determination of dual criminality is limited exclusively to what is contained in the Request. See section 137(7A) of the 2003 Act. The Request does not raise such a defence.

18. A similar argument, albeit on stronger grounds, by reliance on a statutory defence, was rejected by the Supreme Court in the Canadian extradition case of *M.M v United States of America* [2015] 3 RCS 973. It held the extradition judge erred in law in weighing and relying on evidence of defences and other exculpatory circumstances. The court held "The extradition judge's role, like that of the preliminary inquiry justice, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden".

It is clear beyond argument that Assange at least would bear an evidential burden if necessity was raised as a defence, if not a persuasive burden. It follows, like the Canadian system, such a defence is irrelevant to the court's task here.

1. *Shayler and the defence of necessity*

19. Assuming, *arguendo,* necessity could somehow be raised, it would not apply. *Shayler* concerned a former member of the security service who, after leaving the service, disclosed a number of documents relating to security or intelligence matters to a national newspaper. This was in breach of an undertaking which he had signed prior to leaving his employment. He was prosecuted under ss1 and 4 of the 1989 Official Secrets Act.

20. At a preliminary hearing, during the trial, the trial judge (Moses J. as was) ruled that the defence of necessity or duress of circumstance was not open to the defendant, nor could he argue as a defence to the charge that his disclosures were in the public interest to avert damage to life or limb or serious damage to property. *Shayler* appealed this decision.

21. The Court of Appeal ([2001] 1 W.L.R 2206) ruled that the defence of necessity *was* available to a defendant (§§63-4) – provided:

    (1) That the offence was committed to avoid imminent peril of danger to life or serious injury;

    (2) That the injury or danger to life was to the defendant or towards individuals for whom he reasonably regarded himself as being responsible;

    (3) That it must be possible to describe those individuals "by reference to the threatened action which would make them victims" and "to show that the defendant had the responsibility for them because he was placed in a position where he was required to make a choice whether to take the action which it was said would avoid them being injured".

    (4) That the act done was no more than was necessary to avoid the harm feared and was not disproportionate.

22. On the facts of the *Shayler* case, there was no possibility that Shayler would be able to rely on the defence of necessity. This was because he could not "*identify any incident which is going to create danger to the member of the public which his actions were designed to avoid. Instead he* [was] *blowing the whistle on the past misconduct of individual members of, and MI5 as a whole…*" [§65]. The defendant's assertion that his

disclosures were necessary to reform MI5, as its then operation created a danger to the public, was insufficiently precise, and could only identify a risk to members of the public by hindsight. Such a justification might have afforded a public interest were it available – but it was not [§§65-7].

23. The defence of necessity is precisely that – a defence which must be disproved by the prosecution *if it is raised* [§68]. There is an evidential or persuasive burden on the defendant. In the circumstances of an extradition case, it must be raised in the request as no extraneous evidence is admissible. It is not raised in the request.

24. The matter was referred to the House of Lords. In the House of Lords, the unavailability of a public or national interest defence was affirmed, as was the compatibility of ss1 and 4 of the 1989 Act with article 10 of the Convention. The House of Lords did **not** consider the issue of the defence of necessity, given that the defendant's case was that he was "appalled at the unlawfulness, irregularity, incompetence, misbehaviour and waste of resources in the service" and that this could never afford a defence of necessity [Lord Bingham at §17]. The ruling of the House of Lords was clear that the Court of Appeal should not have considered the defence of necessity and that the House should not be taken as endorsing the approach of the Court of Appeal on that issue [see Lord Bingham at §17 and Lord Hutton at §117 for example].

25. The position after the decision of the House of Lords in *Shayler* therefore was:

    (1) no public or national interest defence is available;
    (2) sections 1 and 4 of the 1989 Act are compatible with article 10 of the Convention;
    (3) whilst the Court of Appeal considered that a defendant might avail themselves of the defence of necessity, this did not apply on the facts to Shayler's case. Furthermore, **the defence would be limited to the necessity to avoid imminent peril or danger to life to the defendant or those for whom he was responsible**. The House of Lords did not consider the availability of this defence (which Moses J., as was, had decided was unavailable at first instance) but was at pains not to endorse the approach of the Court of Appeal. It is unclear therefore whether, in fact, the defence would be *available at all*. In any event, however, its availability or otherwise is an irrelevance in this case.

26. The defence contention (defence final skeleton, §13.1 onwards but in particular 13.28 to 13.34) that "UK law – and in particular UK criminal law concerning the Official Secrets

Acts" recognizes the "core principles" of a "right to truth" is wrong, and unarguably so. This Court has the benefit of the ruling in *Shayler* from the House of Lords on this very issue. The House of Lords in *Shayler* **rejected the contention that a "public interest" defence existed**, which would allow for disclosures of "unlawfulness" (see above).

27. The defence skeleton [§13.32] seeks to elide the defence of duress with a public interest defence. This Court should not be led into error by making the same mistake. To do so would be to run a coach and horses through the decision of the House of Lords in *Shayler.* For the sake of clarity:

    (1) no public interest defence to offending under the Official Secrets Acts exists – *Shayler* in the House of Lords*;*

    (2) being appalled at, and wishing to expose, unlawful behaviour does not amount to a 'necessity' defence – *Shayler* in the House of Lords at 266B-C. The defence suggestion to the contrary that it would [defence skeleton §13.31] is wrong; and

    (3) Lord Bingham, in the House of Lords, considered it unfortunate that the Court of Appeal ventured a view on the availability of the defence of necessity [at 266A], and stated the he would not "for my part be taken to accept all that the Court of Appeal said on these difficult topics".

28. The limits of the defence of necessity were highlighted in the very recent case of *R v. Simon Finch.* Whipple J, sitting at the Central Criminal Court, was required to consider a defendant charged with offences under the Official Secrets Acts of 1911 and 1989. Whipple J withdrew the defence of necessity from the jury noting in her ruling that amongst other problems, there was no evidence of the defendant disclosing sensitive information because there was "such a fear operating on his mind ... as to impel him to act as he did", that there was no imminence to any threat he feared, and that he was not responsible for the category of people to whom any threat applied. The parallels with Assange's case are clear.

C. The Prosecution submissions

29. The prosecution submits that the defence argument as to dual criminality is misconceived in that:

    (1) it seeks, impermissibly, to rely on material outside the extradition request;

(2) it elides an essential ingredient of the offence (which need be established as part of the dual criminality analysis) with disproving a defence that may be raised (which need not be so established); and

(3) in any event, on the basis of the conduct as alleged *in the request* no possible defence of necessity could arise.

1. *The relevant material*

30. As set out in the previous prosecution written submissions, the issue of extradition offence must be determined by reference to the request and accompanying papers and not by reference to any extraneous material: *United States of America v Shlesinger* [2013] EWHC 2671 (Admin), §§5, 11 and 12 and s.137(7A) of the 2003 Act. As a consequence, it is not permissible for this court to look to the material prayed in aid by the defendant. This material is irrelevant to the dual criminality exercise.

2. *Cleveland - Is it necessary to disprove a defence?*

31. *Cleveland* is authority for the proposition that where the foreign conduct lacks an essential element or ingredient of the equivalent domestic offence, "*that element may be inferred provided that it is an inevitable corollary of, or necessarily implied from, the conduct which will have to be established in that foreign jurisdiction*" (*Cleveland* §§59).

32. The lack of availability of a defence of necessity *is not an ingredient of the offence.* Rather, necessity is a defence which (if it can be raised at all) must be raised by the defendant and *thereafter* must be disproved by the Crown.

3. *In any event necessity could not arise*

33. In any event, the material provided by the requesting state – the only material which the Court is entitled to consider for this purpose – is demonstrative that no defence of necessity arises or could arise.

34. Breaking the allegations down, count by count, the conduct set out in the request could not raise a proper basis for asserting a necessity defence. The defence would not be available to a defendant who, in the *hope* of uncovering official misconduct, *sought out* official secrets or classified information – obtained illegally through computer hacking or theft, and who received such information pursuant to a pre-existing agreement. It would

not be available to a defendant who published unredacted names of sources, knowingly putting their lives at risk.

35. The indictment does not charge the defendant with passively receiving classified information or publishing stolen material which he received unsolicited. Nor does it charge the publication of the stolen material in bulk. Rather, the charges reflect:

    (1) Assange's complicity in *Manning's theft and unlawful disclosure* (counts 1, 3, 4, 9 to 14, 18 Kromberg 1 §19, by way of example). The defence of necessity could not arise here – the defendant was not *"placed in a position where he was required to make a choice whether to take the action*". He was not "responsible" for "victims" he might claim he was trying to protect. He sought the material out. The conspiracy to obtain, receive and disclose national defense information was formed before receipt of the material itself, and the aiding and abetting of Manning's unauthorized disclosures (counts 9 to 14) was as a consequence of discussions prior to the disclosure, at the behest of Assange, and was disclosure to Assange himself. There can be no defence of necessity to the *seeking out* of such information;

    (2) the defendant's *knowing and intentional receipt of national defence information from Manning* (counts 6 to 8, Kromberg 1 §19, Dwyer §70). These counts reflect the provision to Assange of Detainee Assessment Briefs (count 6), State Department Cables (count 7) and the Iraq Rules of Engagement Files (count 8). Again, where the knowing receipt of this information flowed, as it did, from solicitation by the defendant for classified information generally, this could not form the basis of a necessity defence. It is not necessary for the defendant to *solicit or receive* information in order to prevent death or serious injury to, as yet unidentified, victims;

    (3) the defendant's agreement to engage in computer hacking with Manning, and others, and to crack an encrypted password hash (counts 2 and 5, Kromberg 1 §19, Dwyer §§24-32). The defence of necessity plainly could not apply to any of this conduct. So far as the "password hash" allegation is concerned, necessity cannot conceivably justify an agreement to assist in hacking an encrypted password hash in order to allow Manning to access US military computers using a username that did not belong to her. Necessity is an irrelevance. Similarly there could be no issue of the defence of necessity justifying an agreement with a coterie of hackers [for example Jeremy Hammond, Sabu, Topiary], to hack, or to attack, parliamentary phone call audio recordings from a NATO country, or the computer of a former

WikiLeaks associate [Teenager, Kromberg 5 §§24 – 30 and §33], the computer systems of a cyber security company [Gnosis/Teenager, Kromberg 5 §§36-38], 200 US and state government email accounts [Laurelai, Kromberg 5 §42], the computer systems of Intelligence Consulting Company [Sabu/Hammond, Kromberg 5, §51 - 54], and two US police associations [Hammond, Kromberg 5 §54]; and

(4) the only instances of *distribution* of material relate to and *are limited to* distributing classified information containing the names of individuals in Afghanistan and Iraq (the significant activity reports) and elsewhere (the cables) thus endangering their safety and freedom [counts 15 to 17, Kromberg 1 §20, Dwyer §§38 to 43, confirmed after it was labelled "provably false" by the defence in Kromberg 3 §25-33]. There could be no possible defence of necessity for the publication of such unredacted names, still less so by *knowingly putting lives at risk* [Kromberg 1 §25-64], Dwyer §§44-5, Kromberg 5 §§7, 11(b), 77-8]. This would be incompatible with a necessity defence.

36. For the avoidance of doubt the defence assertion that any disclosure needs to be damaging for the United Kingdom offences unlike the US offence is wrong. The US offences also require proof of:

    (1) the documents must relate to the nation's military activities, intelligence gathering or foreign policy;
    (2) the documents must be closely held by the United States Government; and
    (3) Disclosure of the documents must be potentially damaging to the United States or potentially useful to a foreign nation or enemy of the United States.[10]

37. It follows, like the OSA 1989, there must be damage or likely to be damage by the disclosure.

III. BARS TO EXTRADITION

A. Extraneous considerations

1. *Section 81(a)*

38. This section reads:

[10] REF

> A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—
> (a)the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

39. The defence must prove on a balance of probabilities that the extradition request was in fact made for the purpose of prosecuting or punishing Assange on account of his political opinions. This means the request is made in bad faith and would not have been made if a person did not have the political opinions he holds.

40. That extradition is barred under section 81 of the Act is not demonstrated merely by demonstrating that a defendant, whose extradition is sought holds political opinions offensive to a requesting State or that he stands in wholesale opposition to the State which seeks his extradition or that he is viewed with opprobrium by politicians. So much may be said for anyone accused of terrorism yet no Court would regard the motivation for prosecution as political *per se*. Section 81 requires the defence to demonstrate the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his political opinions. In short, the prosecution must be a tool of oppression, brought to punish for political reasons rather than for any genuine reason expressed in the extradition request.

41. It follows if the extradition request was made for the purpose of prosecuting or punishing Assange because he had broken the criminal law of the United States of America the subsection is not made out. This prevents a political dissident committing a crime and avoiding extradition for that crime simply because his political views are inimical to the government of the requesting state. If it were otherwise a political dissident who committed murder, robbed a bank, or hacked a computer, even as part of his campaign against the government of the state, could evade prosecution or punishment notwithstanding it was clear he committed the crime.

42. It is clear in the instant case that Assange is not being prosecuted because of his 'political opinions', he is being prosecuted because he has committed serious criminal offences. He is not being prosecuted because he holds opinions that America should be more transparent and not hold secrets; he is being prosecuted because he helped Manning breach the Espionage Act and published classified information that put lives in danger.

43. Taken to its logical conclusion, the defence argument is that had Assange not committed those crimes there would still be an extradition request from America to punish him for his opinions on state transparency and disclosure of secrets. This is absurd.

44. In summary there is no evidence of the request being made for the purpose of prosecuting Assange for his political beliefs:

(1) First, because the allegations are narrow in compass going not to publication but to complicity in criminality and the publication of names of sources. Statements that this prosecution is unprecedented are not evidence of political interference but either a reflection of the unprecedented nature of the criminal conduct alleged or predicated upon defence witnesses mischaracterising the prosecution case.

(2) Second, per the repeated statements of Gordon Kromberg, there is a proper and objective basis for this prosecution. The suggestion that this prosecution is part of a campaign against journalists has been shown to be wrong.

(3) Third, that politicians comment adversely on crimes and those associated with them self-evidently does not make an investigation and prosecution of those crimes politically motivated. As regard the sorts of statements specifically cited by the defence as demonstrating that this prosecution is politically motivated appear more like statements of the obvious (see for example the reliance placed upon the Attorney General "'*if a case can be made, we will seek to put some people in jail"*).

(4) Fourth, the UK had been clear from 2012 that it regarded the grant of diplomatic asylum by Ecuador to Assange as an improper attempt to circumvent UK law:[11]

> "It is a matter of regret that instead of continuing these discussions they have instead decided to make today's announcement. It does not change the fundamentals of the case. We will not allow Mr Assange safe passage out of the UK, nor is there any legal basis for us to do so. The UK does not accept the principle of diplomatic asylum. It is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplomatic asylum by a foreign embassy in this country. Moreover, it is well established that, even for those countries which do recognise diplomatic asylum, it should not be used for the purposes of escaping the regular processes of the courts. And in this case that is clearly what is happening."

Thus the United States (or any indeed any other State) would have been entitled to take steps to ensure that Assange could be arrested in the event that he left the Embassy. Moreover, the United Kingdom, the United States (or any other country) would have been perfectly entitled to discuss or negotiate Assange's position with Ecuador. That Assange was not arrested until such time as Ecuador withdrew its grant of diplomatic asylum is demonstrative of international law being respected.

11 Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange

Assange claims that diplomatic sanctity was violated and Ecuador was 'bullied'. However, Assange was arrested only with Ecuador's co-operation (see below).

(5) Fifth: allegations which Assange makes about being surveilled in the Embassy are not evidence that this prosecution is politically motived. In short, taking the defence evidence at its highest, even if Assange was surveilled by or on behalf of the United States, which is not admitted, that does not demonstrate that this prosecution is politically motivated. Surveillance may evidence wider concern about a risk an individual poses or concern to know their movements. Surveillance may demonstrate a state's interest in apprehending an individual but that does not make a prosecution for criminal conduct politically motivated.

(6) Sixth: the evolution of the case against Assange reflects the way the case has developed. As set out in Mr Kromberg's evidence, that a superseding indictment discloses more serious criminality is "quite common"; Kromberg at CB2 §23.

(7) Seventh: the evidence going to the visit by former Congressman Rohrabacher does not demonstrate that this prosecution is politically motivated and indeed makes little sense. On the one hand, the thrust of the defence case is that this administration is prosecuting Assange as part of a war on journalists, intended to chill free speech. On the other, it is suggesting that an offer was made to pardon Assange. As the defence case accepts Rohrabacher, in public reports, stated that he was not authorized to make that approach on behalf of the United States (or on the part of the President). Regardless, this is nothing to point. Assuming, *arguendo*, a pardon offered in the context of a properly instituted and motivated prosecution, does not make that prosecution politically motivated. The defence would have to show that the prosecution had been instituted to obtain leverage and continued for this purpose for political ends. That is wholly at odds with the core of the defence case which is that this prosecution has been instituted to serve a wider political purpose.

(a) *The correct approach*

45. The Requesting State starts from a position of presumption of good faith. It requires cogent evidence for this court to find the requesting state acted in bad faith and made the request to punish a person for his political opinions rather than enforce its criminal law.

46. Where the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess special force; *Serbeh v Governor of HM Prison Brixton (October 31, 2002, CO/2853/2002)* Kennedy L.J. at [40]: *R (Adel Abdul Bary and Khalid Al Fawwaz) v The Secretary of State for the Home Department*, Scott Baker LJ at [50]; *Ahmad and Aswat v The Government of the United States of America* [2007] H.R.L.R. 8, Laws LJ at [74]. *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] 3 *W.L.R. 1087*; Lord Kerr of Tonaghmore JSC (with whom Lord Dyson MR and Lord Wilson JSC agreed at [14]). The approach of Lord Russell in *Re: Arton* [1896] 1 QB 108, 114-5 has not changed:

> "..that the demand for extradition is not made in good faith and in the interests of justice. It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the gravest kind, not only upon the motives and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring and friendly power."

47. It is therefore necessary to carefully scrutinise the evidence put forward by the defence who shoulder the persuasive burden on this issue to see if it reaches this exacting standard.

(b) *Political opinions*

48. While it is clear that Assange has views on government transparency and that secret information should be made publicly available, these are not the 'political opinions' the subsection was aiming to engage. These views are not restricted to the government of the United States of America but are aimed at every government and indeed corporate entity.

49. These views are not 'at odds' in any directed sense with the government of the United States of America. If, which is not conceded, his views are political opinions, the fact that he is not seeking regime change or the overthrow of the government of the United States of America at least diminishes the motive the government might otherwise have for prosecuting him on account of his political opinions. Any link becomes tenuous to vanishing point and cannot supplant the motive for prosecuting him for criminal wrongdoing.

(c) *The issues relied upon by the defence*

50. The defence in broad terms rely on the following points:

(1) that the Obama administration decided not to prosecute Assange;

(2) the Trump administration decided to prosecute Assange for political reasons, because:

i. President Trump was conducting a war on journalists and whistle-blowers;

ii. It is unprecedented to prosecute a journalist for publishing classified information;

iii. There were abuses of the rule of law;

iv. The timing of the superseding indictment; and

v. Public denunciations of Assange.

(3) espionage is a 'pure' political offence.

(d) *The Obama administration decided not to prosecute Assange*

51. This is the recurrent cornerstone of the defence submission. The closing submissions repeatedly state this as a fact. There is no reliable evidence to support this submission.

52. The high watermark of the defence submission is a Washington Post newspaper report of November 2013, referring to comments by a former Department of Justice ("DOJ") official, Matthew Miller (who had left the DOJ in 2011)[12] saying:

> "The problem the department has always had in investigating Julian Assange is there is no way to prosecute him for publishing information without the same theory being applied to journalists," said former Justice Department spokesman Matthew Miller. "And if you are not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange."
> Justice officials said they looked hard at Assange but realized that they have what they described as a "New York Times problem." If the Justice Department indicted Assange, it would also have to prosecute the New York Times and other news organizations and writers who published classified material, including The Washington Post and Britain's Guardian newspaper, according to the officials, who spoke on the condition of anonymity to discuss internal deliberations."

53. However, in the same article it said:

> "The officials stressed that a formal decision has not been made, and a grand jury investigating WikiLeaks remains impanelled, but they said there is little possibility of bringing a case against Assange, unless he is implicated in criminal activity other than releasing online top-secret military and diplomatic documents" [Emphasis added]

54. In fact, Assange is implicated in other criminal activity than mere publishing: aiding and abetting and conspiring with, Manning to breach the Espionage Act. Moreover, as is common sense, publishing classified information that puts individuals at risk, is not analogous to mere publication by a newspaper (the limit of what Mr Miller was referring to).

12 https://www.washingtonpost.com/people/matthew-miller/

55. There is no 'New York Times' problem because Assange is <u>not</u> charged with publishing classified information *simpliciter.* As Professor Feldstein said in relation to a journalist committing a crime to obtain classified material:

> Q. Well, I am going to come to it but let me just explain the difference. If you simply receive documents and do not commit a crime in getting the documents, the prosecutorial discretion under the First Amendment has always been used to prevent you being prosecuted. However, if a journalist breaks the law he is not immune from the law. Do you agree with that?
> A. Yes, journalists are not above the law.
> …
> Q. Thank you. So, you would agree a journalist has no immunity from committing a crime simply because it wants material to publish?
> A. Journalists are not above the law, no.[13]

56. And in relation to publishing material that causes or is likely to cause harm to an individual:

> Q. Let me make it easier for you, Professor, do you think all the material should have been published unredacted?
> A. No.
> Q. Do you accept that there is a quantitative difference between the New York Times problem and what Mr Assange has been charged with?
> A. Absolutely.[14]

57. Moreover, the unequivocal findings of two federal judges show the investigation into Assange continued after 2013. On 4 March 2015 DJ Rothstein said 'there is an ongoing criminal investigation'; On 11 January 2017 DJ Mehta said "no reason to doubt that there is an ongoing investigation of individuals other than Chelsea Manning";[15]

58. Added to this, Assange and his team stated on numerous occasions that they knew there was an ongoing investigation and that the investigation into Assange was not closed.[16] Indeed the whole reason why Assange took up residence in the embassy and endured all the privations that apparently involved, was to avoid his being extradited to the United States.

59. Finally, the testimony of a leading defence expert on this issue, Professor Rogers, underscores the absence of reliable evidence about what decisions the Obama administration made. He said:

> Q. Are you changing your position from there was no decision to prosecute, or they were just investigating at a lukewarm pace? Is that now your evidence?
> A. We certainly do not know, but the point is that there was no decision made to prosecute and that is what I am saying. There was not a decision made to prosecute in that whole period.[17]
> …

13 Transcript 8th September 2020, Page 51, lines 13 - 23
14 Transcript 8th September 2020, Page 54, line 34 – page 55, line 5
15 See Prosecution Core Bundle, tab 7, paragraphs [6] to [14]
16 [ibid]
17 Transcript 9th September 2020, Page 35, lines 24 – 28

A. I am not actually saying that there was a decision of not to prosecute, we do not have evidence of that[18],

…

A. Well, perhaps I should rephrase that slightly by saying, during his term in office, Obama did not take the decision to prosecute. I should have put it as a positive not a negative but, as far as we knew, no decision was taken to prosecute and, yes, it is true that a decision to not prosecute was not formally taken. So, yes, I will correct myself on that by saying that at that time the Obama administration did not take the decision to prosecute. They did not withdraw the possibility of prosecuting, but they did not take the decision to prosecute, whereas when the Obama administration did, that was the change..[19]

…

Q. Thank you, Professor. And just so it is pellucidly clear, you are now saying that it was not a decision - you are not saying there was a decision in the Obama administration not to prosecute, but you are saying that there was no decision to prosecute during the Obama administration?
A. From what we know in the public domain, it is the latter, there was no decision to prosecute[20]

60. The professor acknowledged that he did not know whether 'there was a decision not to prosecute' or simply 'there was no decision to prosecute' during the Obama administration. This is a fundamental distinction, and the absence of reliable evidence on the issue undermines the entire cornerstone of the defence submission.

61. In any event whether or not there was a decision not to prosecute by a former administration when there was an ongoing investigation is probative of nothing. It is a million miles from proving that the decision to prosecute was in fact made to punish Assange for his political opinions.

(e) *The Trump administration decided to prosecute Assange for political reasons*

62. The most important factor here is that there is clear evidence of criminality. It is not disputed Assange published classified information or that he obtained it from Manning. It is not disputed that names of individuals were published without redaction. There is compelling evidence Assange sought to assist Manning to crack the password hash. There is accomplice evidence that he incited and assisted them in computer hacking. In the teeth of evidence of criminality, it would take very cogent evidence to prove the purpose of the prosecution was to punish him for his political opinions rather than put into motion the ordinary criminal law.

18 Transcript 9th September 2020, Page 36, line 32
19 Transcript 9th September 2020, Page 37, lines 15 - 20
20 Transcript 9th September 2020, Page 38, lines 12 - 16

63. Similarly, and importantly, it is not the elected politicians who decide to prosecute someone federally in the United States of America. It is the DOJ. Federal prosecutors are forbidden from taking into account political opinions when making charging decisions:[21]

> "The Principles of Federal Prosecution set forth specific factors that federal prosecutors may *not* consider "[i]n determining whether to commence or recommend prosecution or take other action against a person." *Id.* § 9-27.260. Among other impermissible factors, federal prosecutors are forbidden from considering a person's "*political association, activities or beliefs*," the prosecutor's own personal feelings, or the possible effect on the prosecutor's own personal or professional circumstances."[22]

64. For the defence to succeed on this point all these prosecutors must have been acting in bad faith, for which there is no shred of evidence. Indeed, the defence's own witness Professor Rogers did not make such an allegation:

> A. No, I am certainly not saying they are doing this in bad faith. They are doing their job and I would hope and expect that they will be doing it competently and think so themselves. I am not saying they are acting in bad faith. I am saying that at a different level a political decision was taken to investigate this further after it had lapsed for eight years.[23]
>
> …
>
> MR LEWIS: Thank you. Professor, I am just going to see if we can consolidate our position on your evidence. And tell me if I have got this right. Your position is you do not think the Department of Justice prosecutors are acting in bad faith. Is that correct?
>
> A. I would hope not and I do not see the evidence for it at that level of professional 20 prosecutors within the Department of Justice.[24]

65. The professor in re-examination gave the heart of his answer notwithstanding a leading question:

> Q. --- in the Department of Justice but you said in answer to my learned friend's questions you do not think, you hope not, that there was any acting in bad faith. You are not giving your view on the inner workings of the Justice Department as a definitive view, you are just saying you hope that there was no bad faith. Is that right?
>
> A. Absolutely. I mean, I would not presume to have a definitive view on that.
>
> Q. Yes, but the one thing you did say in answer to my learned friend was that you were 17 concerned that there had been direction from above. Is that right?
>
> A. Well, could I use the term "strong influence" rather than direction?
>
> Q. Yes.
>
> A. Because it depends on what level you get direction.
>
> Q. Yes.
>
> A. You may well say that President Trump did directions to his own political appointees. Whether that was basically directly given to the professional staff in the Justice Department I cannot say but certainly the influence from the President Trump downwards at a political level was the desire for a prosecution.[25]

66. At its height a 'desire' to see a criminal prosecuted is nowhere near the statutory test in section 81(a) of the Act.

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21 Prosecution core bundle, tab 2, at paragraph [10]; and tab 7, at paragraph [4].
22 Prosecution core bundle, tab 2, at paragraph [12]
23 Transcript 9th September 2020, Page 29, lines 3-5
24 Transcript 9th September 2020, Page 32, lines 17 - 20
25 Transcript 9th September 2020, Page 46, lines 11 - 25

67. Mr Timm was of the same opinion:

> Q. Are you saying, Mr Timm, that Mr Kromberg and the other prosecutors which brought this case and seek to prosecute it are, therefore, acting contrary to their obligations and in bad faith?
> A. No, I am not going to ..[26]

68. Mr Kromberg says on oath:

> "As a prosecutor involved in this case, however, I reemphasize that this prosecution is founded on objective evidence of criminality, and focused upon Assange's complicity in criminal conduct and his dissemination of the names of individuals who provided information to the United States of America"[27]

69. Such evidence on oath by a prosecutor who issued the charge is to be given infinitely more weight than the opinions of 'experts' who simply assert that it is politically motivated. *A fortiori* when such 'experts' are partisan to Assange; have not even seen the evidence upon which the case is made and furnish no proof that the request was in fact made to punish Assange on account of his political beliefs. The approach of the Divisional Court to the evidence of Mr Eric Lewis in the case of *Government of the United States of America v Dempsey*[28] is apposite to his evidence on political opinions and the other 'experts' who gave similar evidence:

> "Mr Lewis discussed the change in US government policy between 2013 and 2016 and opined that this explained the delay between the interviews with the respondent in 2013 and 2014 allegedly giving rise to the offence and the return of the indictment in 2016. On that basis he suggested that the prosecution was politically motivated. We are satisfied that the opinion offered by Mr Lewis is pure conjecture. More to the point it does not begin to demonstrate that the prosecution of the respondent is motivated by his political opinions."

70. Moreover, the prosecution was brought after consideration by a Grand Jury. A Grand Jury has determined there is sufficient evidence to bring Assange to trial. As Mr Kromberg says:

> "The grand jury serves "'as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.'" *United States v. Dionisio*, 410 U.S. 1, 17 n.15 (1973) (quoting *Ex Parte Bain*, 121 U.S. 1, 11 (1887), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002)). Like federal prosecutors, grand jurors are bound to examine evidence objectively, and they take an oath to that effect.."[29]

71. Even if most Grand Juries tend to indict, they do not do so because of political pressure. Again, it would mean the Federal Prosecutor acted in bad faith in wrongly compelling the Grand Jury to indict.

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26 Transcript 9th September 2020, Page 78, lines 14 - 16
27 Prosecution core bundle, tab 7, at paragraph [5]
28 [2018] EWHC 1684 (Admin) at [18]
29 Prosecution core bundle, tab 2, at paragraph [16]

72. It is of note that the Grand Jury refused to indict in the case of the Chicago Tribune as Professor Feldstein confirmed:

> "Now, you made great store for instance of President Roosevelt pressuring the attorney general to prosecute the publisher of the Chicago Tribune. That is your witness statement, paragraph 8.
> A. Right.
> Q. But in fact, even though President Roosevelt pressurised the attorney general to prosecute, the grand jury refused to return an indictment, did it not?
> A. The grand jury did not return an indictment, that is correct."[30]

(i) *President Trump was conducting a war on journalists and whistle-blowers*

73. Insofar as the defence also rely upon the Department of Justice as having reversed its view that Assange could not be prosecuted because then media outlets like the New York Times would have to be prosecuted, then this can be answered shortly. Assange <u>was</u> implicated in criminal conduct and in the disclosure of the names of sources, the New York Times was not. As is set out exhaustively in the Second Affidavit of Mr Kromberg, the focus of this prosecution is avowedly not the disclosure of classified material, save where the disclosure revealed the names of sources [Kromberg CB2 at §20]. The Department of Justice has also made this clear: [Kromberg CB2 at §22 citing the announcement about the superseding indictment issued against Mr Assange]:

> "…The department takes seriously the role of journalists in our democracy …and it is not and has never been the Department's policy to target them for their reporting. Julian Assange is no journalist….
> Indeed no responsible actor- journalist or otherwise – would purposely publish the names of publish the names of individuals he or she knew to be confidential human sources in war zones, exposing them to the gravest of danger."

74. If the prosecution of Assange (as opposed to any journalist or newspaper which published the Wikileaks materials) is part of some *war* or intended to chill the media, it might be thought wholly inconsistent with that aim that it was accompanied by an announcement which made plain a policy not to prosecute journalists for reporting and that the Department of Justice did not regard Assange as a journalist.

(ii) *It is unprecedented to prosecute a journalist for publishing classified information*

30 Transcript 8th September 2020, Page 59, lines 15 - 20

75. This submission, which is a recurring theme, is based on a deliberate misleading statement as to what Assange is accused. It could not be clearer from the Extradition Request and Indictment.

76. The prosecution case (as regards the materials obtained from Manning) in the United States is expressly put on the following basis:

    (1) An independent grand jury issued these charges based on evidence of the following actions that Assange knowingly took, in committing the charged criminal offenses:

        i. His *complicity in illegal acts* to obtain or receive voluminous databases of classified information.

        ii. His agreement and attempt to obtain classified information through *computer hacking*; and

        iii. His publishing certain classified documents that contained *the un-redacted names of innocent people* who risked their safety and freedom to provide information to the United States and its allies, including local Afghans and Iraqis, journalists, religious leaders, human rights advocates, and political dissidents from repressive regimes. [Kromberg at CB Tab 2 §6].

    (2) The Grand Jury did not charge Assange with passively obtaining or receiving classified information; neither did it charge him with publishing in bulk hundreds and thousands of these stolen classified documents. [Kromberg at CB Tab 2 §18].

    (3) Rather the charges against Assange focus on his complicity in Manning's theft and unlawful disclosure of national defense information (Counts 1-4, 9-14); his knowing and intentional receipt of national defense information from Manning (Counts 6-8); his agreement with Manning to engage in a conspiracy to commit computer hacking, and his attempt to crack a password hash to a classified US Department of Defense account. [31] [Kromberg at CB Tab 2 §19].

    (4) The only instances in which the superseding indictment charges Assange with the distribution of national security information to the public are explicitly limited to his distribution of documents classified up to the secret level containing the names of individuals in Afghanistan, Iraq, and elsewhere around the world, who risked

31 Per the first superseding indictment.

their safety and freedom by providing information to the United States and its allies. [Kromberg at CB Tab 2 §20].

77. In short, Assange was charged for publishing specified classified documents that contained the unredacted names of innocent people who risked their safety and freedom to provide information [Kromberg at CB Tab 2 §18].

78. It follows it is of no assistance to this court to misstate the charges against him in the hope that such a misstated charge can be attacked.

79. In *US v Rosen*[32] the District Court which will have conduct of Assange's case, in the United States, concluded that a journalist or other person in passive receipt of classified information that causes or is likely to cause harm if published, and knows as much, cannot have a First Amendment defence. The Court said:

> "The first class consists of persons who have access to the information by virtue of their official position. These people are most often government employees or military personnel with access to classified information"[33]
> …
> "The second class of persons are those who have no employment or contractual relationship with the government, and therefore have not exploited a relationship of trust to obtain the national defense information they are charged with disclosing, but instead generally obtained the information from one who has violated such a trust."[34]
> …
> "There can be little doubt, as defendants readily concede, that the Constitution permits the government to prosecute the first class of persons for the disclosure of information relating to the national defense when that person knew that the information is the type which could be used to threaten the nation's security, and that person acted in bad faith, i.e., with reason to believe the disclosure could harm the United States or aid a foreign government."[35]
> …
> "…This position cannot be sustained. Although the question whether the government's interest in preserving its national defense secrets is sufficient to trump the First Amendment rights of those not in a position of trust with the government is a more difficult question, and although the authority addressing this issue is sparse, both common sense and the relevant precedent point persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense.[36]
> …
> "Thus, for these reasons, information relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed, is potentially harmful to the United States, and the defendant must know that disclosure of the information is potentially harmful to the United States. The alternative construction simply is not sustainable. So limited, the statute does not violate the defendants' First Amendment guarantee of free speech"[37].

80. On this analysis, an aider and abettor, or conspirator, of Manning, Assange would fall within the first class of persons. In relation to the second class of persons, he falls within

32 US v Rosen 445 F.Supp 2d 602
33 [Ibid] page 25
34 [Ibid] at page 25
35 [Ibid] page 26
36 [Ibid] page 27
37 [Ibid] page 30

that class as his disclosures caused harm or were likely to cause harm to the named informants. Although this is a District Court ruling, it nonetheless is evidence that what the defence presents, almost as truism, that newspapers would or could never be prosecuted for publishing national defence information, is far too simplistic. The District Court's approach suggests that even in relation to a conventional newspaper, whether the First Amendment precludes prosecution is likely to turn on the harm alleged.

81. It follows this submission by the defence is misplaced.

(iii) *There were abuses of the rule of law*

82. The allegation is that the US proceeded (against all international legal norms) to violate Mr Assange's asylum in the Ecuadorian Embassy. This is simply wrong and the evidence does not substantiate this allegation. But even if it were true, the defendant was a fugitive from justice (as regards the United Kingdom authorities) and a suspect in the United States while in the embassy. Mr Assange's grant of asylum was not an immunity. The rule of international law simply makes the embassy of a foreign state inviolate unless the foreign state invites the host country in.

83. One would expect both the United States of America and the United Kingdom to do all they could in their relations with Ecuador to persuade it that Mr Assange should not escape justice indefinitely. That course was reasonable and lawful. Again, it is impossible to characterise this as a bad faith manipulation of the English extradition proceedings.

84. In fact, the defendant's asylum was not violated and the Ecuadorian Embassy's inviolability was adhered to, showing respect for international law. The arrest by the Metropolitan police, upon the invitation of the government of Ecuador, was unquestionably lawful.

85. The defendant argues that when (through its unlawful acts) the US Government learned that Mr Assange was being given diplomatic status (on 21 December 2017), it issued its criminal complaint and sought a provisional extradition request on the same day. Even if this were correct, it is utterly incapable of amounting to an abuse of process.

86. Fugitives have attempted (unsuccessfully) to use diplomatic status to avoid extradition (see *R v. Governor of Pentonville Prison er parte Teja* [1971] 2 Q.B. 274 and *R v. Governor of Pentonville Prison ex parte Osman (No. 2)* Times Law Reports December 24 1988). Osman became a Liberian ambassador (by paying $1m) to avoid extradition. The

Divisional Court held his diplomatic status was irrelevant as it had not been recognised by the Court of St James in the United Kingdom. Only accredited diplomats enjoyed diplomatic immunity in the United Kingdom and a diplomat could only be accredited by the court of St James (which had a discretion whether or not to accredit). It follows, even if the defendant had been made a diplomat while in the Ecuador embassy he could not have enjoyed diplomatic immunity. A State will be astute to ensure that a grant of diplomatic status is not a device to assist an individual to evade justice.

87. In so far as the allegation that Assange's legal privilege has been breached, it is clear that the American prosecutors will not be told of anything legally privileged. However, it is firstly noted that no prejudice to the defendant's ability to make a challenge to his extradition is alleged or particularised. Given that the US prosecutors will never see and cannot use any LPP materials and that no LPP materials form part of the request, there is no possible basis for alleging the type of prejudice articulated as necessary by Laws LJ in *Bermingham* (*ante*). There is no *nexus* of prejudice between the complained of conduct and these extradition proceedings.

88. The Court should equally be wary of general expressions of outrage about the surveillance of privileged communications. As was identified in our earlier abuse skeleton argument there is no absolute rule against surveillance which includes privileged communications as a matter of UK law. English law *permits* the surveillance of communications and consultations between a lawyer and client; see Re McE [2009] UKHL 15; *Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010* ('the 2010 Order): directed surveillance carried out on premises originally used for legal consultations, at a time when they are being used as such, is to be characterised as intrusive surveillance for the purposes of Part II of RIPA; *Covert Surveillance and Property Interference* – Revised Code of Practice 2018 (which also applies to foreign surveillance by UK authorities).

89. The objection to the "surveillance allegations" constituting an abuse of this Court's process is however far more fundamental. This application fails to demonstrate any nexus between the alleged surveillance and *these* proceedings. It is not the function of this Court to police the surveillance activities of another state. The focus of an abuse application is how the conduct alleged subverts the extradition process.

90. The evidence of witnesses 1 and 2 (the only primary evidence cited in support of the allegations) is not repeated here. Neither their evidence (nor even the wider self- serving

complaint submitted on behalf of Mr Assange in Spain) comes close to demonstrating an abuse of this process:

(1) **First**: The conduct which is the focus of the US indictment is alleged to have occurred between 2009 and 2011, some five years (at least) before it is alleged that the monitoring in the embassy took place.

(2) **Second**: the extradition request sets out the evidence upon which the US Government expects to support the charges. This is not exhaustive but it gives this Court a good insight into the evidence which forms the basis of the prosecution case [see Dwyer Affidavit at §64]: evidence gathered from Ms Manning's personal and government computers, including classified information that Ms Manning searched for and downloaded from US Government computers; electronic messages Ms Manning sent to and received from Mr Assange; statements by Ms Manning and statements made by Ms Manning to others in furtherance of and in scope of the conspiracy; testimony of former members and affiliates of Wikileaks; documents and materials gathered from the Wikileaks website and evidence from the "Wayback Machine" (information once on its website); Assange's public statements and tweets and testimony from those with expertise in US military, intelligence and diplomatic fields. Self- evidently there was sufficient evidence upon which to convict Ms Manning.

(3) **Third**: there is nothing, <u>on the defence case</u>, to show that any privileged materials were gathered in the embassy which are now deployed against Mr Assange.

(4) **Fourth**: The United States has put this beyond dispute. The first Kromberg Affidavit states (i) no privileged communications will be used against Mr. Assange in criminal proceedings; (ii) if the fruits of any surveillance in the Embassy exist,the prosecutors will not review or use any privileged communications [§174]; (iii) "any use of privileged material against Assange would be barred by American law" [§175] (privileged communications include confessions to past wrongdoing).

(5) **Fifth**: developed procedures are in place to prevent <u>agents and prosecutors</u> receiving or viewing privileged materials in cases they are investigating. There is a separate filter team.

(6) **Sixth** (and moreover) to the best of the knowledge, information, and belief of the Prosecutor, the allegations in the superseding indictment and the affirmations made in the affidavits submitted by the United States in support of the extradition request, contain no legally privileged material and were not derived from legally privileged knowledge (Kromberg §5).

91. However widely it is put by the defence, it is submitted that the allegations going to the surveillance of the embassy cannot be capable of amounting to an abuse of this Court's jurisdiction.

(iv) *The timing of the superseding indictment*

92. It is sheer fantasy and speculation to assert the timing of the superseding indictment had anything to do with the Swedish extradition request.

93. The Swedish request was discontinued and never remade because of the time the defendant spent in the embassy. When the United States of America made its request there was no extant request and no need for any increase in charges. Indeed any charge would have sufficed because there was no competing request from Sweden when the defendant was arrested from the embassy.

94. There is not and has never been a need for a decision of the Secretary of State to accord precedent to the Swedish request. This particular is not only fanciful but a hopeless grasping at straws.

2. *Section 81(b)*

95. The sub section reads:

> " ..if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions"

96. The defence make short submissions on this ground at 9.2, pages 67 – 68 of their submissions.

97. No doubt a change of administrations in the United States of America would eradicate the defence allegations that the current administration is intent on persecuting Assange.

98. In any event prejudicial statements by politicians or publicity (even if virulent or sustained), prior to trial, will not result in a defendant having an unfair trial or being punished for his opinions or beliefs. The European Court recognises that the effect of such statements can be mitigated within the trial process (by, for example, jury directions) to ensure that it is fair. As set out in Mr Kromberg's declaration in support of extradition [CB2 at §72- 81] dealing with the suggestion that Assange could not have a fair trial owing to the composition of any jury pool the United States has strong, well evolved procedures in order to determine whether any prospective juror holds prejudicial views or would not be impartial. The aim is precisely the same as would be in this jurisdiction [§75]:

> "If Assange is extradited to face trial in the United States, the district judge would conduct a thorough voir dire of all potential jurors, in the presence of attorneys for both the government and the defendant, to ensure that selection of a fair and impartial jury that is able to set aside any pre-conceived notions regarding this case and to render an impartial verdict based solely on the evidence presented in the case and and the district court's instruction of law"

99. Second, that the prosecution may seek to *argue* that Assange as a foreign national is not permitted to rely on the First Amendment, at least as it concerns defence information, or is not entitled to rely on the First Amendment as a defence to his complicity in Manning's criminality or as a defence to publishing the names of sources [See Kromberg at CB2 §71], these do not demonstrate that Assange will be punished on account of nationality or his opinions or prejudiced at trial on account of them. First, they are possible arguments of law that may be utilised at a trial to define the outer limits of Assange's right to rely on free speech in any prosecution. They are arguments which may or may not be taken and which may or may not be accepted by the Court. There is an obvious difference between a legal process that will judge the availability of certain rights to defendants and those rights being removed for prejudicial reasons like nationality or political opinions. There may be objective reasons for determining that one group of individuals is entitled to rights based upon their nationality, whilst non-nationals are not. In this jurisdiction, extradition is a case in point - only British nationals are entitled to rely upon Article 6. Foreign nationals are not; *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20; see also *R (Al Rawi & Others) v The Secretary of State for Foreign and Commonwealth Affairs & Anor* [2008] Q.B. 289 §78

100. Regardless even of this (and as developed below), it is not accepted that Assange would have a free-standing right to rely on Article 10 in this jurisdiction were he charged with equivalent offences in this jurisdiction.

101. As regards Assange being subjected to SAMs (and any consequences that may have on his prison conditions), the High Court rejected, in a series of cases that SAMs were utilized as a means of punishing Muslim prisoners given that SAMs are often directed against terrorists *Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America* [2006] EWHC 2927 (Admin) (considered in greater detail below). The same reasoning applies here, if Assange is subjected to SAMs, it will not be because he is Australian or professes to hold beliefs about free speech or Government secrecy but because the risk that he poses to national security.

102. Equally, that it is possible that Mr Assange may be detained away from the general prison population, in protective custody, does not demonstrate that Assange will be subject to adverse conditions because he is Australian or holds certain beliefs but because of risk he poses to himself or may be at from others; Kromberg, CB2 at §84.

103. Reliance upon allegations that the current administration in the United States has sought to intervene in prosecutions, for the benefit of individuals, does not demonstrate that the trial process is unfair or impartial. Such allegations do not demonstrate that this prosecution is politically motivated or he will suffer prejudice because of his political opinions or nationality.

3. *Section 82 – passage of time*

104. This provision does not apply as Assange deliberately evaded justice, knowing he would be charged and extradited.

105. By virtue of section 82 of the 2003 Act:

> A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
> (a) committed the extradition offence (where he is accused of its commission), or
> (b) become unlawfully at large (where he is alleged to have been convicted of it).

106. In *Kakis v. The Government of the Republic of Cyprus* [1978] 1 W.L.R 772 Lord Diplock [p782] defined 'oppression' as 'directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration'. In the same case, Lord Diplock considered the test of injustice as 'directed primarily to the risk of prejudice to the accused in the conduct of the trial itself'.

107. A fugitive may not ordinarily be permitted to rely upon the passage of time created by his own deliberate flight, save in exceptional circumstances [*Gomes and another v. The Government of Trinidad and Tobago* [2009] 1 WLR 1038 at 1047F, 1048C].

108. On the issue of injustice, the House of Lords in *Gomes* [supra] ruled [§§32 to 35]:

> "32. With regard to the concept of injustice, the law has moved on since Kakis, in part because of the developing abuse of process jurisdiction over the past 30 years. It is unnecessary to rehearse this at length. Rather it is sufficient to refer to the judgment of the Privy Council delivered by Lord Bingham of Cornhill in Knowles v Government of the United States of America [2007] 1 WLR 47 , in particular at para 31 where the Board approved the Divisional Court's judgment in Woodcock v Government of New Zealand [2004] 1 WLR 1979 from which it extracted and endorsed the propositions:
> "First, the question is not whether it would be unjust or oppressive to try the accused but whether … it would be unjust or oppressive to extradite him (para 20). Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him (para 21). But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect a defendant against a trial rendered unjust or oppressive by the passage of time (paras 21–22). Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case (paras 14–16, 23–25). Fifthly,

'there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive' (para 29)."

33. The second of those propositions, it will be noted, invites consideration of whether, in any particular case, "a fair trial is impossible", and that indeed we regard as the essential question underlying any application for a section 82 bar on the ground that the passage of time has made it unjust to extradite the accused. As was pointed out in Woodcock [2004] 1 WLR 1979 , para 17, a stay on the ground of delay in our domestic courts is only properly granted when "there really is evidence of prejudice to the extent that a fair trial could not be held". We acknowledge that in Kakis [1978] 1 WLR 779 Diplock para 1 speaks of "the risk of prejudice to the accused in the conduct of the trial itself". But Viscount Dilhorne's leading speech in R v Governor of Pentonville Prison, Ex p Narang [1978] AC 247 , 276 the previous year had used the language of impossibility:

"I see nothing in the material before this House to lead to the conclusion that as a result of the passage of time it would be impossible for [the two accused] to obtain justice, and, that being so, I am unable to conclude that by reason of the passage of time their return would be unjust or oppressive."

34. The third of the Knowles propositions requires a requested state to have regard to the domestic law safeguards in the requesting state. As Woodcock [2004] 1 WLR 1979 observed, at para 21, the domestic court of the requested state has obvious advantages in deciding whether or not a fair trial is now possible: "That court will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise." The Divisional Court added, however, at para 21, that

"we would have no alternative but to reach our own conclusion on whether a fair trial would now be possible in the requesting state if we were not persuaded that the courts of that state have what we regard as satisfactory procedures of their own akin to our (and the New Zealand courts') abuse of process jurisdiction."

35. Woodcock was concerned with extradition to New Zealand and evidence was adduced there of an approach in New Zealand very similar to our own. Knowles concerned the extradition of a Bahamian to the United States. What, however, of extradition to countries of whose judicial systems we know less and in which, it is submitted, we should have less confidence? Council of Europe countries in our view present no problem. All are subject to article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial—whether by an abuse of process jurisdiction like ours or in some other way. In so far as Keene LJ's judgment in Lisowski v Regional Court of Bialystok (Poland) [2006] Extradition LR 272 , para 26 suggests the contrary, it should not be followed. Trinidad itself should similarly be assumed to have the necessary safeguards against an unjust trial; the Privy Council is, after all, its final Court of Appeal."

109. Following *Gomes*, in *Dare v Principal Court of Santa Cruz De Tenerife* [2010] EWHC 366 (Admin), Elias LJ in the Divisional Court ruled:

"19. I emphasise that the question is whether the extradition is unjust and not whether it would no longer be possible to have a just trial. The distinction is emphasised by Lord Brown in the Gomes case to which I have made reference. As Lord Brown pointed out at paragraph 35 in that case, it should be assumed that any Council of Europe country will be capable of protecting an accused against an unjust trial; they are signatories to the European Convention and will be bound by Article 6 . They are in a better position than we are, with the very limited material before us, to determine whether a fair trial is possible or not. Lord Brown emphasised … that **the crucial question is whether the court of the requesting state would be bound to conclude on the facts that a fair trial is impossible. In those exceptional circumstances, but only then, it would be wrong to extradite an accused**."

110. A summary of the principles to be applied under s.82 was given by a Divisional Court in *Loncar v. Croatia* [2015] EWHC 548 (Admin) at §29:

"The following principles relevant to s. 14 (and s. 82 which is in materially identical terms for category 2 territories) may be derived from the authorities:

(1) The word "unjust" is directed primarily to the risk of prejudice to the requested person in the conduct of the proposed trial itself, whereas the word "oppressive" is directed to hardship to the requested person resulting from changes in his circumstances that have occurred during the period

> to be taken into consideration. However, there is room for overlapping and between them the two words will cover all cases where to return him would not be fair: Kakis v Government of Cyprus [1978] 1WLR 779 per Lord Diplock at page 782.
> (2) Delay in the commencement or conduct of extradition proceedings which is brought about by the requested person himself by fleeing the country, concealing his whereabouts, or evading arrest cannot be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. In those circumstances, save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept those difficulties: Kakis per Lord Diplock at page 783, Gomes v The Government of Trinidad and Tobago [2009] 1WLR 1038 at paragraph [27].
> (3) Where the delay is not brought about by the requested person himself, the essential question underlying the ground that the passage of time has made it unjust to extradite him is whether, by reason of that passage of time, a fair trial is impossible : Gomes at paragraphs [32-33]. Nevertheless prejudice in the conduct of his defence at a trial or retrial may be a factor contributing to a conclusion that a return would be oppressive, notwithstanding that it will not of itself satisfy the injustice criterion.
> (4) The test of oppression "by reason of the passage of time" will not easily be satisfied; hardship, a comparatively commonplace consequence of an order for extradition, is not enough: Gomes at paragraph [31].
> (5) The gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand trial oppressive. The more serious the offence, the less easy it will be to satisfy the test of oppression: Kakis per Lord Diplock at page 784; Gomes at paragraphs [31].
> (6) The length of time is itself an important consideration in whether a return would be oppressive: Wenting v High Court of Valenciennes [2009] EWHC 3528 (Admin) .
> (7) Where the delay is not brought about by the requested person himself, it is a relevant factor if the delay has engendered in the requested person a legitimate sense of security from prosecution or punishment: Gomes at [26]; La Torre per Laws LJ at [37].
> (8) Where the delay is not brought about by the requested person himself, the culpability of the delay by the judicial authority may contribute to establishing the oppressiveness of making an order for his return, and may be decisive in what is otherwise a marginal case: Kakis per Lord Edmund Davis at page 7855, La Torre v The Republic of Italy [2007] EWHC 1370 per Laws LJ at paragraph [37]; Gomes at paragraph [27]."

111. Recently, in *Scott v. Australia* [2020] EWHC 2924 (Admin) a Divisional Court endorsed the summary in *Loncar* (set out above). The Court also considered *Ex Parte Patel* [1995] Admin 7 LR 56 (relied on by the defendant at §23.3 of his skeleton argument), but noted that "the leading authorities on delay in extradition cases indicate a more hardened approach." [§61]. As an illustration of the high threshold to be met in establishing oppression, in the case of *Scott*, the Divisional Court declined to overturn an order for extradition in the case of an 88 year old Appellant, suffering from dementia and frail physical health, with a nearly 50 year delay, 20 years of which was culpable.

(a) *The relevant period*

112. The relevant period is the period between the commission of the offence and the extradition hearing.

113. The indictment particularises specific conduct taking place in 2009/10 (contact with Manning and the agreements formed between Manning and Assange), 2010 (the

publication of the Iraq and Afghanistan SARs), November 2010 - September 2011 (the publication of the Diplomatic Cables), 2012 (Sabu and Hammond) and 2015 (Snowden). Indeed, the indictment itself covers offending up to 2015 [counts 1 and 2], 2010 [Counts 3 to 14, and 18] and 2019 [counts 15 to 17].

(b) *Assange is a fugitive*

114. This is a case where the defendant, on his own case (see Kromberg, Second Supplemental Declaration at CB7 §§8-12 setting out statements by Assange's lawyers and by Assange as to his seeking asylum in Ecuador because he believed there was a sealed case against him in the United States) lived in an embassy for some seven years, for the express purpose of avoiding the very prosecution he now faces. According to Assange, he took this action because he knew that he might face these allegations and was prepared to go to extraordinary lengths in an attempt to avoid prosecution. It is simply not open to him to suggest that he has suffered any prejudice or oppression as a result of taking this course [*Gomes* [supra]]. Is it seriously to be suggested that if Assange had known of the charges sooner, that he would have left the Embassy or better prepared his defence?

(c) *Injustice*

115. It appears that the Appellant relies on the injustice limb of section 82 [see defence skeleton argument §23.6].

116. The relevant test is whether the American courts would be bound to conclude that a fair trial is not possible (see above).

117. For all the reasons set out in this skeleton argument, which will not be repeated in this section, it is clear that a fair trial is not only possible but that one can and will take place. There can be no tenable injustice argument under s82.

(d) *Oppression*

118. To the extent that Assange relies on changes in personal circumstances which have arisen during the period that he lived at the embassy then the only changes known to the prosecution are that he has had two children. Again, any decision Assange made to establish a family life when, on his own case he faced prosecution and was living in an embassy expressly so as to avoid extradition, was a decision made in the full knowledge of how precarious the foundation of that family life was. His family life was built on foundations of sand.

119. In any event there is nothing out of the ordinary about the defendant's personal circumstances. That he has two children and a partner would not be sufficient to raise oppression for the purposes of s.82. Indeed, until his arrest in these proceedings he was choosing to remain outside the reach of the law, with an extant warrant for his arrest after his failure to surrender in previous extradition proceedings.

120. As to the other factors relied on by the defendant:

    (1) As to the "decision not to prosecute" [defence skeleton §23.5, then repeated in a slightly different formulation in §23.9], the defence submissions are misleading as to the significance of decisions not to prosecution in the caselaw. In other cases, clear decisions not to prosecute were considered relevant because they engendered in the defendant a false sense of security [*Gomes* §26*, Loncar* §29]. This plainly is not the case for Mr. Assange who remained holed up of his own volition in the Ecuadorian Embassy well beyond 2013, the date of the decision he claims to rely on. Finally, no oppression arising from the decision claimed by the defendant has been properly particularised.

    (2) The evidence is **not** to the effect that there is a "real risk [Assange] could not effectively participate in his trial" [defence skeleton argument §23.8]. Rather, as this court will have noted during these proceedings, the defendant followed complex legal argument assiduously, correcting the advocates from the dock and requiring numerous and lengthy conferences with his legal team to discuss the evidence and submissions.

121. There can accordingly be no question of s82 presenting a bar to extradition.

IV. HUMAN RIGHTS

A. Article 3

122. In general terms it is submitted that the case advanced on behalf of Mr Assange, in respect of conditions of detention, was damaged, not improved by the witnesses called on his behalf.

123. The starting position is that the issue of detention with Special Administrative Measures (SAMs) and detention at the *Administrative Maximum Security United States Penitentiary* ("ADX") (taken separately and together) has been subject to exhaustive consideration by

the domestic courts and by the European Court of Human Rights in the *Ahmad et al* litigation. The European Court found that being subject to Special Administrative measures pre-trial raised no issue under Articles 6 or 3. This is not surprising – it would be difficult for any defendant (subject to SAMs or not) to contend that pre-trial he was being detained in conditions of solitary confinement. The fact alone that a defendant is entitled to legal visits essentially rules out solitary confinement pre-trial. To this may be added the evidence of Mr Sickler confirming that the conditions in the ADC are impressive and that the ADC is 'stellar' when it comes to preventing suicide.

124. In *Ahmad et al*, the European Court went on to consider whether detention, subject to SAMs, in ADX Florence would be incompatible with Article 3. It found that it would not. It made that finding having considered detailed information about how individuals subject to SAMs are detained at the ADX and how they are able to transition out of Unit H (the Unit that those subject to SAMs are detained in) and ADX. In short, the European Court was satisfied on the evidence before it that it was possible for those detained in ADX and subject to SAMs, to transition out of H Unit and ADX – their detention there was not indefinite.

125. In *Minh Quang Pham v The United States of America* [2014] EWHC 4167 (Admin), the District Judge accepted that the profile of the appellant was such that he "might well be subject to SAMs". The High Court also proceeded on this basis [Lord Justice Aikens [37]]. It dismissed the argument on detention subject to SAMs in short order despite proceeding on the basis that SAMs would likely be imposed [39]:

> "39. Once again, we regard this argument as speculative. It cannot be known to what SAMs the appellant will be subjected. We think it is fanciful to suggest that any resulting effect of the SAMs could amount to a "flagrant breach" of the appellant's Article 6 rights with regard to his trial in the USA. Similar arguments were raised on behalf of the applicants in the admissibility case before the ECtHR of Babar Ahmad and others v United Kingdom . 37 The ECtHR found, first, that there was no evidence that SAMs were coercive. Secondly, it recognised that Article 6 and the Eighth Amendment to the US Constitution were "strikingly similar" and that there was every reason to believe that a trial judge would respect a defendant's rights under the Eighth Amendment. Thirdly, the Court found that even if being subject to SAMs would have an adverse effect on the well-being of a defendant, it was not such as to impair their Article 6 rights such as to amount to a "flagrant breach".

126. Ground 4 of appeal in *Pham* was "Would the fact that the appellant would be detained (after trial) in the ADX, Colorado, amount to an infringement of his Article 3 rights such that he should not be extradited." The High Court rejected this having considered the decision in *Rezaq v Nalley* 677 F.3d 1001 (2012). The High Court concluded:

> "9. The effect of the Federal Appeal Court's decision in Rezaq is that a placement in the ADX is not indeterminate. It is subject to periodic reviews which can be challenged administratively.

> Therefore the situation set out in [223] of the ECtHR's decision in Ahmad , viz. that if an applicant were at real risk of being detained "indefinitely" in the ADX, it would be possible for the minimum levels of severity to be reached to found a breach of Article 3 , is not made out.".

127. None of the evidence called on behalf of the defence comes close to providing a basis upon which this Court could come to a different conclusion on the question of whether detention in the ADX is akin to solitary confinement and indefinite. In summary, none of the witnesses called were qualified or had any empirical evidence upon which they could demonstrate that detainees at ADX were not able to work through Unit H and were at risk of indefinite detention at ADX.

128. The Court is also respectfully reminded of the evidence that was submitted by way of agreed fact (going to the suggestion by witnesses that those convicted of espionage would inexorably be detained at the ADX and that those subject to SAMs in ADX were subject to them for the entirety of their detention (and would thus have to stay in H Unit and be unable to transition out of ADX)). This is in addition to the statement of Gordon Kromberg at §102 [declaration of 17 January 2020, CB Tab 2] that not all inmates who are under special administrative measures are housed at the ADX. The agreed facts were:

    (1) Nine (9) BOP inmates have a SAM for Espionage pursuant to 28 C.F.R. 501.2. Four are housed at the ADX, One at MCC New York, Two at FCI Terre Haute (CMU), one at FCI Hazelton, and one at FMC Carswell:

    (2) Since January 2012, there were approximately 26 inmates who were on SAMs and housed at the ADX who were moved out of H unit and never returned to H unit.

    (3) Since January 2012, there have been approximately 20 inmates housed at ADX whose SAMs were not renewed.

129. There are two very important caveats to all of the arguments about SAMs and possible detention at ADX. In *Ahmad et al* – all of the applicants were accused of terrorism offences and there was no question but that there was a real risk they would be subject to SAMs and to detention at ADX. That is not the position here – all that Mr Kromberg has said on behalf of the United States is that it is possible. Equally all that he has said as regards where Assange might be detained is that it is *possible* he might be detained at the ADX or in a CMU [declaration of 17 January 2020, CB Tab 2]:

> "103. If he is sentenced to a period of incarceration, it is possible that Assange will be placed under special administrative measures for at least a portion of his sentence. As outlined above, such measures are imposed on a case-by-case basis using a number of different factors. It also is possible that the government will not seek to impose SAMs on Assange, but otherwise seek to limit and monitor his visits and communications. If that is the case, Assange may be designated to a facility

> with a Communications Management Unit ("CMU"). There currently are two prisons with CMUs, and neither of these prisons is ADX.

130. And [Fourth declaration §28, CB Tab 8]:

> "In short, sentencing and facility designations are difficult to predict, and, as a result, it is purely speculative to conclude that Assange would receive a life sentence and/or be designated to the ADX."

131. Whether Mr Assange would be subject to SAMs would be dependent on decision making at the highest level. The United States Attorney General would have to determine that the test for the imposition of SAMs was met in Assange's case. The Attorney General can only direct a warden to impose SAMs when the head of a member agency of the United States intelligence community has certified that there is a danger that an inmate will disclose classified information and that this would pose a threat to the national security. The SAMs imposed must be tailored to protect the information at issue: [Kromberg declaration of 17 January 2020 CB Tab 2 at §96].

132. Only a tiny proportion of the US prison population is subject to SAMs. For example, in *Ahmad and others v UK* (2013) 56 E.H.R.R. 1 the Court referred [§89] to there being 41 prisoners in the entire US prison system who were subjected to special administrative measures. The current position is confirmed in the Fourth Kromberg declaration: at §59: *Only a tiny fraction of federal inmates are the subject of SAMs. For example, as of September 1, 2020, of the 156,083 inmates in BOP custody, only 47 are under SAMs*. Mr Sickler agreed that this was a "tiny number" [39/ 12 and 15].

133. A further important caveat is the length of sentence that Assange might be subject to. As set out at paragraph **288** below, there is no evidence upon which it can reliably be forecast that Assange will receive a sentence of many decades or a sentence in the region of a life sentence.

134. For all of the reasons set out below the defence has failed to demonstrate, contrary to the decisions in *Ahmad et al* and *Pham*, that Assange is at a real risk of indefinite detention in ADXMr Sickler's evidence

135. Before developing this submission, a number of points are made about Mr Sickler's evidence. He agreed with the evidence of the United States on (or volunteered evidence agreeing with) almost every single point put to him on behalf of the United States. His evidence was inconsistent with almost the entirety of the defence case and is fatal to it:

    (1) He agreed that whether or not SAMs would be imposed was entirely speculative: [28 September/ page 39 line 5].

(2) He agreed that as well as it being speculative as to whether or not Assange would be subject to SAMs, it was also entirely speculative as to what measures those SAMs might consist of [page 40 line 5].

(3) He agreed that in non-Covid times, individuals who are subject to SAMs have the same access to their lawyers as everyone else. In Covid times those subject to SAMs have the same access to their lawyers as everyone else [Page 43 line 7].

(4) He confirmed that the basis of his evidence that SAMs led to lawyers fearing incarceration for violating SAMs and to self-censure was based upon the conviction Attorney Lynne Stewart. Mr Sickler agreed that she had been prosecuted for passing on messages from a terrorist client to al-Gama'a, a jihadist group, messages which were unrelated to her client's case [From page 43 line 31].

(5) He confirmed that the ADC is not an overcrowded prison and is below capacity. Mr Sickler volunteered that many penal institutions in the United States are below capacity because of changes in many of the laws that have impacted prison populations, litigation and because during the Covid pandemic there has been an effort towards depopulating institutions. [45/11].

(6) Mr Sickler volunteered that the ADC "is a well-run jail" and that he was "very impressed with the personnel there"; they were "very professional". 45/19. He repeated this – "I have to say my comments about the ADC, again, it is a very well-run jail." [48/11]

(7) He confirmed that prisoners who have anxiety, depression, and conditions of that kind, have access to medication and if they need it, professional counselling or therapy [46/18].

(8) He confirmed that in the event that a prisoner in the ADC, became severely mentally ill (or decompensated) that they were moved to a psychiatric facility 46/12. Specifically, if a prisoner needed ongoing psychiatric care and is United States marshal's prisoner then they would probably go to the Federal Medical Centre Butner. [46/17]

(9) He volunteered that the ADC has a "stellar record" on preventing suicide [49/5].

(10) He confirmed that nothing had changed as regards the operation of SAMs pre-trial since the admissibility decision in *Ahmad et al v UK*. [50/12]

(11) Mr Sickler confirmed that he had been involved in the representation of Reality Winner. She was a Government Contractor convicted of leaking national defence information. [53/6] She received a sentence of 63 months. [52/31].

(12) Mr Sickler confirmed that the sentencing court recommended that Ms Winner be designated to the Federal Medical Centre in Carswell, Texas, or to another facility with the same risk level programmes and facilities that the FMC Carswell offered. [53/25] Mr Sickler said that this was a common recommendation [54/]3.

(13) Mr Sickler volunteered that the Judge had recommended Ms Winner be placed at FMC Carswell because it was close to her family, not because she had any particular mental health needs. [54/ 7-10].

(14) Mr Sickler agreed that most prisoners placed in 'Special Housing Units' in the United States are double celled (not in solitary confinement) [55/1 -11].

(15) Mr Sickler agreed that most prisoners placed in 'Special Management Units' in the United States are also double celled (not in solitary confinement) [55/21-29].

(16) Mr Sickler represented one individual who was sent to ADX 22 years ago. [57/17].

(17) Mr Sickler has never been to ADX [58/6].

(18) Mr Sickler was asked to explain the basis upon which he gave evidence to the Court that Assange could be detained indefinitely in the H unit at the ADX. Mr Sickler volunteered that Assange's detention there could be a few months, a few years, a few decades. "Who is to say" [61/12]

(19) Mr Sickler was not aware of the process by which prisoners could work their way through the H Unit [61/27-33].

(20) Mr Kromberg's evidence was put to Mr Sickler to explain how a prisoner might step down from H Unit. Mr Sickler's response was that if that is what is done in practice 'that is wonderful'. [64/4]

(21) Mr Sickler did not know how many individuals had been taken off SAMs / moved out of H unit [64/21-26].

(22) When asked if he accepted that the experience that a detainee would have in ADX would also depend on what their SAMs do or do not permit them to do? Mr Sickler's response was "Yes. I know enough that that is true". [65/13-15].

(23) Mr Sickler agreed that being subject to SAMs at the ADX did not affect the individual's ability to access medical care or mental health care. [65/32 and 66/ 1]

(24) Mr Sickler agreed that it appeared to be the case that the provision of mental healthcare at the ADX had improved since 2012 as a result of the *Cunningham* settlement [66/7].

(25) Mr Sickler was familiar with the CIC inspection report which stated - "*ADX Florence has more mental health staff than most bureau institutions with a mental health staff inmate ratio greater than any other institution. Psychological positions at the ADX are currently filled at 100 per cent. ADX Florence implemented an inmate request tracking system which tracks an inmate request until staff completion of the request. Each inmate at 1 ADX Florence is seen at least once a week by trained mental health professionals, or more often as warranted*." [66/31 and 67 1- 4]

(26) Mr Sickler agreed that there was no issue with mental health staffing numbers at the ADX. [67/5].

(27) Mr Sickler agreed that the majority of people who had a mental illness were, moved out of the ADX following the Cunningham settlement. [68/1]

(28) Mr Sickler did not take any issue with the fact that there is adequate provision for people with serious mental illness that might require in-patient treatment within the US prison system. [69/15].

(29) Commenting overall on the Department of Corrections prisons, Mr Sickler described the Bureau of Prisons as a "a cut above". [78/21].

1. ***Abu Hamza***

136. An important aspect of the evidence given by Lindsay Lewis was her insistence that the United States had detained Abu Hamza at ADX contrary to assurances given to the United Kingdom by the United States. She maintained this in the face of the express view of the English court and the United States' Court (in sentencing Abu Hamza) that no such assurance had been given. She was, of course, a member of the legal team which argued the same point unsuccessfully on behalf of Abu Hamza at his sentencing hearing. That Ms

Lewis argued this point forcefully before this Court, despite rulings to the contrary, demonstrates her to be an advocate on these issues as opposed to a dispassionate expert.

137. No assurance was given to the UK in the Abu Hamza case. Warden Wiley (the Warden of ADX) provided a declaration in the Abu Hamza proceedings about ADX (the entirety of that declaration may be found at page 1 of the Bundle put to the defence prison experts). The content of that declaration is also recorded in the Judgment of the High Court in *Abu Hamza v The Government of the United States of America, Secretary of State for the Home Department* [2008] EWHC 1357 (Admin) by the President of the Queen's Bench Division at 65] (emphasis added):

> "Mr Wiley states that he has been advised by the chief of health programmes for the FOB that if, after a full medical evaluation "it is determined that (the appellant) cannot manage his activities of daily living, it is highly unlikely that he would be placed at the ADX but, rather, at a medical centre".

138. The High Court did not regard this an assurance but proceeded on the basis that what it indicated was that if Hamza's detention in ADX was in contention then an objective medical evaluation would be carried out before any decision was taken about that [PQBD at §69]:

> "Second, although Mr Wiley's evidence does not constitute the kind of assurance provided by a Diplomatic Note, we shall proceed on the basis that, if the issue of confinement in ADX Florence arose for consideration, a full and objective medical evaluation of the appellant's condition, and the effect of his disabilities on ordinary daily living and his limited ability to cope with conditions at ADX Florence would indeed be carried out. This would take place as soon as practicable after the issue arises for consideration, so that the long delay which appears to have applied to another high profile convicted international terrorist, who is now kept at an FOB medical centre because of his ailments would be avoided.

139. It was submitted at length on behalf of Abu Hamza, at his sentencing hearing in the US, that this amounted to an assurance that Hamza would not be detained at ADX. The Judge rejected that argument (see sentencing Judgment at page 84 (first line)); page 91 and page 138 of the Prosecution Bundle (put to Sickler and the other witnesses on prison conditions)).

140. The Judge was not determining whether Abu Hamza should go to ADX. The only issue before her was whether she should effectively make a recommendation that Hamza should not go to ADX. She declined to make any recommendation [at page 140] finding that the BOP was better placed to assess where Hamza should be detained. At page 96 the Judge also referred to having spoken to counsel at the Bureau of Prisons about the ADX, to understand if it had housed amputees before. At page 136 she also set out the various complex conditions

that defendants who had come before her (to make the point that upon sentence, they came into the custody of the BOP).

141. At page 135 the Judge set out the extent to which she had involved herself in Hamza's pretrial detention. At page 139 she stated that conditions at the MCC (the pre trial detention facility in New York) "…*were not close to rising to a level of any kind of constitutional violation*". The Court is asked to note that this was the same period of time that Ms Baird was the Warden of the MCC (see below as to whether Ms Baird's evidence is credible about conditions for SAMs prisoners during the period that she ran the MCC). The Court is also asked to consider Ms Lewis's *argument* about the Judge's observation about conditions at the MCC - In summary - *it is her opinion* and it would have been *foolish* for her to say anything else. [72/22].

142. Consistent with the Wiley declaration and with the approach of the sentencing Judge, Ms Lewis' evidence explains that such a medical evaluation took place prior to Hamza being placed at ADX. She confirmed in her written statement [at 47] that, post sentence, Abu Hamza spent eight months at a Federal Medical Centre for the purposes of assessment (Ms Lewis described this in her evidence as a rubberstamping exercise). The letter from the BOP Chief of Heath, setting out that the assessment was in order to determine whether Hamza ought to be imprisoned at the ADX is at page 45 of the Prosecution Bundle (on prison conditions). It also sets out, in detail, the assessment process prior to placement at the ADX; the level of medical care available and what would happen if the individual's needs exceeded the care available. It was self evidently determined that after the eight-month assessment Hamza could be detained at the ADX.

143. Abu Hamza has made complaint about the conditions of his detention at ADX Florence where he is presently serving his life sentence. As matters stand, they are allegations only (as is clear Hamza has been able to instruct Ms Lewis to bring litigation on his behalf). The allegations have not been adjudicated upon. The court is reminded that, in terms of his credibility, Abu Hamza has been convicted of incitement to murder in England. He was convicted in the United States on 19 May 2014 of 11 different counts. These counts covered conduct including participation in a hostage taking in Yemen whose purpose was to coerce the Yemeni Government to free some of his followers (including his stepson). During the hostage taking four western tourists were murdered. The counts also included tasking two men to come to the United States to set up in a Jihad camp in Bly, Oregon. The purpose of the camp was to train young men in America to fight and kill as part of

Jihad, specifically, that they could travel to Afghanistan to join forces with Al-Qaeda. The third strand of conduct concerned the provision of support to Al-Qaeda and the Taliban in Afghanistan. This was put to Ms Lewis from page 62 onwards (it appears that Hamza may have succeeded on appeal in challenging to two counts related to the provision of material support to terrorists).

144. In short, whatever *allegations* Hamza may make about his detention are untested and of no relevance to this claim.

B. Mental Health

145. Assange seeks to argue that his mental health (in conjunction with a diagnosis of Asperger syndrome) adds an extra dimension to his submission that his detention in the United States would amount to inhuman treatment. For all of the reasons set out in section V of this skeleton argument, it is not accepted that Assange's mental health is particularly out of the ordinary amongst the prison population, nor that any mental health condition that he has is as bad as Professor Kopelman has claimed.

146. The defence skeleton argument attempts to shoehorn Assange into the circumstances of *Love v United States* [2018] 1 W.L.R. 2889. For all of the reasons set out in paragraphs [450ff] below, Assange's case is very different to that of Mr Love's. The Court found in *Love* that Mr Love would probably be determined to commit suicide, here or in America [118]. In addition to that finding, the Judgment set out at some length Mr Love's psychiatric history; his vulnerabilities and his reliance upon his parents – factors not at apparent here at all or nowhere near to the same degree.

147. The approach in this skeleton argument is not the same as that taken in the defence argument. This submission will focus upon what the domestic courts and the European Court have already determined as a matter of fact and law about SAMs and ADX and then analyse the basis upon which the defence asserts that these Judgments should not be followed. It will not address the evidence of Craig Haney, improperly cited by the defence, as it was ruled inadmissible.

1. *Mental Health: the general approach*

148. The overarching observation is made that it will be an exceptional course to determine that an individual cannot be extradited owing to his mental health. Serious mental health problems are endemic amongst prisoners in this jurisdiction. Such problems are only very rarely a basis for not subjecting an individual to trial in this jurisdiction or for detention in a high security hospital like Broadmoor. Even where there is evidence that an individual is not fit to plead, the general approach remains, per *Warren v SSHD and Crown Prosecution Service (acting for the United States of America)* [2003] EWHC 1171 (Admin), that it is not unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. Even if the inevitable result would be that he would be found unfit, there may nonetheless be countervailing circumstances that warrant return (for example where there was a process akin to that in the UK whereby a defendant who is unfit may be found to have committed the acts of the offence); Hale LJ as then at §42.

149. As explained by Professor Fazel's report, the United States has a very considerably *lower* rate of suicide within its prisons than the UK and other European states. The prosecution has provided detailed information about the standard of care and the sort of provision made for prisoners in the United States. It is not accepted that this is significantly different to what might be provided in the United Kingdom.

150. Whether the Court accepts Professor Kopelman's evidence or not, the observation is made at the outset that Assange's condition is obviously not one that precludes his detention in this jurisdiction; it is not one that requires that Assange be detained in medical facility within prison; it is not one that requires any form of "in-patient" care and is not even one that appears to necessitate any particularly onerous or complex treatment. It appears that Mr Assange has lived most of his adult life (save for a single episode in his early twenties for which he was hospitalised for a week) without a formal psychiatric history. In short, it appears that it is threatened extradition which may have precipitated a downturn in his mental health and which it is said (by Professor Kopelman) will precipitate a further, more severe, downturn.

151. As is clear from the extradition request and all of the defence evidence served on Assange's behalf (which explains Assange's running of Wikileaks) neither mental health problems, nor Asperger syndrome prevented Assange's solicitation of, and orchestration of, the leaking of materials from the highest levels of government and state agencies, apparently on a global scale; his running of Wikileaks (again as a global enterprise); his public speaking; his co-ordination of various media outlets (again across the globe) in

dealing with and disclosing the materials stolen via Manning; or even presenting a television chat show in 2011 ("*The Julian Assange Show*") for the TV program Russia Today.[38]

152. That said, according to Professor Kopelman's report Assange regarded himself as being in solitary confinement for a year in the Embassy: "*In his last year in the embassy, Mr Assange told me that he was effectively in solitary confinement for 60 hours a week, and even the toilet and bathroom were bugged, resulting in a recrudescence of the PTSD symptoms. Dr Michael Korzinski, a psychologist who assessed Mr Assange while in the embassy, diagnosed 'complex PTSD'; this could be viewed as a form of 're-traumatisation' well described in the clinical literature…" [para 6 at page 18].* Clearly Assange was willing to endure these conditions so as to avoid extradition.

153. Certainly, neither his being in the Embassy nor any mental condition nor Asperger syndrome prevented his establishing a family whilst living in the Embassy or continuing to run Wikileaks. That Professor Kopelman sought to conceal this relationship from the Court serves as a measure of why it is significant in this context- it is also material to the risk of suicide.

154. Assange's mental health condition is patently not so severe so as to preclude extradition. Rather what appears to be suggested by Assange (and conveyed by Professor Kopelman) is that it is extradition which will trigger a downturn. The problem with Professor Kopelman's evidence (asides its lack of credibility) is that much of his analysis was predicated upon factors such as length of sentence and conditions of detention which are highly contentious.

155. The principles to be applied to the question of whether a mental health condition is such to make extradition incompatible with Convention rights, are well established and coterminous with the criteria applied where mental health is relied upon for the purposes of section 91 of the Extradition Act 2003.

156. These principles were summarised in *Turner v Government of the United States of America* [2012] EWHC 2426 (Admin) (Aiken LJ para 28) (emphasis added):

> "(1) The court has to form an overall judgment on the facts of the particular case …
> "(2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him …
> "(3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There

[38] Leigh and Harding, Wikileaks, Inside Julian Assange's War on Secrecy, page 258.

> has to be a 'substantial risk that [the appellant] will commit suicide'. The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression …
> "(4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition …
> "(5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression? …
> "(6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide? …
> "(7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind …"

157. In *McIntyre v USA* [2015] 1 W.L.R. the Court accepted, for the purposes of Article 3 that the appellant was suffering from PTSD and that he would be at a real risk of suicide when a final decision to extradite him was communicated to him. In determining whether extradition was precluded as being incompatible with Article 3, the Court applied the tests set out in *Turner* at three stages, namely whilst the appellant was in the UK pending extradition, during transfer to the USA and when in the USA.

158. The Court considered that it was necessary that [at §63]:

> "The Home Secretary or those responsible for the appellant ensure that full and proper steps are taken to put proper preventive measures in place to address the risk of suicide from the time a decision to extradite him is communicated to him. We would have had no doubt that such steps could be taken prior to the decision being communicated to him. We would have therefore restricted the manner in which this draft judgment could be used and we so restrict it, but give liberty to apply immediately if the intervention of the court is required.
> We note the concerns that have been expressed by Mr Sickler about transfer to the USA; such concerns have been expressed in other cases and have not always been addressed by the US authorities. It must be and is the responsibility of the Home Office (or other UK authorities acting on behalf of the Home Office) to satisfy themselves that in the arrangements made for transfer from the UK to the USA proper preventive measures are in place to address the risk of suicide during the journey to the USA and that the medical records and reports accompany the appellant. This is not a matter solely for the US authorities. We would therefore have been satisfied that the issues on transfer could have been addressed and will be addressed by the Home Office.
> After arrival in the USA, we do not consider the evidence before us would have given rise to a real risk of inhuman or degrading treatment in the US of such severity as to put the United Kingdom in breach of its obligations to the claimant under article 3. The evidence does not establish either that the risk of suicide cannot be properly addressed by the US authorities or that the treatment that will be afforded to him would fall below a standard that might put the UK in breach of its obligations under article 3."

159. It is of note that in the case of *Turner* the Court also proceeded on the basis that there was a substantial risk that Ms Turner *would* attempt suicide upon extradition. Amongst the factors which the Court considered relevant was the distinction between the risk of suicide because of a mental health condition and the risk of suicide because of extradition [§44]:

> "44. Thirdly, Dr Hayes has found no psychotic symptoms. He has concluded that the cause of the appellant's anxiety is closely associated with the fatal road accident in which she was involved. As I read Dr Hayes' reports, although he regards the risk of Ms Turner attempting to commit suicide as substantial or high, he does not say that this risk is one that is brought about by her mental

> condition or her depressive illness; rather it is brought about by the fact that she might be extradited. Although Ms Turner's mental condition evidences clinical depression and some features of post traumatic disorder, she appears to remain rational. Any decision to make an attempt to take her life will, on the evidence, be taken because Ms Turner has decided to make a choice to do so. As Ms Turner told Dr Hayes when he interviewed her on 17 July, she would make a choice between extradition and wanting to be alive: see para 5.6 of that report. That position has not changed since Ms Turner's admission to the Michael Carlisle Centre.

160. The Court reiterated this at §49

> "…..However, ultimately, Ms Turner's current delicate mental state has as its cause the fact that she was involved in a fatal road accident in which she received little or no physical injury and that her extradition is sought to stand trial on charges which result from that accident. It seems to me, at least on the evidence of the present case, that it cannot be said that Ms Turner's current mental condition which flows from the consequences of the accident and the request for her extradition, even if that includes a substantial risk of further attempts at suicide by her, will give rise to the extradition being either unjust or oppressive by reason of **that** mental condition. In that sense, all the evidence that is now before this court is not "decisive". [Emphasis added]

161. In short, Assange does not fall into the category of individual so mentally ill that he has no capacity to resist suicide. The defence suggests that he might he in the future; that is entirely speculative and premised upon a number of variables that may or may not ever eventuate.

2. ***Special Administrative Measures / ADX Florence***

162. There has been exhaustive consideration of Special Administrative Measures (SAMs) within in the extradition context in a series of high-profile cases. To the extent that the defence case rests upon the contention that to be subject to SAMs is essentially to be detained in solitary confinement and on an indefinite basis is plain wrong.

163. Equally wrong is the suggestion that there is, in reality, no remedy available to those subject to SAMs. Aside the administrative remedy programme, United States courts have been willing to entertain challenges to SAMs pre-trial prior to the exhaustion of the administrative remedy programme and after exhaustion, prior to trial. See for example *US v Hashmi* 621 FSupp 2d76 (administrative remedies not exhausted) [page 501 of the Prosecution Prison Conditions Bundle] and *US v EL Hage* 213 F.3d 74 (administrative remedies exhausted) [page 479 of the Prosecution Prison Conditions Bundle]. SAMs can also be challenged during post-conviction during serving any prison sentence.

164. El Hage's application for rescission or for substantial modification of the SAM of his confinement, was determined pre-trial, first by the District Court and then on appeal.

165. Contrary to the impression given by Ms Baird, SAMs are not uniform. The Code of Federal Regulations ("CFR") 501.2 provides:

§ 501.2 National security cases

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. **These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information.** The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or national security. The inmate shall sign for and receive a copy of the notification.

I Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for a period of time as determined by the Director, Bureau of Prisons, up to one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, but only if the Attorney General receives from the head of a member agency of the United States intelligence community an additional written certification that, based on the information available to the agency, there is a danger that the inmate will disclose classified information and that the unauthorized disclosure of such information would pose a threat to the national security. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

I Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.

166. The authorities about challenges to SAMs demonstrate that they are not identical – see for example *Abdulmutallab v Sessions* [page 487 of the Prosecution Bundle]. This is an example of a judicial challenge post -conviction on the part of a prisoner at ADX Florence. His SAMs permitted him visits with immediate family, with other authorised individuals; to communicate with non- terrorist prisoners and to request additional contacts evaluated on case by case basis.

167. As is thus clear, CFR 501.2 does not require that the inmate be subject to any particular measure. It does not require they be detained in segregated detention but rather refers to administrative detention (this does not mean segregation). The position is very much more nuanced than the defence witnesses stated.

168. El Hage was charged with six conspiracies to kill United States citizens and destroy United States property abroad, 20 counts of perjury based on his grand jury testimony, and three counts of false statements. The charges against El-Hage arose from his alleged participation in conspiracies led by Osama Bin Laden. Specifically, he was charged with

being a key participant in al Qaeda. The indictment included his complicity in the bombing of the United States embassy in Nairobi, Kenya causing more than 212 deaths and injuring 4,500 people, and the bombing of the United States embassy in Dares Salaam, Tanzania that caused 11 deaths and injuries to 85 people. The Judgment of the United States Court of Appeals, Second Circuit records the following information as regards the risks he posed:

> "Defendant was one of Bin-Laden's trusted associates, privy to al Qaeda's secrets and plans, served as Bin Laden's personal secretary, travelled on his American passport on Bin Laden's behalf, moved Bin Laden's money, and worked in Bin Laden's factories in the Sudan—factories which served as a cover for the procurement of chemicals and weapons.
> Documents found on El-Hage's computer seized at his home in Nairobi, Kenya in 1997, the affirmation continues, details El-Hage's role and his overall dangerousness. Other evidence, apart from this computer record, confirms El-Hage's role in conveying military orders from Bin Laden including the direction that the East African cell (which later carried out the embassy bombings) "militarize," and that defendant had a role in providing false passports and in seeking weapons including Stinger missiles for al Qaeda members. Passport photographs of al Qaeda members who participated in al Qaeda's efforts against American troops in Somalia were also recovered in the Kenya files.
> The accused clearly has the ability to flee. El-Hage has been a frequent traveller who lived in Afghanistan, Pakistan and the United States in the 1980's, eventually moving to the Sudan in 1992 and Kenya in 1994, before returning to the United States in 1997. By his own admission, while living in the Sudan and Kenya, he travelled to Tanzania, Somalia, Italy, Slovakia, Russia, Afghanistan, Pakistan, England and other countries. He has demonstrated access to false travel documents."

169. Even El Hage did not spend his entire pre-trial period in solitary confinement:

> "He was subject to solitary confinement for the first 15 months of his detention, but before the January 10, 2000 hearing, he was permitted to have a cellmate. In addition, the government has revised El-Hage's S.A.M. conditions to give him seven extra minutes of time in each phone call to his family and to provide him with a plastic chair so that he can review documents more comfortably. He is also permitted three calls per month to his family, rather than the one call per month usual for inmates in administrative detention."

170. This case is put forward merely as an illustration as to how, in even the most extreme cases, it is simply wrong of the defence to suggest that SAMs are all the same as regards every prisoner and that they cannot be adapted or changed.

171. The compatibility of SAMs with Convention rights was first raised *Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America* [2006] EWHC 2927 (Admin). The High Court considered three points relating to SAMs. (1) By the imposition of SAMs each appellant would be "punished, detained or restricted in his personal liberty by reason of his … religion" and so there would be a bar to extradition under s.81(b) of the 2003 Act. (2) They would also be prejudiced in the preparation and/or conduct of their defence, principally by inhibitions placed upon communication with their legal advisers, and so there would be violations of ECHR Article 6 quite apart from s.81(b) . (3) And

there would be violations of ECHR Article 3 given that SAMs involve or may involve solitary confinement.

172. On Article 3, the Court concluded (per Laws LJ):

> "93. It is convenient to deal first with ECHR Article 3. I did not understand Mr Fitzgerald to press this aspect as part of the forefront of his case. It is clear from the jurisprudence of the European Court of Human Rights that solitary confinement does not in itself constitute inhuman or degrading treatment. Regard must be had to the surrounding circumstances including the particular conditions, the stringency of the measures, its duration, the objective pursued and its effects: McFeeley v UK 3 EHRR 161 , paras 49–50. Applying this approach, the evidence before us does not begin to establish a concrete case under Article 3. The argument on SAMs is really about the other two points."

173. The High Court rejected the other points. It further found that SAMs are open to judicial scrutiny citing [95] *US v Reid* 369 F. 3 d 619 (1st Circuit 2004) ; *US v Ali*; E.D. Va Oct 24, 2005 ; *US v El-Hage* 213 F. 3d 74 (2nd Circuit 2000).

174. The Court also rejected the submission that attorney/client privilege would not be honoured and referred to there being no challenge to the specific finding that [§97]:

> "there is judicial control to see that communication passing between the defendant and his lawyers, although monitored, does not reach the eyes and ears of those prosecuting". In an affidavit of 13 March 2006 Maureen Killion, of the Office of Enforcement Operations at the United States Department of Justice, says this (paragraph 13):"[T]he regulations [sc. The United States Code of Federal Regulations] require the Government to employ specific safeguards to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy. 501.3(d)(3) [of the Regulations]. These protective requirements are designed to safeguard a prisoner's legitimate need to communicate with his or her attorney, while also helping to safeguard human lives."

175. Lord Justice Laws concluded [§97]:

> "In my judgment the evidence does not begin to show that the imposition of SAMs, were that to occur (as it may), would mean that either appellant would be "prejudiced at his trial" (s.81(b) of the 2003 Act), or that it would violate the appellants' rights under ECHR Article 6 , not least given that a flagrant denial of justice has to be shown. Nor, for good measure, does it show (what Mr Fitzgerald must I think establish) that the United States authorities would knowingly perpetrate a violation of the Sixth Amendment to the American Constitution."

176. The issue of SAMs was not pursued in *Mustafa Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America*, *Secretary of State for the Home Department* [2008] 1 W.L.R. 2760, (PQBD) and Sullivan J at [65] given the Judgment in *Aswat* and *Ahmad*. As noted above, the High Court proceeded on the basis that Hamza would be assessed prior to his placement in any prison.

177. In *R (On the Application of Adel Abdul Bary and Khalid Al Fawwaz) v The Secretary of State for the Home Department* [2009] EWHC 2068 (Admin) was a judicial review of the Secretary of State's decision that the Claimant's extradition was not compatible with

Convention rights having regard to the possibility that they would be subject to SAMs and detained in ADX Florence.

178. In coming to her decision, the Secretary of State had regard to the treatment of El Hage, referred to above. The High Court set out her conclusions [Scott Baker LJ at §9]:

> (a) There is substantial evidence of close judicial oversight of the prison conditions in which Mr El Hage was detained. For example, the trial judge personally inspected those conditions.
> (b) The Trial Judge specifically dealt with Mr El Hage's complaint that he was subjected to unnecessary strip searches. The Trial Judge conducted an inquiry into the reasons and justifications for the strip searches to which Mr El Hage was subject and was satisfied that there were good penological reasons for the strip searches.
> Further, many of the complaints which were made by Mr El Hage and which have been substantially adopted by (the claimants) as to the conditions in which he and his co-defendants were held have to be viewed against the background, as the trial judge found, that two of Mr El Hage's co-defendants had inflicted a life threatening injury on a prison guard and that there was a general concern that the attack in question (using a concealed weapon) had been planned over a considerable period of time. As such, stringent security measures were justified. The extent to which (the claimants) might be subject to similar security measures would depend, in part, on (their) behaviour and that of (their) fellow inmates at the facility in which they were detained.
> (d) When Mr El Hage complained that by reason of prison conditions his mental condition had deteriorated to the extent that he was no longer able to participate in the trial or assist in the preparation of his defence, the trial judge ordered that he be examined by three independent medical experts. All three concluded that Mr El Hage was malingering and deliberately fabricating amnesia and that, contrary to his claims, he was able to assist in the preparation of his defence and participate in his trial."

179. The High Court also considered at very considerable length, and having regard to voluminous defence evidence, the conditions of detention in ADX Florence. The Court cited the description given by the then Warden Wiley, as to the stratified housing in ADX Florence [Scott Baker LJ at §§30-32]:

> "30. Warden Wiley's evidence is that the ADX has nine housing units which allow a phased housing unit/privilege system. The stratified system of housing inmates is used to provide inmates with incentives to adhere to the standards of conduct associated with the maximum security programme. As the inmates at the ADX demonstrate periods of clear conduct and positive institution adjustment, so they may progress from the 'general population' units (with the most restrictive regime) through intermediate and transitional units to the pre-transfer unit with increasing degrees of personal freedom and privileges at each stage. The types of privilege are determined by the type of housing unit to which the prisoner is assigned. It will take an inmate a minimum of 36 months to work his way through the layered housing system. It is the goal of ADX to transfer inmates to less secure institutions when the inmate demonstrates that a transfer is warranted and he no longer needs the control of the ADX.
> 31. The claimants rely on the fact that a prisoner may be deferred from the step down unit programme for "longer periods of time" "due to the very serious nature of the original placement factor". <u>In short, the point that is made is that because of the very grave crimes for which (if convicted) the claimants will be incarcerated, there is every prospect that they will be held in ADX Florence indefinitely</u>."

180. The High Court concluded that neither SAMs nor the prison conditions at ADX Florence, nor a combination of both, in the context of a whole life sentence constituted a breach of Article 3 [see §97].

181. The applicants in the above cases applied to the European Court of Human Rights on a number of issues which included SAMs and detention at ADX. The applicants were Ahmad ("the first applicant"); Aswat ("the second applicant"); Ahsan ("the third applicant") and Abu Hamza ("the fourth applicant").

182. The detailed admissibility decision is important because it demonstrates all of the points which the European Court of Human determined to be inadmissible. The following parts of the admissibility decision relevant to this case may be summarised as follows (in bold):

> §122: Ahsan emphasised the fact that he had bipolar disorder and had been diagnosed in June 2009 with Asperger syndrome. He produced two reports from consultant psychiatrists to that effect. The first report predicted a serious risk of suicide if the third applicant were placed in solitary confinement for a long period. The report also stated that, if he became severely depressed before trial, the third applicant would be unable to do justice to himself at trial, to give instructions to his lawyers and actively participate in his defence. The second report stated that Ahsan was suffering from a severe episode of depressive disorder, including persistent thoughts of self-harm and suicide. This had been adversely affected by his detention pending extradition in conditions of high security at HMP Long Lartin and was forecast to deteriorate further. The report concluded that, by virtue of his Asperger syndrome and depressive disorder, Ahsan was an extremely vulnerable individual who would be more appropriately placed in a specialist service for adults with autistic disorders. Ahsan argued that his conditions of detention at HMP Long Lartin were relatively benign compared with the severity of a regime of special administrative measures and so, if he were extradited, there would be a greater risk of suicide or deterioration in his mental health.
> §123. The Court was informed that Aswat had been diagnosed with schizophrenia and a deterioration in his condition had necessitated his transfer to Broadmoor Hospital, a high-security psychiatric hospital, where he remained under the care of a consultant psychiatrist.
> §128. **In respect of the stringency of special administrative measures, pre-trial,** the Court considered that the experiences of Mr Al-Moayad, Mr Hashmi and Mr Kassir were instructive (i.e other US prisoners subject to SAMs). **None of the three men was deprived of all human contact during their detention at the Metropolitan Correctional Center. Whilst subjected to special administrative measures, they enjoyed regular access to their attorneys. Communications with family members were restricted but not completely prohibited.** Mr Al-Moayad and Mr Kassir were also allowed visits from consular officials. In Ramirez Sanchez (2007) 45 E.H.R.R. 49 at [131]–[135], the Grand Chamber considered that twice-weekly visits from a doctor, a monthly visit from a priest and frequent visits from the applicant's lawyers were sufficient for it to conclude that the applicant had not been in complete sensory isolation or total social isolation and that his isolation was "partial and relative". Previously, in Öcalan v Turkey (2005) 41 E.H.R.R. 45 at [194], where the applicant's lawyer and family members were able to visit once a week, the applicant was able to communicate with the outside world by letter and had books, newspapers and a radio at his disposal, the Grand Chamber considered that the applicant had not been kept in sensory isolation. The Court reached a similar conclusion in respect of the special prison regime laid down in s.41 bis of the Italian Prison Administration Act, where prisoners were not allowed to make calls, were limited to a one-hour visit per month and were prohibited from contact with prisoners under a different prison regime (Argenti v Italy (56317/00) November 10, 2005 at [22]; Bastone v Italy (59638/00) July 11, 2006 ; Messina v Italy (25498/94) June 8, 1999). The Court considers that the limitations on contact which were imposed on Mr Al-Moayad, Mr Hashmi and Mr Kassir are analogous to these cases and it found no reason to suppose that the four applicants would be subject to more stringent limitations on contact.
> §129. **In respect of the duration of the special administrative measures** (pretrial), the Court also found that no issue would arise under art.3.
> §130. As to the objective pursued by special administrative measures, the Court readily understood, particularly in terrorist cases, that prison authorities would find it necessary to impose extraordinary security measures (see Ramirez Sanchez (2007) 45 E.H.R.R. 49 at [125]; Öcalan (2005) 41 E.H.R.R. 45 at [192]). In the present case, the United States authorities are best placed to assess the need for such measures and there was no evidence they do so lightly or capriciously. **There is also no risk of arbitrariness in the decision to impose special administrative measures. The**

decision was made with reference to established criteria. It was one that must be made by the Attorney-General personally. He must make specific findings and give reasons for his decision. The decision is subject to annual review and judicial challenge.
§131. Ahsan provided evidence that his mental health would be adversely affected if he were to be subjected to special administrative measures. The Court was prepared to accept that the imposition of special administrative measures would have a greater effect on all three applicants than detainees who were in good mental health. However, was is not convinced that any adverse effect would automatically mean that the very imposition of such measures would entail a violation of art.3 . It was not been suggested that, prior to extradition, the United Kingdom authorities would not advise their United States counterparts of the applicants' mental health conditions or that, upon extradition, the United States authorities would fail to provide appropriate psychiatric care to them. It was not been argued that psychiatric care in United States federal prisons was substantially different to that provided at HMP Long Lartin and there was also no reason to suggest that the United States authorities would ignore any changes in the applicants' conditions or that, if they did present any suicidal tendencies or symptoms of self-harm, they would refuse to alter the conditions of their detention to alleviate any risk to them. For Aswat (who was being cared for at Broadmoor Hospital), the Court did not doubt that the United States authorities would allow transfer to an equivalent high security hospital should that need arise after extradition.
§133 (**as regards fair trial issues**) **First**: the Court found there was no evidence that special administrative measures were coercive (in terms of forcing defendants to plead guilty). Neither Mr Al-Moayad nor Mr Kassir decided to plead guilty despite being subjected to such measures. It was also highly unlikely that a United States District Court would accept a guilty plea where there was evidence of coercion. **Second**: Art.6 and the Eighth Amendment to the Constitution of the United States were strikingly similar. There was every reason to believe that the trial judges in the applicants' trials would ensure proper respect for their rights under the Eighth Amendment. Moreover, it was clear from the affidavit of Ms Killion (that, even in the unique context of special administrative measures in terrorism cases, there has only been one case of monitoring of attorney–client conversations and for wholly exceptional reasons. **Third**: There would be some adverse affect on their well-being if they were to be subjected to special administrative measures pre-trial. However, it was not established that this would impair significantly the preparation of their defence in the sense that it would render them unable to provide any kind of instructions to their lawyers. If, during the preparation of their defence or in the course of the trial, the applicants' lawyers felt that there was a significant impairment of their work, it would be open to them to bring their concerns to the attention of the trial judge. There would be the possibility of an appeal against any ruling the trial judge made. The Court also finds that the same considerations must apply in respect of the third applicant's submission that, if his mental health worsened as a result of special administrative measures, he would be unable to do justice to himself at trial.

183. Consequently, the imposition of special administrative measures before trial would not violate art.6 .

184. The defence evidence precludes this Court from making any different findings from the English courts or the ECtHR on these points.

185. Before setting out why that is the case, some observations are made about the other two witnesses called by the defence on prison conditions. The first is that Maureen Baird is a former prison officer and prison warden. She is not a lawyer and not qualified to opine on what sentence Assange might get. Her suggestion that those convicted of espionage offences always get a life sentence was wide of the mark. She was able to cite only one example of this (Aldrich Ames – a CIA officer turned KGB agent). She was not familiar with any of the cases concerning the leaking of National Defense Information or

specifically that the highest sentence imposed in this context was one of 63 months (on Reality Winner) [Transcript of 29 September 2020 from 28/ 25]

186. Her only experience of SAMs was in the course of her employment for two years at the MCC prison in New York. She cannot speak to the likelihood that Assange would be subject to SAMs (and is certainly not qualified to suggest that Mr Kromberg was wrong in his view that it was only 'possible' that Assange might be subject to SAMs). Asides that Ms Baird does not work and has never worked as a federal prosecutor and cannot pre-judge whether the criteria for the imposition of a SAM would be met in Assange's case, she does not even have experience of SAMs being imposed in espionage cases [15/8] and has never had any involvement in an extradition case concerning espionage offences [17/13].

187. Ms Baird has never visited the ADC. She was not familiar with it. She could not comment on medical care there. She could not dispute Mr Sickler's evidence about it, nor the evidence of Gordon Kromberg [see page 25]. Her evidence about the detention of SAMs prisoners in the MCC is largely irrelevant. That said, there are clear indications that even her evidence on the MCC was neither reliable nor credible. In the course of her evidence she tried to suggest that the conditions in the MCC for SAMs prisoners were of great concern to her (she went so far as to suggest that she "*.. had to convince myself it was ok*") [24/12]. Despite Ms Baird's apparent concern she did nothing to raise concerns with anybody above her in the Bureau of Prisons, did not raise any concerns with any judges in contact with her about SAMs prisoners (such as the Abu Hamza Judge who expressly mentioned being in touch with the MCC Warden on a number of occasions about Abu Hamza's conditions) and did not even encourage her staff to converse with SAMs inmates. Her suggestion that she did not feel able to do any of these (24/20) might be tenable if that claim was made by a junior employee but it is not tenable on the part of the officer in charge.

188. That conditions were not as Ms Baird now claims is supported by objective evidence. She confirmed that no prisoner subject to SAMs was found unfit for trial or was transferred to a hospital for mental health treatment during her tenure. There were no suicides in the whole facility for 13 years until the death of Jeffrey Epstein. [24/ 24; 29 and 33].

189. Ms Lewis had not visited the ADC either. She could not offer any opinion on the conditions at ADC [Transcript of 29 September 2020 at 61/24].

190. In any event, the evidence on behalf of the defence precludes the Court coming from a different conclusion to the English Courts and the European Court on SAMs pre-trial. The reasons why may be stated shortly:

(1) Fundamentally, the position remains as it was before the European Court - Assange will not be in solitary confinement because he will have access to his lawyers. It is also clear that SAMs permit visits from family members pre-trial; see Baird confirming [18/17]; and as a specific example of a SAMs prisoner, Lindsay Lewis at §10 of her statement confirmed "*In my capacity as Mr Mustafa's counsel, I visited him countless times during his pre-trial incarceration at the MCC in Manhattan*".

(2) Mr Sickler's evidence went beyond saying that standards of care at the ADC were satisfactory – he was emphatic in his evidence that they were impressive and that the ADC had a stellar reputation on suicide prevention.

(3) The European Court took into account the evidence that Ahsan had bipolar disorder and that he was a suicide risk. The evidence about Assange's mental health does not suggest that he is at any greater risk. Mr Sickler's evidence rules out entirely any suggestion that Assange would not be afforded adequate medical care at the ADC.

3. ***ADX Florence***

191. It is open to the Court in this case to proceed on the basis that it is simply too speculative to determine what sentence Assange may get if convicted; whether he will be subject to SAMs and where he might be detained.

192. In any event, it is clear that it is not open to this Court to come to a different conclusion to that reached by the European Court in *Ahmad et al*, namely, that detention in ADX (with SAMs) will not breach Article 3.

193. Having found that pre-trial detention did not give rise to any issue under the Convention, the European Court went on to consider detention in ADX Florence, post – trial (including detention with SAMs). It also added Bary ("the fifth applicant") and Al Fawwaz ("the sixth applicant") to the Judgment.

194. The Court sought detailed information from the United States about the length of time that prisoners in ADX Florence took, for example, to transition through, the levels of detention which became progressively less restrictive. §§83- 86; 88 and 93-97. The Court looked closely at the ability of prisoners subject to SAMs to transition through the Special Security Unit (or H Unit) which was for SAMs prisoners (see below).

195. It also took into account evidence from Dr Terry Kupers [§99] (who Professor Kopelman also relies as a source of evidence about solitary confinement in ADX Florence).

196. As regards the European Court's general approach, the following parts of the Judgment may be summarised as follows (emphasis added):

> § 177.The European Court agreed with Lord Brown's observation in Wellington that the absolute nature of art.3 did not mean that any form of ill-treatment would act as a bar to removal from a Contracting State. As Lord Brown observed, this Court had repeatedly stated that the Convention did not purport to be a means of requiring the Contracting States to impose Convention standards on other states. That being so, treatment which might violate art.3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art.3 in an expulsion or extradition case.
> § 178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, had been decisive in the Court's conclusion that there has been a violation of art.3 :
> the presence of premeditation;
> that the measure may have been calculated to break the applicant's resistance or will;
> an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
> the absence of any specific justification for the measure imposed;
> the arbitrary punitive nature of the measure;
> the length of time for which the measure was imposed; and
> the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention

197. The Court also observed that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.

198. The Court agreed with Lord Brown, that it had been very cautious in finding that removal from the territory of a Contracting State would be contrary to art.3 of the Convention. It had only rarely reached such a conclusion since adopting the Chahal judgment. Save for cases involving the death penalty, it had even more rarely found that there would be a violation of art.3 if an applicant were to be removed to a state which had a long history of respect of democracy, human rights and the rule of law.

199. Applicants 1,3 and 5 also relied upon the following mental health diagnoses:

    (1) Ahmad (the first applicant) had been diagnosed with post-traumatic stress disorder, which had worsened in the prison unit where he was detained [§193].

(2) Ahsan (the third applicant) had been diagnosed with Asperger syndrome, recurrent depressive disorder (with his current episode assessed as "mild" as opposed to previous, severe depressive episodes), and obsessive compulsive disorder in conjunction with other anxiety symptoms. The latter had worsened in detention, though his depressive symptoms had improved. Before his Asperger syndrome had been diagnosed in June 2009, a psychiatrist had predicted a high risk of serious depression leading to suicide if Ahsan was to be extradited and placed in solitary confinement for a long period. The third applicant also submitted a statement prepared by an American criminologist, detailing the heightened difficulties experienced by those with Asperger syndrome in federal prisons and the absence of proper facilities within the Bureau of Prisons to treat the condition.93]

(3) Bary (the fifth applicant) had a recurrent depressive disorder and had suffered several mental breakdowns while in detention in the United Kingdom. His most recent psychiatrist's report assessed his current episode as moderate to severe. The recommended treatment was medication with psychological treatment and support, including productive activity, opportunities for interaction with others and exercise.

200. As regards, the Court's key findings on ADX Florence (and SAMs), the Court determined that (emphasis added):

"220. For the first, the Court finds no basis for the applicants' submission that placement at ADX would take place without any procedural safeguards. … **Instead, it is clear from the declarations submitted by the Government, particularly that of Mr Milusnic, that the Federal Bureau of Prisons applies accessible and rational criteria when deciding whether to transfer an inmate to ADX**. Placement is accompanied by a high degree of involvement of senior officials within the Bureau who are external to the inmate's current institution. Their involvement and the requirement that a hearing be held before transfer provide an appropriate measure of procedural protection. There is no evidence to suggest that such a hearing is merely window-dressing. Even if the transfer process were unsatisfactory, there would be recourse to both the Bureau's administrative remedy programme and the federal courts, by bringing a claim under the due process clause of the Fourteenth Amendment, to cure any defects in the process. Despite the third-party interveners' submission that recourse to the courts is difficult, the fact that Fourteenth Amendment cases have been brought by inmates at ADX shows that such difficulties can be overcome.

221. For the second complaint, ADX's restrictive conditions, it is true that the present applicants are not physically dangerous and that, as the Court has observed at above, it must be particularly attentive to any decision to place prisoners who are not dangerous or disorderly in solitary confinement. However, as the applicants' current detention in high-security facilities in the United Kingdom demonstrates, the United States' authorities would be justified in considering the applicants, if they are convicted, as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world. There is nothing to indicate that the United States' authorities would not continually review their assessment of the security risk which they considered the applicants to pose. As Ms Rangel has indicated, the Federal Bureau of Prisons has well-established procedures for reviewing an inmate's security classification and carrying out reviews of that classification in six-monthly programme reviews and three-yearly progress reports. **Moreover, as the Department of Justice's most recent letters show, the United States'**

authorities have proved themselves willing to revise and to lift the special administrative measures which have been imposed on terrorist inmates thus enabling their transfer out of ADX to other, less restrictive institutions.

222. The Court also observes that it is not contested by the Government that conditions at ADX Florence are highly restrictive, particularly in the General-Population Unit and in Phase One of the Special Security Unit.

222. It is clear from the evidence submitted by both parties that the purpose of the regime in those units is to prevent all physical contact between an inmate and others, and to minimise social interaction between inmates and staff. This does not mean, however, that inmates are kept in complete sensory isolation or total social isolation. Although inmates are confined to their cells for the vast majority of the time, a great deal of in-cell stimulation is provided through TV and radio channels, frequent newspapers, books, hobby and craft items and educational programming. The range of activities and services provided goes beyond what is provided in many prisons in Europe. Where there are limitations on the services provided, for example restrictions on group prayer, these are necessary and inevitable consequences of imprisonment. The restrictions are, for the most part, reasonably related to the purported objectives of the ADX regime.

222. The Court also observes that the services provided by ADX are supplemented by regular telephone calls and social visits and by the ability of inmates, even those under special administrative measures, to correspond with their families. The extent of those opportunities would be of considerable assistance to the applicants who would, by their extradition, be separated from their families in the United Kingdom.

222. The Court finds that there are adequate opportunities for interaction between inmates. While inmates are in their cells talking to other inmates is possible, although admittedly only through the ventilation system. During recreation periods inmates can communicate without impediment. Indeed, as Mr Milusnic indicates, most inmates spend their recreation periods talking.

222. In addition, although it is of some concern that outdoor recreation can be withdrawn for periods of three months for seemingly minor disciplinary infractions, the Court places greater emphasis on the fact that, according to Mr Milusnic, inmates' recreation has only been cancelled once for security reasons and that the periods of recreation have been increased from 5 to 10 hours per week.

222. All of these factors mean that the isolation experienced by ADX inmates is partial and relative.

223. The Court would also note that, as it emphasised in *Ramirez Sanchez* at [145], solitary confinement, even in cases entailing relative isolation, cannot be imposed indefinitely. **If an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for a violation of art.3 . Indeed, this may well be the case for those inmates who have spent significant periods of time at ADX. However, the figures provided by the United States' authorities, although disputed by the applicants, <u>show that there is a real possibility for the applicants to gain entry to the step-down or special security unit programmes.</u>** First, the Department of Justice's letter of September 26, 2011 shows that while there were 252 inmates in ADX's General-Population Unit, 89 inmates were in the step-down programme. **The figures provided in that letter for the Special Security Unit programme, when compared with the November 2010 figures given by Mr Milusnic, demonstrated that inmates are progressing through that programme too**. **Secondly, Ms Rangel's declarations show that inmates with convictions for international terrorism have entered the step-down programme and, in some cases, have completed it and been transferred to other institutions**. Ms Rangel's declaration **is confirmed by the Rezaq v Nalley judgment of the District Court where the petitioners, all convicted international terrorists, had brought proceedings to obtain entry to the step-down programme but, by the time the matter came to judgment, had completed the programme and been transferred elsewhere**.

224. Finally, to tshe extent that the first, third and fifth applicants rely on the fact that they have been diagnosed with various mental health problems, the Court notes that those mental-health conditions have not prevented their being detained in high-security prisons in the United Kingdom. On the basis of Dr Zohn's declaration, it would not appear that the psychiatric services which are available at ADX would be unable to treat such conditions. The Court accordingly finds that there would not be a violation of art.3 in respect of these applicants in respect of their possible detention at ADX.

201. After the Judgment of the European Court was delivered, each of the Applicants instituted judicial review proceedings, in part, on the basis that the European Court of Human Rights

had misunderstood the defence evidence and that the European Court was wrong when it said that there was a real possibility for the Claimants to gain entry to the Step Down or Special Security Unit Programmes. (*Hamza and others [2012] EWHC 2736* (Admin), (PQD and Ouseley J). This was rejected [§58]:

> We are therefore entirely satisfied not only that the EctHR did not fall into the error alleged in its judgment, but also the judgment contains a careful and clear elucidation of the facts which correctly reflected the evidence before it.

202. The High Court considered it clear, that the court looked in detail, not at the overall time a person would spend at ADX Florence, but at the periods of time that were likely to be spent in the differing conditions of restricted confinement as part either of the General Population Programme or part of the Special Security Unit Programme. [§60]

203. As this demonstrates, the European Court's consideration of whether detention at ADX Florence is incompatible with Article 3 was founded upon a detailed and careful analysis of the different types of confinement within ADX; entry to the step down programme and of the possibility of transfer to another prison.

204. To the extent that Assange's case (and medical evidence) proceeds on the basis that detention at ADX Florence (whether the individual is subject to SAMs or not) is consistent solitary confinement, unchanging and for the entirety of a sentence this is wrong.

205. In the judicial review following the decision of the European Court of Human Rights, the Applicant Bary also sought to challenge his extradition, again, on the basis of his psychiatric health. The High Court noted:

> "It is very clear from psychiatric reports which go back to 2004 that over a number of years Abdel Bary has experienced symptoms indicating a major depressive disorder which have been exacerbated by the very many years which he has spent in custody awaiting extradition.
> 111. In the course of the proceedings before this court in 2009, his psychiatric condition (which was summarised at paragraph 13 of its decision) was one of the significant factors relied upon in support of the contention that to order his extradition would entail a breach of his Article 3 rights, as ADX Florence, Colorado had no proper facilities for dealing with someone with his severe depressive condition.

206. Further evidence was put before the High Court to the effect that Bary continued to experience symptoms of a major depressive disorder and suggested that he was on suicide watch [§113]. The report stated that the conditions at ADX would significantly increase the risk of suicide or irreversible psychological harm. The High Court also referred to a complaint brought before the US Federal District Court in Denver which set out in detail evidence that contradicted that of Dr Zohn and asserted that in practice there was no proper psychiatric care at the ADX facility [§114]. The High Court concluded:

> "115. It is clear to us that there has been no material change in the psychiatric condition of Abdel Bary. The decision of this court in 2009 makes clear that there was a suicide risk then, but this court considered that there would be no breach of Article 3. The issue was again considered by the EctHR which again concluded that there would be no breach of Article 3. That court rejected the evidence of the claimants and preferred the evidence of Dr Zohn. That court therefore decided on the facts against all the claimants, including Abdel Bary, in relation to the provision of psychiatric care at the ADX facilities. As the conclusion of Dr Latham in his most recent report is not based on the findings made by the EctHR, it cannot form the basis of a significant material change of circumstances. The fact that Abdel Bary is now on suicide watch was said by Mr Cooper on his behalf to be the significant change. In the context of the claimant's history and the submissions presented in the past, we cannot agree."

207. It is clear that psychiatric disorders of the type suffered by Bary and Ahsan did not preclude their being detained in ADX Florence. Aswat's application to the European Court of Human Rights was considered separately (Aswat v UK (2014) 58 E.H.R.R. 1).

208. Aswat's health condition was such that he was transferred from HMP Long Lartin to Broadmoor Hospital because he met the criteria for detention under the Mental Health Act 1983 [§21]. His continued, compulsory detention in Broadmoor was authorised by the First-Tier Tribunal. It was concluded that he needed to be detained because he was suffering from paranoid schizophrenia [§22].

209. The European Court referred to the evidence before the Tribunal [§22] as to why Aswat needed to remain in hospital. It was the opinion of a psychiatrist that his mental disorder was of a nature that required his detention in hospital for medical treatment and that such treatment was necessary "for his own health and safety."

210. A further psychiatric report dated 12 April 2012 described Aswat's condition as follows [§22]:

> "Mr Aswat suffers from an enduring mental disorder, namely paranoid schizophrenia, which has been characterised by auditory hallucinations, thought disorder, delusions of reference, grandeur and guarded and suspicious behaviour. Mr Aswat's condition is currently well controlled on amilsulpride (anti-psychotic medication). However, he has only partial insight into his illness and he would be likely to relapse if he ceased taking his medication…"

211. The starting point for the European Court's consideration of the *Aswat* case was that he was detained, under the Mental Health Act, in a hospital not a prison because his schizophrenia was of a nature that he needed to be detained for treatment.

212. Aswat's application was brought on the basis that his "uprooting for placement in an as yet unknown and unidentified future environment of which no detail had been provided to the Court, with a risk of placement in conditions of isolation, would not be compatible with art.3 of the Convention." [§39].

213. The European Court approached the case on the basis that whether extradition to the United States would breach art.3 of the Convention very much depended upon the

conditions in which he would be detained and the medical services that would be made available to him there. However, any assessment of those detention conditions was hindered by the fact that it cannot be said with any certainty in which detention facility or facilities the applicant would be housed, either before or after trial. [§52]. The Court also pointed out that it did not have adequate information about where the applicant would or could be held, how long the applicant might expect to remain on remand pending trial; if a competency assessment would extend this and what would happen if he was not fit to stand trial [§52].

214. The European Court noted the following [§53]:

> "[53]… with regard to detention following a possible conviction, the Department of Justice has informed the Court that after sentencing the Federal Bureau of Prisons would decide which institution the applicant should be housed in. The Bureau would assess the applicant within the first 24 hours and if there were concerns about his mental health at that time a doctoral level psychologist would be consulted. In any case, he would be referred to a doctoral level psychologist after 14 days for an evaluation. If the Bureau held a hearing, the applicant could present evidence and make an oral statement to the panel. In deciding which institution he should be housed in, the Bureau would consider any medical, psychiatric or psychological concerns that had been identified. While his mental disorder would not by itself preclude his designation to ADX Florence, the evidence suggested that most inmates with paranoid schizophrenia were not housed in maximum security facilities."
>
> 54. Moreover, according to the information provided by the Department of Justice, mental health services were available in all prisons, including ADX Florence, and both in-patient, residential and out-patient care was available. Conditions of confinement could also be modified if an inmate's mental health was to deteriorate and acutely mentally ill inmates could be referred to a Psychiatric Referral Centre for acute, in-patient psychiatric care. 18
>
> 55. The Court therefore accepts that if convicted the applicant would have access to medical facilities and, more importantly, mental health services, regardless of which institution he was detained in. Indeed, it recalls that in Ahmad it was not argued that psychiatric care in the US federal prisons was substantially different from that which was available at HMP Long Lartin. However, the mental disorder suffered by the present applicant was of sufficient severity to necessitate his transfer from HMP Long Lartin to a high-security psychiatric hospital and the medical evidence, which was accepted by the First-Tier Tribunal, clearly indicated that it continued to be appropriate for him to remain there "for his own health and safety".

215. The European Court however distinguished Aswat's case from those of other Applicants on account of the severity of his mental condition. It found that there was a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.

216. This did not ultimately preclude Aswat's extradition. He was extradited to the United States upon the United States giving assurances about his treatment; *Haroon Aswat v Secretary of State for the Home Department* [2014] EWHC 3274 (Admin).

217. As regards ADX Florence, the High Court in *Pham* (supra) referred to the findings of the District Judge (emphasis added) [45]:

> "45. The DJ made detailed findings of fact about the ADX and the conditions likely to be encountered there if the appellant were to be convicted. The DJ found that if the appellant were to be subjected to SAMs after conviction, then there was a "strong likelihood" that he would be housed at the ADX. The following is a summary of the DJ's findings: the ADX is a high security prison built in the 1990s. It contains a "Special Security Unit" or "H-unit" where the appellant would be likely to be housed. All prisoners have their own cell with shower and lavatory, have "ready access to books", and a television with access to 50 TV networks. This compared very favourably with prison conditions in some Council of Europe states.

218. As noted above, the High Court rejected that there had been changes since Ahmad and others at the European Court which bore on Article 3. It pointed at [49] to the decision of the Federal Appeal Court decision in *Rezaq v Nalley* 677 F.3d 1001 (2012) as demonstrating that a placement in the ADX was not indeterminate. It was subject to periodic reviews which could be challenged administratively. Therefore the situation set out in [§223] of the EctHR's decision in Ahmad , viz. that if an applicant were at real risk of being detained "indefinitely" in the ADX, it would be possible for the minimum levels of severity to be reached to found a breach of Article 3 was not made out.

219. In short, the European Court found (and the High Court agreed in *Pham*) that there were different forms of detention within ADX and that an inmate could work progressively towards release to another prison and that detention did not amount to an indefinite form of solitary confinement.

220. *Rezaq v Nalley* is an apt demonstration of this. The Plaintiffs in that case had been housed in ADX Florence. The gravamen of their index offences is apparent from the Court's description of the factual background to the claims:

> "The plaintiffs in these actions were all convicted of terrorism-related offenses. Rezaq was convicted on one count of aircraft piracy for his involvement in the 1985 hijacking of EgyptAir Flight 648, in which fifty-seven passengers were killed. *See United States v. Rezaq,* 134 F.3d 1121, 1125–26 (D.C.Cir.1998) (upholding conviction). Saleh, Elgabrowny, and Nosair were convicted of crimes arising out of their assistance in the 1993 bombing of the World Trade Center and related terrorist plots. *See United States v. Rahman,* 189 F.3d 88, 103 (2d Cir.1999) (upholding convictions)."

221. Each of the Plaintiffs in *Rezaq* was admitted to the stepdown programme and transferred out of the ADX.

4. *No change since 2012 or 2014 (Pham)*

222. To be clear (and contrary to what was suggested at points in the defence case), the European Court in Ahmad expressly examined the numbers of prisoners subject to SAMs who had transitioned through H Unit (or the Special Security Unit) at ADX [see §94]:

> 94. The questions were forwarded to the US authorities. By letter dated September 26, 2011, the Department of Justice stated that there were 252 inmates in ADX's general-population unit. The Special Security Unit programme could house up to 32 inmates. There were 17 inmates in Phase I, nine in Phase II and six in Phase III. For the step-down programme, 32 inmates were in J Unit, 32 in K Unit and 25 in D/B Unit. The Department of Justice stated that the Bureau of Prisons obligations under US law prevented disclosure of information as to the length of time inmates had spent at each stage of the two programmes.
> And:
> 97. The Department of Justice's letter of September 26, 2011 also stressed that, while generally inmates who were subject to special administrative measures were housed in the Special Security Unit, it was possible for such inmates to be housed at other prisons. Furthermore, if special administrative measure were vacated for an inmate at ADX, he could be transferred from ADX to other prison. This had occurred for 7 of the 13 inmates whose special administrative measures had been vacated.

223. None of the defence witnesses in this case were able to provide any evidence as to what had changed at the ADX since 2012, in terms of the ability of prisoners to transition through ADX. There are some overarching points which can be made about their evidence. None of the witnesses had ever been to ADX. Mr Sickler had represented one person detained there over two decades ago. Ms Lewis has only represented Hamza and no other individual subject to SAMs who was detained at ADX [74/1].

224. Ms Baird had been a 'designator' to the ADX for a period in the 1990s but appeared to have little knowledge of the up to date processes and reviews that have to be undertaken before an individual is considered for the ADX [27/4]. She gave evidence that there was "nowhere else" for anyone to go who was subject to a SAM than ADX. She was unaware that in relation to nine individuals with a SAM, in relation to an espionage offence, only four were housed at the ADX. [28/9].

225. Ms Lewis appeared to suggest in her (hearsay based) evidence that she had not heard of anyone progressing out of the special security unit and suggested that this would not be possible because their SAMs would have to be modified [77/1]. As is plain, Ms Lewis did not have any empirical basis for her evidence but rather based it upon what she had heard from others [page 78]: "*It does seem to me that on balance we are getting more and more inmates that are being housed under SAMs conditions, not a decreasing number. Again, I personally do not know of anyone, not one individual who was serving a long-life sentence who ultimately progressed out of there, yes, who was on SAMs.*"

226. Like Ms Lewis, Ms Baird appeared under the misapprehension that SAMs cannot be amended or adapted so that inmates who are subject to them can spend time with other

inmates. She too lacked any empirical basis for her assertions about SAMs and ability of prisoners to transition through ADX: [29/7] A. *I have never personally seen it happen. I do not know of any cases where that has happened. I understand it is phase 3 which is on paper. I do not know how many inmates have participated in this phase 3 of the ADX in the H unit. I have no idea. I would guess that it is probably very, very few, if any at all.*

227. Ms Baird's personal understanding is plainly incapable of constituting any sort of basis for suggesting that there has been a change since 2012 so that individuals are not progressing through the H Unit (or special security unit) at ADX.

228. She was asked how she could possibly suggest to the Court that individuals with SAMS were subject to indefinite detention in the H Unit if she did not know how many individuals had worked their way though the unit. Ms Baird suggested that she knew of individuals who had been there for 'quite some time'. When pressed to identify any examples, she was only able to specify Abu Hamza. [35/26].

229. Ms Lewis was obviously wrong to suggest that more and more inmates are subject to SAMs (per Kromberg there were only 46 prisoners subject to them in the entirety of the US system in September 2020). The personal impressions (and they amount to no more than that) advanced by Ms Lewis and Ms Baird about individuals not being able to transition through ADX are demonstrably wrong. They are:

(1) Inconsistent with the evidence before, and the findings made by, the European Court about transition through the stages of ADX.

(2) Inconsistent with the evidence submitted by the United States by way of agreed fact that since January 2012, there were approximately 26 inmates who were on SAMs and housed at the ADX who were moved out of H unit and never returned to H unit.

(3) Inconsistent with the evidence submitted by the United States by way of agreed fact that since January 2012, there have been approximately 20 inmates housed at ADX whose SAMs were not renewed.

(4) Inconsistent with *Rezaq v Nalley* [*supra*].

(5) Inconsistent with the published guidance on the step-down process within the Special Security Unit [As set out in Gordon Kromberg's Fourth Declaration from para 45 and also set out at page 341 of the Prosecution Bundle on Prison

Conditions]: "*Placement into phase 3 typically requires a modification of the SAMs to allow inmates to have physical contact with one another*",

230. That Abu Hamza remains in ADX and is still subject to SAMs does not demonstrate that there is not a system from progressing out of ADX. It simply shows that he has not been able to avail himself of it. Ms Lewis was asked the direct question, whether Hamza had violated SAMs. She answered "no" and then went on to describe why she considered an allegation that he *had* violated SAMs was unjust. This related to communications with a family member [79/28]. Plainly this Court is unable to investigate Hamza's breach of SAMs but it is well known that he has family members implicated in criminality (not least the family member involved in the hostage taking in Yemen). The Court should be slow to accept any unsubstantiated claims that Hamza is being detained in ADX or subject to SAMs absent justification. Regardless, his detention affords no empirical basis for finding that there has been any change in the availability of the step -down process at ADX.

231. It is also of note that Hamza (despite family members being implicated in criminality) is entitled to visits by his wife, daughter and a son [80/27].

5. ***Evidence that conditions have improved since 2012***

232. Far from assisting the defence case, the evidence demonstrates that the settlement reached in *Cunningham v. Bureau of Prisons* made significant changes to the detention of the mentally ill at ADX Florence and within the BOP more generally.

233. Mr Kromberg refers to the Wiley declarations given to the European Court in his Declaration in Support of Request for Extradition, 17 Jan 2020 at §§16- 19 and updates the Court as to the developments in that decade to *improve* the situation.

234. These changes were part and parcel of the settlement process in *Cunningham v BOP*. The addendum to the settlement sets out the reforms introduced as a result of it. Paragraph 4 gives a flavour of the spirit into which it was entered by the BOP:

> "This addendum is the result of nearly four years of collaborative arms-length settlement negotiations by energetic and experienced counsel for the parties and their respective consultant and experts, aided by an experienced United States Magistrate Judge to resolve the claims raised by this action. The parties, without conceding any infirmity in their claims or defences, engaged in extensive arms-length settlement negotiations to implement changes related to the constitutional violations alleged in the complaint."

235. The changes were part of a process of widening access to mental healthcare in other institutions [Kromberg at §18]. To that end the following have been set up:

(1) A secure mental health unit at the United States Penitentiary in Atlanta, Georgia.

(2) A second secure mental health unit at the United States Penitentiary in Allenwood, Pennsylvania.

(3) A secure Steps Toward Awareness Growth and Emotional Strength (STAGES) Program at the United States Penitentiary, at ADX, specifically designed for inmates with personality disorders.

236. Kromberg also states that since the last Wiley declaration, BOP has undertaken the initiatives to improve mental health treatment at BOP and, in particular, at the ADX [Kromberg at §19]:

(1) Developing and implementing behavior-related incentive programs for inmates housed at ADX;

(2) Using and enhancing an at-risk recreation program to identify inmates who are not participating in any recreation programs, attempting to educate them on wellness, and encouraging their participation in a structured recreation program;

(3) Constructing, maintaining, and employing facilities for group therapy at ADX;

(4) Constructing, maintaining, and employing areas for private psychological and psychiatric counselling sessions in all housing units at ADX;

(5) Allowing telepsychiatry sessions to take place in private without the presence of correctional officers;

(6) Screening all inmates housed at ADX as of August 2014, to determine, among other things, whether the inmates have a mental illness. This included a screening record review of all inmates and in-depth clinical interviews of approximately 130 inmates by outside psychiatrists and non-ADX Bureau psychologists;

(7) Clarifying that psychotropic medications are available to any inmate for whom such medication is prescribed, regardless of the inmate's housing assignment;

(8) Ensuring that inmates receiving psychiatric medications at the ADX are seen by a psychiatrist, physician, or psychiatric nurse every ninety (90) days, or more often as clinically indicated for, at a minimum, the first year;

(9) Ensuring that during the screening and classification process identifies inmates with mental illnesses, provides accurate diagnoses, and assesses the severity of the mental illness or suicide risk;

(10) Developing and implementing procedures to ensure that Health Services notifies the psychiatrist, psychiatric mid-level provider, psychiatric nurse, or physician and Psychology Services of inmates who refuse or consistently miss doses of their prescribed psychotropic medications;

(11) Requiring Health Services staff to take steps to ensure that psychotropic medications are prescribed so that they are distributed on pill line;

(12) Assessing all inmates at ADX periodically to determine whether mental illness has developed since the last screening;

(13) At the classification stage, using mental health care levels as defined in the Program Statement, *Treatment and Care of Inmates with Mental Illness*;

(14) Excluding certain inmates with a Serious Mental Illness, as defined in the Bureau's Program Statement 5310.16, *Treatment and Care of Inmates with Mental Illness*, from ADX, except when extraordinary security needs exist. When extraordinary security needs exist, ensuring those inmates are provided treatment and care commensurate with their mental health needs, which includes the development of an individualized treatment plan in accordance with the Policies;

(15) Taking steps to ensure the prompt identification of inmates who develop signs or symptoms of possible mental illness while incarcerated at ADX, to permit timely and proper diagnosis, care, and treatment;

(16) Taking steps to ensure the reasonable access to clinically appropriate mental health treatment for all inmates with mental illness at ADX;

(17) Considering a commitment order under 18 U.S.C. §4245, or other applicable statute or regulation, for inmates who have a need for, but who do not agree to participate in, a Secure Mental Health Unit or for a treatment program at a Medical Referral Center. An inmate's refusal to be designated to a Secure Residential Mental Health Unit or Medical Referral Center, or a court's denial of a commitment order, is not grounds or justification to house an inmate with a Serious Mental Illness at ADX. However, if a court denies commitment or determines that an

inmate does not have a Serious Mental Illness, permitting that inmate to be placed at ADX if needed for security and safety reasons and providing treatment commensurate with his mental health care level;

(18) Housing certain inmates in need of inpatient psychiatric care at a Medical Referral Center;

(19) If an inmate with Serious Mental Illness who continues to be housed at ADX due to extraordinary security needs declines treatment consistent with his mental health care level, taking steps to develop and implement a treatment plan that includes regular assessment of the inmate's mental status, rapport-building activities, and other efforts to encourage engagement in a treatment process, and, at a minimum, a weekly attempt to engage the inmate;

(20) Offering inmates with Serious Mental Illness who continue to be housed at ADX due to extraordinary security needs between 10 and 20 hours of out-of-cell therapeutic and recreational time per week consistent with their individualized treatment plan;

(21) Taking steps to support inmates with mental illness through creation of wellness programs and recreational activities, specialized training of staff, and care coordination teams;

(22) Developing procedures for heightened review of requests and referrals for mental health services;

(23) Ensuring that any calculated use of force or use of restraints involving an inmate at ADX with a mental illness is applied appropriately to an inmate with such conditions, as set forth in the Policies;

(24) Excluding mental health clinicians from participation as a use of force team member in a calculated use of force situation, other than for confrontation avoidance.

(25) Merging BOP's Electronic Medical Record (BEMR) and Psychology Data System (PDS);

(26) Staffing and hiring four additional full-time psychologists at ADX, one psychiatric nurse, and one psychology technician, with one of the four additional full-time

psychologist positions facilitating trauma-informed psychological programming (Resolve Treatment (Trauma) Coordinator);

(27) Ensuring that the ADX Care Coordination and Reentry (CCARE) Team meets monthly, pursuant to the applicable section ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(28) Ensuring that a Mental Health Transfer Summary is completed in BEMR/PDS every time an inmate with mental illness (CARE2-MH, CARE3-MH, and CARE4-MH) transfers out of ADX, pursuant to the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(29) Ensuring the collaboration of Psychology and Health Services staff, beginning no later than 12 months before an inmate's anticipated release with Community Treatment Specialist (CTS) regarding ADX inmates CARE2-MH or higher releasing to an residential re-entry center or home detention, pursuant to the applicable section of the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(30) Hiring a full-time Social Worker for FCC Florence, whose priority is those inmates housed at ADX and who provides Reentry Planning Services within 1 year of an inmate's projected release date, as appropriate, and pursuant to the applicable section of the ADX Institutional Supplement regarding *Treatment and Care of Inmates with Mental Illness*;

(31) Taking steps to ensure that discipline is applied appropriately to inmates with Serious Mental Illnesses or Mental Illness, as set forth in the Policies; and

(32) Enhancing mental health training provided to Bureau staff.

237. Dr Leukefeld's affidavit also sets out the updated position, generally, as regards healthcare in BOP prisons and specifically that afforded in the ADX. To the extent that the defence appears to place some reliance upon a CIC report of an inspection in 2017, the Court is reminded that the settlement in Cunningham was only reached at the end of 2016 (it was filed in November 2016) and that the monitoring of it did not end until January 2020 [Kromberg Fourth declaration at §4]. The inspection relied upon was carried out in April 2017. The BOP response to it in 2018 may be found at page 457 of the prosecution bundle (on Prison Conditions).

238. As regards the ADX, Dr Leukefeld makes two important points. **First** (and a development since 2012) BOP policy now excludes those suffering from a Serious Mental Illness from ADX. The only exception to this is where there are "extraordinary" security concerns (as determined by a committee). There are only 14 such persons in the entire system with a serious mental illness that meet this threshold and are in the ADX [Dr Leukefeld at §33].

239. Aside the general procedures for admission to ADX, there is an entirely separate process for mental health screening: [at page 463 of the prosecution bundle]:

> "BOP has implemented a robust screening process to ensure inmates are serious mental illness are not placed in the ADX, which is described in the policy referred to. This process begins with the initial referral, which requires a clinical interview and psychological testing, conducted by a psychologist at the referring institution. Psychologists in the central office screen out inmate who have serious mental illness, review the results of this assessment and the mental health record. The ADX's chief psychologist screens inmates who are not precluded again at the time that they are designated to the ADX to ensure that no significant deterioration has occurred since the time of the original screening. A psychologist sees them again on arrival."

240. It further describes working diagnoses that are assessments of functional impairments and specialist medical screenings as well.

241. The second point Dr Leukefeld makes, in addition to setting out improvements at the ADX including its staffing levels, is that those subject to SAMs can receive therapy and group therapy at the ADX [§35].

242. Ms Lewis' reply when Dr Leukefeld's evidence about therapy was put to her is telling -

> A. I think it shows her lack of knowledge what is possible for a SAMs inmate. How is it even feasible, even possible, that someone who is not allowed to have contact with other inmates could possibly participate in group therapy? I think that it requires us to discount everything she has to say about mental healthcare if this is what her position is.

243. It is respectfully submitted that it is Ms Lewis who lacks knowledge, not the witness in charge of the administration of psychology services in the BOP. Ms Lewis seems wholly unaware that SAMs are amendable and adapted to suit the individual's circumstances (see *Abdulmutallab v Sessions* [supra] [page 487 of the Prosecution Bundle] whose SAMs permitted him to communicate with non terrorist prisoners and to request additional contacts to be evaluated on a case by case basis).

244. Ms Baird also sought to deny that the improvements wrought by the Cunningham judgment would be of benefit to SAMs prisoners - principally upon the basis they could not have therapy if they were subject to a SAM In addition to Ms Baird's lack of experience with post- conviction SAMs prisoners or ADX, she too appeared to have no understanding, per the affidavit of Dr Leukefeld [at §35], that it was simply question of approval being provided for a SAMs prisoner to have therapy [page 39/25]. She went so

far as to suggest that she was better placed than Dr Leukefeld to give evidence about the availability of psychological care at ADX [40/19].

245. Ms Baird accepted Dr Leukefeld's evidence as to the overall standard of psychological care provided within BOP prisons as regards suicide risk [see page 41 et seq] (and 42 that overall psychology services did a good job):

> Q. Do you agree that that indicates that the programmes in place for suicide prevention are effective, Miss Baird, and that your former colleagues do a good job in preventing people from taking their own lives?
> A. I believe that they are almost usually very effective and, yes, the psychology staff do a great job. I give them a lot of credit for all that they do.

(a) *Other evidence of changes since 2012*

246. The defence points to other evidence of change since 2012:

(1) An Amnesty International report from 2014 at page 12.

(2) The report of Allard Lowenstein International Human Rights Center Report on SAMs – 'The Darkest Corner: Special Administrative Measures and Extreme.

(3) The example of an individual who spent 17 years in ADX whilst he had a mental health illness.

(4) The Abu Hamza case.

(5) The lawsuit filed by a group of inmates at ADX Florence in the case of *Cunningham v BOP.*

(6) The decision to admit a claim by the Inter-American Commission of 16 March 2020

247. In summary, as regards each of these:

(1) Insofar as Assange relies on page 12 of the 2014 report to demonstrate a change in facts since the decisions cited above, it is clear that the change considered had taken place many years beforehand. Page 12 describes how group exercise ceased in 2005 because two inmates were killed by other inmates (in separate incidents).

(2) The Lowenstein report is about SAMs and describes the conditions at ADX only at a high level of generality (as opposed to the detail considered by the European Court of Human Rights and the High Court).

(3) The position as regards the detention of mentally ill inmates at ADX Florence has only improved since 2014 as a result of the settlement of *Cunningham v. Bureau of Prisons.*

(4) Abu Hamza's case does not provide any evidence of changes to the nature of detention at ADX Florence.

(5) The admissibility decision does not provide evidence about conditions at the ADX, only allegations.

6. *Application to this case*

248. Taking all of the above, the prosecution case may be summarised conveniently as follows:

249. **First**, the starting position for consideration of this case is that Assange's mental condition is not of a type or nature that renders his extradition incompatible with Article 3. The defence evidence is orientated towards demonstrating that if extradited to face conditions like those described by Mr Sickler, there is a real risk Assange would become suicidal.

250. **Second**, the defence argument is speculative as to the conditions that Assange would face and any sentence, he might be subject to. To say that SAMs would be imposed on him says nothing about the nature of the duration of those SAMs. His being subject to SAMs would only occur upon written certification to the Attorney General by the head of a member agency of the United States intelligence community (i) that was reasonably necessary to prevent disclosure of classified information; (ii) that the unauthorized disclosure of such information would pose a threat to the national security and (iii) that there is a danger that the inmate would disclose such information.

251. **Third**, regardless of whether he was subject to SAMs or not, Assange's detention pre trial would not amount to solitary confinement (as analysed extensively by the High Court and the European Court). It is clear that Assange would enjoy high levels of contact with his defence teams.

252. **Fourth**, there is no evidence to demonstrate that pre-trial access to medical health breaches Article 3 standards. Mr Sickler's evidence was to the opposite effect.

253. **Fifth**, if convicted, it is speculative as to whether Assange would be assigned to ADX Florence. Conditions at ADX Florence meet Article 3 standards and meet them as regards prisoners who suffer from mental illness.

254. **Sixth**, the case of Aswat v UK does not assist Assange. Aswat's psychiatric condition, at the time of Judgment, was of a wholly different order. The critical difference was, at the time, Aswat was judged to need hospital treatment and was being compulsorily detained at a hospital rather than a prison.

255. **Seventh**, if he was assigned to ADX, Assange would assessed to see if a serious mental illness precluded detention there [Dr Luekefeld at §32]. As she notes, these assessments have been praised for their effectiveness during a two- year monitoring period. Only 14 individuals out of the US prison population who have been found to have a serious mental illness are detained at ADX. That speaks of the exceptionality of this course being taken.

256. **Eighth** settlement reached in the case of Cunningham v BOP demonstrates that the care of the mentally unwell at ADX Florence has improved since 2014 and has had effects beyond the care of those at ADX Florence.

257. **Ninth,** ADX Florence marks the most severe conditions that Assange could be detained in. Conditions at other units that restrict communications between prisoners and the outside world do not reach the same level of severity. Housing in Communication Management Unit varies does not constitute solitary confinement (as confirmed by Mr Sickler).

C. Article 6

1. *Flagrant denial of the right to a fair trial*

258. It is submitted on behalf of Assange that he would suffer a flagrantly unfair trial in America. It is noted that, notwithstanding the apparent concerns expressed by defence witnesses as to:

(1) Access by the defence to evidence and classified material in the trial process [Lewis, core bundle tab 3, §§24-35, Pollack core bundle tab 19 §13-16, Durkin core bundle tab §16 §§9 - 13]; and

(2) The discovery procedure and the "unprecedented volume of material" [Pollack, core bundle tab 19 §13, Durkin, core bundle tab 16 §§14 to 16].

there is now no argument that any of these issues would lead to a breach of the defendant's fair trial rights.

259. This is presumably because, as set out in the request and accompanying affidavits, the defendant would be able to participate in the trial process and his fair trial rights will be upheld to a high degree:

(1) The government will be required to permit inspection and copying of all material in the government's possession if it is material to preparing a defence [Kromberg (1) §108];

(2) The government must produce information that is exculpatory, even if it is classified [Kromberg (1) §108]. The prosecution expects to provide defence counsel (either with security clearance or appointed "cleared counsel") with classified information [Kromberg (1) §109]; and

(3) The government may apply to withhold classified information from the defence, but this will be granted only if the Judge agrees it is "not relevant and helpful" to the defence [Kromberg (1) §112]. This is a stricter test than that which applies in the equivalent public interest immunity procedure in England and Wales in which relevant or helpful material may be withheld from the defence provided the overall trial remains fair [*R v. H* [2004] UKHL 3], this including material relating to national security . Whilst "special counsel" may be appointed in the English Courts, this is exceptional (H [supra] at §22] and special counsel are independent of the defendant, unable to take full instructions or report to their client. They attend at for the purpose introducing an adversarial element to the PII application. By contrast, in the US the defendant will benefit from the availability of cleared counsel, or defence counsel with clearance, to inspect classified information. The defendant will benefit from a greater degree of access to sensitive material than he would in the UK courts.

260. Four matters are particularised in an attempt to make good the article 6 argument [defence skeleton part C §§17.1 – 17.8]:

(1) Plea bargaining;

(2) The jury pool;

(3) Public denunciations; and

(4) Unjust sentencing procedure;

2. ***The legal framework***

261. By virtue of section 87 of the 2003 Act extradition may not take place if it is incompatible with the defendant's human rights as set out in the Human Rights Act 1998 (and by extension the European Convention on Human Rights).

262. Article 6 of the convention protects the individual's right to a fair trial. It provides:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

263. In extradition or other expulsion cases, a requested person must risk a 'flagrant' denial of the right to a fair trial before extradition can be resisted on article 6 grounds [see *R (Ramda) v. Secretary of State for the Home Department* [2002] EWHC 1278 (Admin) at §10 and *Soering v. UK* (1989) 11 E.H.R.R 439 at §113]. In *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512 Lord Phillips of Maltravers confirmed that:

> 'A different approach will, however, be appropriate in an extradition case. There it is the prospective trial that is relied on to justify the deportation. If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the likely consequences of the unfair trial.'
> RB [supra] as per Lord Phillips of Maltravers at §139

264. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, *Ahorugeze v Sweden* (2012) 55 EHRR 2, at §§114-115). It constitutes a breach that is so fundamental it amounts to a nullification or destruction of the very essence of the right guaranteed by Article 6 (*Othman v United Kingdom* (2012) 55 EHRR 1 at §§258-260).

265. None of the issues raised by the defence, considered individually or cumulatively, raise any tenable concern as to the propriety of the trial process in America. Even at the height

of the defence case, there can be no issue of a flagrant breach. The issue is, simply, unarguable.

(a) *Plea bargaining*

266. Plea bargaining does not give rise to any breach of article 6 per se: see the ECtHR in *Babar Ahmad v United Kingdom* (2010) 51 E.H.R.R, but rather would only raise an issue under article 6 if "the plea bargain was so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear to be the only possible way of avoiding a sentence of such severity as to breach art.3" [Ahmad §168]. Even if entered into before the extradition proceedings, plea bargaining is not abusive: *McKinnon v USA* [2008] UKHL 59 [§33].

267. The evidence before the Court establishes that a plea will only be accepted by the US Courts if it is made voluntarily, knowingly, and intelligently, with awareness of the likely consequences [Kromberg 1 §179]. Any plea entered will be scrutinized by the Court to ensure that it is made voluntarily and not as the result of force, threats or promises [Kromberg 1 §§180-1]. The defendant will "not be allowed to plead guilty unless he agrees he is guilty, and a district judge finds a trustworthy basis for his guilty plea" [Kromberg 1 §181].

268. There can be no suggestion, in light of the above, that any potential plea bargain would be so coercive as to vitiate the defendant's right against self-incrimination. The system of plea bargaining, in this case, would not amount to a nullification of the very essence of the defendant's article 6 rights.

(b) *Jury Pool*

269. It would appear that the defence do not submit that the jury pool in Virginia would on its own lead to a flagrant denial of the defendant's article 6 rights. Rather, it is said that the "system will be skewed even further against Julian Assange" by virtue of the potential jury pool [defence final submissions part C §17.3]. The defence maintain [defence final submissions, part C §17.3] that a "jury pool comprised almost entirely of government employees and/or government contractors is guaranteed". This submission, which was contained in the earlier defence skeleton argument (and was fully responded to by the prosecution) is plain wrong.

270. As a matter of fact, the probability of a complete jury pool consisting completely of government employees is negligible and the suggestion is risable. The district employes an enormous population of people who work across the spectrum of business types, from across all parts of the socio-economic spectrum Mr. Kromberg cites, by way of example, that more than 1,100,000 people live in Fairfax County alone. Fairfax County is one division of the Eastern District of Virginia in which the defendant will be tried [Kromberg 1 §77]. The jury could also be drawn from Faira County, Fauquier County, Loudoun County, Prince William County, and Stafford County [Prince, bundle E §7]. The defence evidence does not establish – as is claimed – that a jury pool of government contractors is "guaranteed". At its height it establishes that four defence related government agencies are among the top fifty employers in the area [Bundle E, Prince §9]. On the basis of Ms. Princes's own researches, others include the public school system, the area transit authority, local government, the department of agriculture, the Coca Cola Bottling Company, the postal services, and food and catering companies [Bundle E, Prince exhibit 2].

271. In any event, the defendant will benefit from a wide range or procedural guarantees to ensure the impartiality of the jury. This right is guaranteed by the sixth amendment to the constitution [Kromberg 1 §§72 to 81]. The trial Judge will conduct a voire dire to ensure that each juror can lay aside any impression or opinion and return a verdict based on the evidence in court [Kromberg 1 §§74-5, 78]. Only those jurors found to be capable of "fair and impartial jury service" after a "careful voire dire" will be able to serve. A similar process will be undertaken to ensure no bias on the basis of a juror's employment by the US government or a government contractor [Kromberg 1 §§79-80]. The defendant can challenge any juror for good cause, and ten jurors with *no cause at all* [Kromberg 1 §75]. The guarantees set out above, and in particular the ability to challenge jurors without cause affords the defendant more by way of procedural rights than would be available in this country.

272. The defence citation of "Prince 1 tab 13" as authority for the proposition that a jury pool comprised "almost entirely of government employees and/or government contractors is guaranteed" is not just misleading but utterly untenable. This is **not** the effect of Ms. Princes's researches, and it is **not** the consequence of the panoply of rights which Mr. Assange will benefit from to challenge and exclude jurors.

273. Furthermore, and in any event, the submission proceeds on the misconceived basis that those employed by the government are not capable of considering the case impartially or serving properly on a jury. On this basis, large swathes of society including the civil service, or teachers, would be barred from sitting on a jury considering the defendant's case. Such a submission is, for obvious reasons, misconceived. The key point is that the Court should monitor the potential for bias, and exclude any juror unable to return a verdict based on the evidence. This will be done.

274. The suggestion that the potential jury pool in Virginia can sustain or support an argument that Mr. Assange's article 6 rights would be flagrantly breached in America is therefore entirely unarguable.

(c) *Public denunciations*

275. The defendant relies on *Allenet de Ribemont* (1996) 22 E.H.R.R 582 as "clearly establishing" that "intemperate public denunciations violate the presumption of innocence" [part C §17.6]. In fact, (1996) 22 E.H.R.R 582 is the reference for a different *De Ribemont* case concerning whether a sum awarded as just satisfaction could be paid to an applicant free of attachment. The relevant case is *De Ribemont* (1995) 20 E.H.R.R 557. In that case, a press conference held by a high-ranking police officer in which the applicant was described as a murderer, was found to violate the presumption of innocence pursuant to article 6(2) [see §41].

276. The modern approach was set out by the domestic courts (in the context of abuse of process submissions considering the fairness of an accused's trial) by the Privy Council in *Montgomery v. HM Advocate* [2003] 1 A.C 641 PC and by the Court of Appeal in *R v Abu Hamza* [2007] 2 W.L.R 266.

277. In *Montgomery* the Privy Council noted [673B-H] that:

> "It needs to be emphasised, as was pointed out in Pullar v United Kingdom 22 EHRR 391, that the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact. It does not require the issue of objective impartiality to be resolved with mathematical accuracy. It calls instead for "sufficient" guarantees or safeguards and for the exclusion of any "legitimate doubt": Pullar v United Kingdom, pp 402-403, 405, paras 30, 40
> ….
> The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge."

278. In *Abu Hamza* the Court of Appeal noted the inherent strengths of the jury system [§90] and added:

> "89. In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. The position was summarised by Lord Taylor of Gosforth CJ in R v West [1996] 2 Cr App R 374 , 385–386 as follows:
> "But, however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In Kray (1969) 53 Cr App R 412 , 414, 415, Lawton J said: 'The drama … of a trial almost always has the effect of excluding from recollection that which went before.' That was reiterated in Young and Coughlan (1976) 63 Cr App R 33 , 37. In Ex p The Telegraph plc [1993] 1 WLR 980 , 987, I said: 'a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'"
> …
> 92. …The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial."

279. In *Abu Hamza*, the Court of Appeal considered a case in which the defence provided 600 pages of newspaper reports, articles and comments as "samples of a sustained campaign against the defendant, almost entirely hostile to him and some of it couched in particularly crude terms" [§96]. The publicity was described by the Court as a "barrage of adverse publicity, some of which treated the appellant as an ogre". The Court of Appeal nonetheless upheld the Judge's decision that the defendant could have a fair trial.

280. *Abu Hamza* also attempted to raise the issue of prejudicial reporting in the context of his article 6 rights when facing extradition to America [see *Ahmad* [supra] at §166]. The complaint related to a press release accompanying a US Department of Treasury freezing order describing him as a legal officer for the Islamic Army of Aden, an organisation responsible for the kidnapping of foreigners and tourists, who had sought support for jihad against the Yemeni regime and a return to Islamic law. It stated that Abu Hamza had endorsed the killing of non-Muslim tourists visiting Muslim countries. The ECtHR considered the argument "manifestly ill-founded":

> "In any trial in the United States it would remain for the prosecution to prove the charges against the applicant to the appropriate standard of proof and for the trial judge to direct the jury to try the case on the basis of the evidence alone. It cannot be said that a press release dating from 2002 would render such a trial unfair, still less give rise to the flagrant denial of justice required in an extradition case."

281. The issue was considered more recently still in by the ECtHR in *Ali v UK* (2016) 62 E.H.R.R. 7, at §§89-91:

> "89. Even in cases involving jury trials, an appropriate lapse of time between the appearance of any prejudicial commentary in the media and the subsequent criminal proceedings, together with any suitable directions to the jury, will generally suffice to remove any concerns regarding the appearance of bias. In particular, where the impugned newspaper reports appeared at a time when the future members of the jury did not know that they would be involved in the trial process, the likelihood of any appearance of bias is all the more remote, since it is highly unlikely that the jury members would have paid any particular attention to the detail of the reports at the time of their publication. In such cases, a direction to the jury to disregard extraneous material will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial press campaign. It is essential to underline in this respect that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary."
> 90. In some cases concerning adverse press publicity, the Court has looked at whether the impugned publications were attributable to, or informed by, the authorities. However, it is important to emphasise that the fact that the authorities were the source of the prejudicial information is relevant to the question of the impartiality of the tribunal only in so far as the material might be viewed by readers as more authoritative in light of its source. The question whether public officials have prejudged a defendant's guilt in a manner incompatible with the presumption of innocence is a separate issue to be considered under art.6(2) , with the focal point being the conduct of those public officials and not the impartiality of the tribunal itself. Thus, while the authoritative nature of the published material may require, for example, a greater lapse of time or most robust jury directions, it is unlikely in itself to lead to the conclusion that a fair trial by an impartial tribunal is no longer possible. In particular, allegations that any disclosure of prejudicial material by the authorities was deliberate and was intended to undermine the fairness of the trial are irrelevant to the assessment of the impact of the disclosure on the impartiality of the trial court.
> 91. It can be concluded from the foregoing that it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible. Indeed, the applicant has not pointed to a single case where this Court has found a violation of art.6 on account of adverse publicity affecting the fairness of the trial itself. As noted above, the trial judge, when invited to consider the effect that an adverse media campaign might have on a "tribunal", has at his disposal various possibilities to neutralise any possible risk of prejudice to the defence and ensure an impartial tribunal. In cases involving trial by jury, what is an appropriate lapse of time and what are suitable directions will vary depending on the specific facts of the case. It is for the national courts to address these matters—which, as the Law Commission observed in its 2012 consultation paper, 26 are essentially value judgments—having regard to the extent and content of the published material and the nature of the commentary, subject to review by this Court of the relevance and sufficiency of the steps taken and the reasons given."

282. Despite the modern caselaw, and the plain manner in which that caselaw would prevent the defendant from sustaining his argument as to public denunciations, both being set out in the prosecution response to the defendant's earlier skeleton argument, the defendant maintains his submission without any reference to *Ali, Abu Hamza, or Montgomery*.

283. A schedule "overview timeline of political statements" has been provided by the defence [bundle F tab 10] together with some press reports [Bundle E tabs 11 – 41].

284. Many of the comments identified date back as far as 2010. The most recent material relied on dates to September 2019. There will therefore be a lapse between the commentary complained of and the trial. This is a relevant factor to the fairness of the trial (see *Abu Hamza, & Ali* [both supra]).

285. Furthermore, many of the comments are anodyne or entirely unobjectionable. Some are even favourable to the defendant or WikiLeaks. It is unsurprising that the media, and

indeed government, have commented on the actions of the defendant and of WikiLeaks. There can be no objection to, for example, to Attorney General Holder declaring in 2010 that there was an "active ongoing criminal investigation into WikiLeaks" and that "to the extent that we can find anybody who was involved in the breaking of American law, who put at risk the assets and the people I have described, they will be held responsible". Nor could there be any objection to Attorney General Sessions declaring in 2017 that Mr. Assange was a "priority" and that "whenever a case can be made, we will seek to put people in jail" for serious criminal conduct. Similarly, the announcements accompanying the release of the superseding indictment are unremarkable.

286. The defence submissions also ignore entirely the rights, and the checks and balances, available to the defendant in challenging jurors, and in ensuring their impartiality (set out above). These are important. There is no prospect of any statements made by public officials impacting on the fairness of the trial, let alone flagrantly so.

287. To the extent that there has been comment on the defendant and his activity, in the press and even from individuals in government, this is perhaps hardly surprising given his profile. However, the defendant will face trial before an impartial tribunal, after a lapse of time and will be tried on the basis of the evidence alone. There is no basis on which it could be said that pre-trial publicity would lead to a breach of article 6, let alone a flagrant breach.

(d) *Unjust sentencing regime*

288. This exact same argument by Mr Fitzgerald, upon the same evidence of Mr Eric Lewis, was recently rejected as unarguable by the Grand Court of the Cayman Islands in *MacKellar v United States of America*_ No. 06385/2017 at paragraphs [64] to [76]. Mrs Justice Dobbs concluded:

> " I find that the ground has no reasonable prospect of success and accordingly leave is refused".

289. Notwithstanding that trenchant rejection of the same argument, the defence repeat it in this court.

290. The defendant asserts that the sentencing court will consider conduct outside the extradition request when sentencing. This is, in reality, a submission as to the specialty arrangement between the UK and the USA. Indeed, the source material relied on by the defendant (Durkin, core bundle tab 16, §19 to 24) specifically relates to "the rule of

specialty". This is a matter which should properly be raised before the Secretary of State pursuant to s.95 of the 2003 Act and not before this court.

291. Mr. Durkin asserts that the Federal Criminal Code permits sentencing courts in America to take into consideration conduct for which the defendant has not been prosecuted. This assertion is of general application. Were this to amount to a flagrant denial of the right to a fair trial, it would prevent extradition to America wholesale, and would mean that the regular return of fugitives to America pursuant to extradition arrangements between the UK and US has been misconceived for years.

292. No conduct is identified, in this case, which it is said the defendant would be sentenced for, outside the conduct set out in the request.

293. The issue of US sentencing practice and whether it comports with specialty has been exhaustively considered *Welsh, Thrasher v The Secretary of State for the Home Department the Government of the United States of America* [2007] 1 W.L.R. 1281 [2007] 1 W.L.R. 1281. The ruling in Welsh included consideration of the case of *US v. Watts*, cited by Mr. Durkin at §21 of his affidavit. In short, the Divisional Court:

(1) Noted that whilst American courts "can take a broader approach to what is relevant to sentencing than the UK courts might do, and adopt a different procedure for determining facts, does not mean that there is a breach of specialty. They are still punishing the defendant, and certainly on their legitimate perception, for the offence for which the defendant has been tried, the extradition offence in an extradition case" [§113].

(2) Considered that, as there have been longstanding extradition arrangements between the UK and the US, over several treaties, "if this sentencing practice was seen by the United Kingdom or other countries as breaching treaty obligations, there would have been a clarification in the superseding treaties, but instead there is nothing which excludes that practice" [§137].

(3) Noted that, whilst the US Courts "appear to range more widely than would the United Kingdom", nonetheless UK sentencing practice permits sentences to be aggravated on account of factors which could have been charged as separate offences.

(4) Accordingly, found that US sentencing law, comprehensively considered on this point, did not amount to a breach of specialty.

294. *Welsh* is determinative that US sentencing practice does not breach specialty. It is perhaps of note that neither applicant in that case even suggested that a flagrant breach of article 6 arose. The defence argument in this case must be that the whilst the sentencing practice conforms with the statutory provision which addresses the issue of specialty directly, it nonetheless also amounts to such an egregious breach of specialty as to nullify his fair trial rights. This inconsistent argument is untenable.

295. In their final submissions [part C §17.7] the defence concede that this argument had failed in *Welsh*, failed in *MacKellar* and failed at first instance in *Saddiq v. USA* (permission granted on appeal). Not only is the argument flawed (for the reasons set out above), it has consistently been determined against the defendant by other courts. This Court must follow suit.

296. As to the potential length of sentence (Part C §17.1(i), commenting on Eric Lewis and §17.1(iii) commenting on Mr. Durkin):

(1) Eric Lewis's figure of 175 years was predicated on the maximum sentence permissible for the offending, which he accepted in cross examination is imposed against "only a tiny fraction of federal defendants" [Tr. 15.9.20 p13(21)]. It is inconsistent even with Mr. Durkin's upper estimate of 30 to 40 years [Tr. 15.9.20 p58].

(2) Other comparable cases have led to significantly lower sentences than those identified by the defence witnesses – in *Sterling* a sentence of 42 month (maximum exposure 130 years), in *Allbury* 48 months (maximum exposure 20 years), and the lengthiest sentence served by a federal defendant for unauthorised disclosure to the media is in the case of *Winner,* and was 63 months [see cross examination of Eric Lewis, Tr. 15.9.20 pp14 to 18, and Kromberg 1 §185, Tab 2 to prosecution bundle].

(3) The ultimate decision on sentence will be determined by a Federal Judge of 35 years' standing, who is independent of the parties and of the Government [cross examination of Eric Lewis, Tr. 15.9.20 pp19-20]. Eric Lewis described the judge as strict but fair and would not question his integrity [Tr. 15.9.20 p20(9-15)]:

> Q. Well, let me help you a little bit. He was appointed a federal judge in 1985 and has been sitting on the bench for 35 years. Would you agree that he is a highly experienced district judge?
> A. Yes.
> Q. Do you have any reason to think he would not make a fair sentencing decision in this case?
> A. His reputation is as a strict sentence, but I do not know whether that would say that he is unfair. Lawyers talk a lot about the tendencies of judges and who you would want to sentence your client. He is not one of them.

> Q. But you agree ---
> A. But he is fair, I do not ---
> Q. You ---
> A. --- I do not question his integrity in any way

297. Indeed, there was no dispute when it was put that the longest sentence ever imposed in the United States of America for the same charges under the Espionage Act that Assange is facing was 63 months.[39]

> Q. Answer me this, Mr Lewis. What is the longest sentence, and this is a simple question that does not require a speech, what is the longest sentence served by a federal defendant for unauthorised disclosure to the media? What is the longest sentence ever imposed? Do you know?
> A. I do not have – I mean,…
> Q. I am going to ask you to agree that it is 63 months' imprisonment.
> A. Well, I believe there have been eight cases that have been tried under the Espionage Act until this one… then I accept that those days, 63 months, is the longest.
> Q. Do you agree that Mr Assange does not face a mandatory minimum sentence in this case?
> A. I do agree with that.
> Q. Do you agree that the federal judge assigned to this case will himself decide on the appropriate sentence?
> A. The federal judge has a discretion upon the sentence…

298. There is no tenable argument, therefore, that the potential sentence to be imposed against Mr. Assange would flagrantly breach his article 6 fair trial rights.

(e) *Other complaint – availability of Manning as a witness and evidence obtained through torture*

299. As to the defence contention that he would be unable to call Chelsea Manning in his defence [part c §17.], this is no different to the familiar situation in which a defendant is tried after the conviction of a co-defendant. There is no evidence that the defendant would not have the power to compel relevant witnesses to give evidence at his trial. The fact that Ms. Manning appears unwilling to testify to the government, does not mean she will prove equally recalcitrant if invited to give evidence for the defendant. In any event, the fact that a witness is willing to undergo contempt or commitment proceedings rather than testify does not render the trial of the defendant, or the legal framework in which it would take place, flagrantly unfair.

300. The suggestion that the defendant would be liable to be tried on evidence obtained by torture is entirely new [Part C §17.4]. Surprisingly, given that the first time this argument was advanced was in the second skeleton argument drafted on behalf of the defendant, and after the evidence had been called, the defence dedicate only one paragraph to the proposition. This is because it is unarguable. There is no evidence at all that the defendant would be liable to trial on evidence obtained through torture. The evidence of publications,

39 Transcript 15th September, page 18, lines 8 - 28

of the operation of Wikileaks, and of communication between Assange and Manning plainly has no connection at all to Manning's detention after her arrest (even if this could properly be described as "torture"). The evidence that Manning gave at her plea hearing was given of her own volition, and in order to ensure that her pleas were voluntary. Manning was thereafter the subject of civil contempt proceedings because she **refused** to co-operate or give evidence.

301. It is, at the very least, remarkable that the defendant should make the allegation that he would be liable to trial on the basis of evidence obtained through torture in such a throwaway fashion. There is no evidence to sustain this suggestion. It can safely be rejected by the Court.

302. Accordingly, no issue of article 6 breach arises.

D. Article 7

303. Article 7(1) reflects the principle, found in other provisions of the Convention, in the context of requirements that interferences with or restrictions in the exercise of fundamental rights must be "in accordance with law" or "prescribed by law", that individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible—an individual must have an indication of the legal rules applicable in a given case—and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of the criminal law. *SW v United Kingdom* (1996) 21 E.H.R.R. 363 [Commission §44].

304. Domestic legal provisions, meet this requirement where the individual can know from the wording of the relevant provision, <u>if needs be with the assistance of the courts' interpretation</u> of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable; *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91, ECHR 2013; *S.W. v. the United Kingdom* , 22 November 1995, §§ 34-35, Series A no. 335-B; and *C.R. v. the United Kingdom* , 22 November 1995, §§ 32-33, Series A no. 335-C).

305. In the context of "prescribed by law" the European Court sets the standard of foreseeability to that of reasonable certainty: *The Sunday Times v. United Kingdom* (A/30): 2 E.H.R.R. 245 at. §49.

> "… a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.."

306. In common law systems like those of the United Kingdom and the United States, the European Court recognizes that the law may be developed by the Courts and applied to circumstances not foreseen when a provision was enacted (or when, as a matter of common law, it first developed): *SW v UK* (Judgment at 36/34):

> "There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

307. Thus in *SW*, the European Court upheld that the defendant could be prosecuted for raping his wife despite that as a matter of English common law, prior to the date of the offence, a husband had been immune from prosecution for the rape of his wife on account of the consent to sexual intercourse that was thought to be inherent in the contract of marriage. The law was found to comply with Article 7 notwithstanding that the change in common law immunity had been steadily decreased by virtue of a series of judicial decisions making the immunity subject to an increasing number of exceptions, and had eventually disappeared altogether.

308. This demonstrates that in a common law system, any requirement for certainty must be fashioned having regard to the role that the Court plays in refining the ambit of criminal law: *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35 at [142]:

> "Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".

309. The overarching aim of Article 7 is to ensure effective safeguards against arbitrary prosecution, conviction and punishment; see *Kafkaris* at 138.

1. *The Correct Approach in Extradition Law*

310. The role of the extradition court is not to require that United States law meets the requirements of European Convention law. The extradition court is only concerned with the question of whether extradition is incompatible with Assange's Convention rights. As is apparent from the above cited cases, where is said that the law has been extended excessively so as to encompass behaviour previously not criminal (per *SW*), the European Court considers closely the evolution of the law. It also has regard to the findings and analysis of the domestic court as to the content of its own law (and accords a degree of deference to that judgement). It goes without saying that in the extradition context, the English Court cannot replicate that approach – it does not have the benefit of the analysis and opinion of the requesting state's court as to whether the law meets the requirements of certainty on the facts of a given case.

311. As with almost every part of the defence case, the submission on Article 7 rests upon the contention that Assange is in the same position as a journalist provided with sensitive information as opposed to his being part and parcel of the criminal activity of the leaker. There are a number of very obvious differences between Assange and the security journalists with whom the defence seek to compare him. These are set out below.

312. The defence contends that there are two possible approaches to Article 7 either (1) that are strong grounds for believing that there is a real risk that Assange would be subject to law sufficiently uncertain as to be prohibited by Article 7 or (2) that there would be a real risk of a flagrant breach of his rights under Article 7 by ordering his return.

313. However, the defence also accepts that the House of Lords in *R(Ullah) v Special Adjudicator* [2004] AC 323 (per Lord Steyn at paragraph 45 with whom Lord Carswell expressly stated at 67 that he agreed with Lord Steyn in respect of Articles 2,4,5,7 and 8. Lord Bingham and Baroness Hale agreed generally) laid down a real risk of a flagrant violation in respect of Article 7.

314. The same submission as made here was advanced in *Arranz v Spanish Judicial Authority [2013*] EWHC 1662 (Admin) and rejected (per the PQB at [§38]: "Although it was submitted on the appellant's behalf that what Lord Steyn said was not necessary for the decision, it is clear that Lord Steyn was laying down the approach the courts should take in cases where Articles of the Convention, including Article 7 were in issue. It would not be consistent with the principles on which this court should operate for us to depart from

the guidance expressly given in relation to Article 7. Although we see some force in the argument advanced on behalf of the appellant in relation to Article 7, it must be for the Supreme Court to determine whether it should reconsider the guidance given by Lord Steyn in a case where Article 7 is actually in issue."

315. Whether the Court applies the flagrant breach test or the lesser threshold does not matter here. It is inconsequential because what is being contended for is that Assange did not know or could not have foreseen that assisting Manning's criminal activity, going so far as to attempt to crack a password hash, and then disclosing the names of informants to the world at large might be against the criminal law. This is unsustainable.

2. ***General attack upon the Espionage Act as vague***

316. The first limb of the defence case appears to aimed at demonstrating in *general* terms that 18 USC §793 and the CFAA are too uncertain in their application. That is not the issue here – the only question that it is permissible for the Court to determine is whether *Assange's* extradition is incompatible with Article 7.

317. Second: reliance upon allegations of over-classification or on assertions these laws have not been used to publish journalists do not assist the analysis conducted for the purposes of Article 7. It is the nature of criminal law that it will be applied in a range of factual circumstances *and that some will be novel* – the question is whether the application of law to the given facts is consistent with the essence of the offence and could reasonably be foreseen.

318. As regards the suggestion that the Espionage Act is overly broad, the defence evidence failed to inform the Court that the Espionage Act has been subject to refinement through a series of judicial rulings (in precisely the sort of way the European Court of Human Right envisages). In other words, the Act has been interpreted as subject to conditions so as to avoid it being overly broad. One important such condition is that a defendant cannot be prosecuted simply on the basis that material is classified. As confirmed by Gordon Kromberg [3 September 2020 Declaration at 83- 84 (emphasis added)]:

> "83. Clarification of the law in the United States regarding the definition of information relating to "the national defense", under Section 793 of Title 18 of the United States Code, may assist the Court. Case law in the United States establishes that, to be national defense information, the documents at issue must satisfy three criteria. First, the documents must generally relate to military matters or related activities of national preparedness. See Gorin v. United States, 312 U.S. 19, 28 (1941); United States v. Rosen, 445 F. Supp. 2d 602, 620 (E.D. Va. 2006) ("[T]he phrase 'information relating to the national defense' has consistently been construed broadly to include

> information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities."). Second, the information must be "closely held" by the U.S. government. See United States v. Squillacote, 221 F.3d 542, 579 (4th Cir. 2000)("[I]nformation made public by the government as well as information never protected by the government is not national defense information."); United States v. Morison, 844 F.2d 1057, 1071-72 (4th Cir. 1988). Third, disclosure of the documents must be potentially damaging to the United States or potentially useful to an enemy of the United States. See Morison, 844 F.2d at 1071-72 (approving jury instruction that the prosecution must prove that the information "would be potentially damaging to the United States or might be useful to an enemy of the United States.").

319. Mr Kromberg cites the approval given by the Court of Appeals in *Morison* to the jury directions given in that case as authority for the third requirement that the prosecution must prove not, that the material is classified, but that its disclosure is potentially damaging. The Court in *Morison* explained the importance of this condition as follows [see Morison at page 104 of the Prosecution Bundle put to Mr Shenkman]:

> "The notice requirement insures that speakers will not be stifled by the fear they might commit a violation of which they could not have known. The district court's limiting instructions properly confine prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government. Without undertaking the detailed examination of the government's interest in secrecy that would be required for a traditional balancing analysis, the strictures of these limiting instructions confine prosecution to cases of serious consequence to our national security."

320. Equally any suggestion in the defence evidence that the Espionage Act ought not apply outside the context of 'classical espionage' or that there is any doubt about this [see for example Shenkman Report at [31]- "*The current escalation of use of the Espionage Act of 1917 in the United States against activities that have nothing to do with 'espionage'—as the term is commonly understood—is entirely consistent with the political origins and applications of the Act since World War I*…] ignores that the Espionage Act has long been held as applying to a broader range of circumstances that 'traditional espionage'. The argument that it did not was expressly rejected in *Morison*. The Court of Appeals recorded the Appellant's argument as follows (emphasis added) [see page 90 of the Bundle put to Mr Shenkman (first paragraph under the heading)]:

> "The initial defense of the defendant to his prosecution as stated in Counts 1 and 3 of the indictment (sections 793(d) and (e)), rests on what he conceives to be the meaning and scope of the two espionage statutes he is charged with violating. It is his position that, properly construed and applied, these two subsections of 793 do not prohibit the conduct of which he is charged in those counts. Stated more specifically, it is his view that the prohibitions of these two subsections are to be narrowly and strictly confined to conduct represented "in classic spying and espionage activity" by persons who, in the course of that activity had transmitted "national security secrets to agents of foreign governments with intent to injure the United States." He argued that the conduct of which he is charged simply does not fit within the mold of "classical spying" as that term was defined, since he transmitted the national security secret materials involved in the indictment to a recognized international naval organization located in London, England, and not to an agent of a foreign power. In short, he leaked to the press; he did not transmit to a foreign government."

321. The Court of Appeals found that it was clear on the face of section 793 that it applied to cases outsides traditional spying or espionage. It nonetheless went on to compare section 793 to section 794 to demonstrate that section 793(d) was not intended to apply narrowly to "spying" but was intended to apply to disclosure of the secret defense material to *anyone* "not entitled to receive" it (see penultimate paragraph on page 91).

> "The two statutes differ — and this is the critical point to note in analyzing the two statutes — in their identification of the person to whom disclosure is prohibited. In section 793(d) that party to whom disclosure is prohibited under criminal sanction is one "not entitled to receive" the national defense material. Section 794 prohibits disclosure to an "agent . . . [of a] foreign government. . . ." Manifestly, section 794 is a far more serious offense than section 793(d); it covers the act of "classic spying"; and, because of its seriousness, it authorizes a far more serious punishment than that provided for section 793(d). In section 794, the punishment provided is stated to be "punish[ment] by *death* or by imprisonment for any term of years or for life" (Italics added). The punishment for violation of section 793(d) is considerably more lenient: A fine of "not more than $10,000 or imprisoned not more than ten years, or both." In short, section 794 covers "classic spying"; sections 793(d) and (e) cover a much lesser offense than that of "spying" and extends to disclosure to *any* person "not entitled to receive" the information. It follows that, considered in connection with the structure and purposes of the Espionage Act as a whole and with other sections of the Act *in pari materia* with it, section 793(d) was not intended to apply narrowly to "spying" but was intended to apply to disclosure of the secret defense material to *anyone* "not entitled to receive" it, whereas section 794 was to apply narrowly to classic spying.

322. Also exaggerated are defence claims that the Espionage Act makes no distinction between the leaker, the recipient of the leak or the "100th recipient" of the leak (see, for example, Shenkman Report at §29). Section 783 provides a mens rea requirement for each offence. § 793(a)-(b) require "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." § 793(c) requires knowledge that the information was obtained or taken illegally. § 793(d) and (e) require "reason to believe" the information "could be used to the injury of the United States or to the advantage of any foreign nation" and "wilful []" transmission or retention. Courts have held that "wilful" in this context requires a showing that an act is done "voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law." See, again *Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988) (in the bundle of materials put to Shenkman).

323. These points here are mentioned by way of general introduction. **First**, they demonstrate that criticisms that the defence has ranged at the width of the Espionage Act fail to reflect the extent to which the scope of the Act has been narrowed by judicial interpretation. This interpretation has served to ensure (per *Morison* above) that it does not result in the punishment of individuals for revealing material that is embarrassing or critical of the Government. It also demonstrates that to the extent that witnesses like Mr Shenkman attempt to suggest that the Executive or the President decide the scope of criminal law

because they determine what is *classified*, this is quite wrong and misleading (see for example, Mr Shenkman at paragraph 20 of his report - *This allowed the president unprecedented power to effectively decide the scope of criminal law*). The test is not whether the material is classified, it is whether its disclosure is potentially harmful. **Second**, *Morison* makes clear that the Espionage Act has long been recognised to apply outside the ambit of traditional espionage type cases and that it was never the legislative intent to limit it to those sorts of cases.

324. The evidence of Carey Shenkman appears to be the high point of the defence case on uncertainty. The prosecution does not accept that he is an expert. Alternatively, if the Court concludes he is an expert, his evidence ought to be approached with considerable caution. The reasons why overlap:

(1) He is not sufficiently independent. He has previously acted for Mr Assange (although he sought to distance himself from that representation and obfuscated about it), it is plain that he did [see transcript 17 September, page 39 line 1].

(2) He has published strong opinions on this case even to the extent of accusing the UK of arbitrarily detaining Assange when he evaded the Swedish extradition proceedings by remaining in the Ecuadorian Embassy [see transcript 17 September pages 39- 40].

(3) He is not qualified as an expert. He said in express terms that he was giving evidence as a "*historian*" [see page 59 line 19]. However as is clear, his description of himself as a "constitutional historian" is entirely self- titled. He is not even an academic [transcript 17 September page 44-45]:

Q. *When you describe yourself as a constitutional historian, what is the basis of that, Mr Shenkman*?

A. *I mean, the last decade, reading a lot of books and giving a lot of talks and writing a lot of papers that folks are hopefully reading about constitutional issues and also my experience as a constitutional litigator that has happened (inaudible).*

(4) Although this may not matter given that Mr Shenkman sought to distance himself from giving expert *legal* evidence [see page 45 line 4 and 59/19 (*supra*)] Mr Shenkman is, in any event, a lawyer of only six years- experience.

(5) His evidence was incomplete and omitted a number of important points. It was misleading. For example, the Court would not have known from reading his opinion, that the Espionage Act has already been interpreted as subject to a number of limitations which confine its ambit (as above). He also appeared to dispute and argue the finding of the Court of Appeals in Morison as to the application of the Espionage Act outside classic espionage cases – see for example transcript 18 September page 53 line 16]. In general, Mr Shenkman appeared unable to accept statements of principle by the US Courts – rather the thrust of his evidence was that he and others disagree with them).

325. In any event, whether Mr Shenkman's evidence is accepted as expert or not, it is inconsequential to the issue before the Court on Article 7 for the reasons set out below.

3. *The application of the Espionage Act to publishers*

326. The repeated submission made by the defence is that there has never been a prosecution of a publisher under the Espionage Act. The implication of the defence case is that it is uncertain whether the Espionage Act could be applied to a publisher for publishing national defense information.

327. This point does not fall to be determined in this case because the case against Assange is in large part based upon his unlawful involvement in Manning's theft of the materials. Like so much of the defence case, this submission rests entirely upon the premise that Assange is being prosecuted for publishing and that he is analogous to any of the journalists or publishers cited by witnesses like Mr Shenkman (see for example at §34 of his report).

328. Even as regards publishers, it appears that United States law has, for a very long period of time, contemplated that they may be susceptible for prosecution for publishing.

329. In *United States v Rosen* 445 F. Supp. 2d 602 (E.D. Va. 2006), the United States District Court, E.D. Virginia (the same district that will try Mr Assange's case) considered the position of two lobbyists who passed information obtained from the Government to the media. It follows that they were not Government leakers but rather individuals to whom materials had been leaked. The case against was described as follows [see *Rosen* at page 52 of the bundle put to Shenkman]:

> "In general, the superseding indictment alleges that in furtherance of their lobbying activities, defendants (i) cultivated relationships with government officials with access to sensitive U.S. government information, including NDI, (ii) obtained the information from these officials, and (iii) transmitted the information to persons not otherwise entitled to receive it, including members of the media, foreign policy analysts, and officials of a foreign government."

330. The US District Court in *Rosen* considered that the Supreme Court's decision in *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam) was the most relevant case to the question of the ambit of the Espionage Act, despite that the New York Times case was a *prior restraint* case. In the New York Times case, the Supreme Court concluded that there should not be a prior restraint of publication of materials derived from the Pentagon Papers. In Rosen, the District Court analysed why the Judgment did not signify that a prosecution thereafter would have been unlawful (emphasis added):

> " There, the Supreme Court, in a brief *per curiam* decision, denied the United States' request for an injunction preventing the New York Times and Washington Post from publishing the contents of a classified historical study of United States policy towards Vietnam, known colloquially as the Pentagon Papers, on the ground that the government failed to overcome the heavy presumption against the constitutionality of a prior restraint on speech. *See id.* at 714. The *per curiam* decision was accompanied by six concurring opinions and three dissents, and although the issue was not directly before the Court, a close reading of these opinions indicates that the result may have been different had the government sought to prosecute the newspapers under § 793(e) subsequent to the publication of the Pentagon Papers. Of the six Justices concurring in the result three — Justices Stewart, White and Marshall — explicitly acknowledged the possibility of a prosecution of the newspapers under § 793(e). And, with the exception of Justice Black, whose First Amendment absolutism has never commanded a majority of the Supreme Court, the opinions of the other concurring justices arguably support, or at least do not contradict, the view that the application of § 793(e) to the instant facts would be constitutional. Justice Douglas's rejection of the potential applicability of § 793(e) to that case rested on his view that Congress specifically excluded "publication" from its prohibited acts. *See id.* at 720-22 (Douglas J., concurring). The obvious implication of Justice Douglas' opinion is that the communication — as opposed to publication — of information relating to the national defense could be prosecuted under § 793(e). Likewise, while Justice Brennan did not specifically address the espionage statutes, his concurrence was based on the heavy presumption against the constitutionality of prior restraints. *See id.* at 725-27 (Brennan, J., concurring). Thus, among the concurring justices, only Justice Black seemed to favor a categorical rule preventing the government from enjoining the publication of information to the detriment of the nation's security, and even he relied on the absence of congressional authority as a basis for denying the requested injunction. *See id.* at 718 (Black, J., concurring). Furthermore, while the dissenting justices chiefly objected to the feverish manner of the Supreme Court's review of the case, a survey of their opinions indicates the likelihood that they would have upheld a criminal prosecution of the newspapers as well. *See id.* at 752, 91 S.Ct. 2140 (Burger, C.J., dissenting 757 (Harlan, J., dissenting); *id.* at 761, 91 S.Ct. 2140 (Blackmun, J., dissenting). Thus, the Supreme Court's discussion of § 793(e) in the Pentagon Papers case supports the conclusion that § 793(e) does not offend the constitution.

331. Importantly, the District Court also indicated that this part of the Supreme Court's judgment was binding upon it:

> "While the Supreme Court's discussion of the application of § 793(e) to the newspapers is clearly *dicta,* lower courts "are bound by the Supreme Court's considered *dicta* almost as firmly as by the Court's outright holdings, particularly when, as here, a *dictum* is of recent vintage and not enfeebled by any subsequent statement." *McCoy v. Massachusetts Institute of Technology,* 950 F.2d 13, 19 (1st Cir. 1991); *see also Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir. 1996); *Reich v. Continental Gas Co.,* 33 F.3d 754, 757 (7th Cir. 1994); *United States v. Bell,* 524 F.2d 202, 206 (2d Cir. 1975); *Fouts v. Maryland Casualty Co.,* 30 F.2d 357, 359 (4th Cir. 1929).

> In sum, Congress's attempt to provide for the nation's security by extending punishment for the disclosure of national security secrets beyond the first category of persons within its trust to the general populace is a reasonable, and therefore constitutional exercise of its power

332. To this can be added that the District Court's judgment appears wholly consistent with the academic article much relied upon the defence "The Espionage Statutes and Publication of Defense Information", Harold Edgar and Benno C. Schmidt, Jr. Vol. 73, No. 5 (May, 1973). That article is misquoted throughout the defence case (see for example, the Report of Jameel Jaffer at paragraph 8). The Article states that it is the *Supreme Court Judgment* in the New York Times case which constitutes a loaded gun pointed at the media- "these tentative readings of the espionage act are a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets." In other words, the 1963 Article was making the point that the New York Times Judgment contemplated the prosecution of the media for the publication of national defence material.

333. *Rosen* is relevant to this case simply because it evidences how the Court which will try Assange has previously approached the question of whether the Espionage Act can be used to prosecute a recipient of leaked materials. It regards the approach of the Supreme Court, in 1971, in the New York Times case, as binding upon it.

334. However, Assange's position is wholly different. His position cannot be compared to the New York Times. Superseding Indictment 2 thus alleges:

(1) At §§1,2 and 3 –that Wikileaks' very purpose and design was to recruit persons to break the law – by circumventing classification restrictions and computer and access restrictions.

(2) At §3- that WikiLeaks's purpose was to solicit the provision of classified materials – see for example its posting of the 'most wanted' leaks – obtainable by an *outsider*. In summary, an invitation to break to the law by insiders or an invitation to hack by outsiders.

(3) At §4 –Assange explained that unless such individuals were a serving member of the military, they would have no legal liability

(4) §5 – <u>To an audience of hackers</u>, Assange explained that there was a small vulnerability within the Congress document distribution system.

(5) §6 – To an audience of hackers, Assange publicised materials that he would like to be obtained by hacking.

(6) §86 – Assange exhorts the public to join the CIA in order to steal information "I am not saying don't join the CIA; no go and join the CIA, go in there, go into the ball park and get the ball and bring it out."

(7) §36 Assange asks a 17-year-old "to commit computer intrusions and steal audio recordings of conversations between high ranking officials of a NATO country".

(8) §46 – Assange asks the 17-year-old to break into someone's computer and delete chat logs.

335. In general terms (and as alleged in the indictment), Wikileaks was not merely operating drop-boxes but actively in the business of encouraging individuals to hack into computers. As regards the allegations specific to Ms Manning, then as set out in detail in the indictment, the allegations against Assange are that he encouraged and assisted Ms Manning to break the law. A further point of distinction, between Assange and the journalists to whom he compares himself, is that Assange encouraged the mass and indiscriminate theft of a vast number of documents.

336. The evidence of Gordon Kromberg is a complete answer to the defence submissions that United States law is not uncertain in terms of Assange's conduct. United States law does not permit journalists to commit crimes in order to obtain material nor does it confer any form of immunity. Under US law, journalists have no rights to steal or engage in criminal activity [§7 of the Declaration of 17 January 2020]:

(1) "Contrary to the claims of Cary Shenkman and others, such acts are illegal and not protected by the U.S. Constitution. There is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Regardless of whether one considers Assange to be a journalist, it is well-settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (noting that the First Amendment does not protect those who "obtain[] … information unlawfully"); *Cohen*, 501 U.S. at 669 ("The press may not with impunity break and enter an office or dwelling to gather news."); *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or

otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (observing that the First Amendment "right to speak and publish does not carry with it the unrestrained right to gather information," for example, "the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right"). [Kromberg at CB2 at §7].

(2) "Like Assange numerous people have been charged in the United States for conspiracy to commit computer hacking even though they engaged in that hacking purportedly to obtain newsworthy information for political purposes. [Kromberg at CB2 at §7].

337. Whilst the defence sought to rely upon *Bartnicki v. Vopper* 532 U.S. 514 (2001) (which concerned the publication of information but <u>not</u> national defence information) obtained through an unlawful interception), the Supreme Court citing *Branzburg v. Hayes,* 408 U. S. 665, 691 (1972) [page 48 of the prosecution bundle put to Shenkman] stated at Footnote 19:

> *"*It would be frivolous to assert-and no one does in these cases-that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Branzburg* v. *Hayes,* <u>408 U. S. 665</u>, 691 (1972)."

338. Another article cited by a defence witness (See Jameel Jaffer at Footnote 5) agrees that the position as set out in Mr Kromberg's evidence is wholly uncontroversial; See McGraw and Gikow, Harvard Civil Rights-Civil Liberties Law Review [Vol. 48] 474:

> "Were charges premised on some intrusion by journalists — hacking into government systems, for instance — the First Amendment protections would largely collapse under the obvious precedents. See Bartnicki v. Volper, 532 U.S. 514, 532 n.19 (2001)."

4. ***CFAA***

339. *Even* the suggestion that the Computer Fraud and Abuse Act (CFAA) is vague as regards its application to the facts alleged against Mr Assange might be thought surprising. Mr Assange is after all accused of assisting Ms Manning's attempts to crack a password

hash. Indeed, as Gordon Kromberg pointed out, the CFAA's basic prohibition against gaining access to a computer without authorization is "common throughout the world" [Kromberg at CB2 at §169]:

> 169. In his affidavit, Carey Shenkman suggests that the Computer Fraud and Abuse Act (CFAA) is unconstitutionally vague. Shenkman Aff. ¶¶ 35, 40-41. In fact, the CFAA's basic prohibition against intentionally gaining access to a computer "without authorization," Title 18, United States Code, Section 1030(a)(1), is common throughout the world. *See* Council of Europe, Convention on Cybercrime, Sec. 1, Art. II ("Each party shall … establish as criminal offenses under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right. A party may require that the offense be committed by infringing security measures, with the intent of obtaining computer data…."); ORIN S. KERR, COMPUTER CRIME LAW 40 (4th ed. 2018) ("Every state and the federal government has an unauthorized access statute."). Indeed, as noted in the Opening Note, the United Kingdom's Computer Misuse Act similarly prohibits "Unauthorised access to computer material." Opening Note ¶ 57.

340. Again, the high point of the defence evidence on this appears to the evidence of Mr Shenkman. Mr Shenkman relied, in his report, upon the article cited above by Orin Kerr to suggest that there was uncertainty as to whether the CFAA would apply to the facts of this case. However, the area of uncertainty referred to in the article has nothing to do with the facts of this case (see Kromberg CB2 at §170). To the contrary, the Kerr article states [see page 127 of the bundle put to Mr Shenkman]:

> "To be sure, there are some obvious cases. If A guesses B's password and logs into B's email account to read B's email, A's access to the computer is clearly unauthorised. A has hacked into B's account. If hacking is not unauthorised access, nothing is."

5. *Constitutional protections in United States law*

341. Overarchingly and a complete answer to whether there is any risk that Assange's extradition might be incompatible with Article 7, is the United States Constitution. Assange is not at risk of being prosecuted on the basis of an arbitrarily uncertain criminal law because he is protected by the "void for vagueness" protections under the Fifth Amendment to the US Constitution. "*A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement*" [Kromberg at prosecution bundle Tab 2 at §69]. This is considered further below. Additionally, cases like *Morison* constitute examples of how United States Courts will approach statutes (and, if necessary, will read them subject to limitations or conditions) in order to ensure that they are not overly broad or vague in their application.

342. A considerable amount of the defence evidence concerned the extent to which there was *discretion* as to whether prosecute publishers for publishing national defence information.

These examples tend to suggest that there has been reticence on the part of Governments to prosecute publishers (given the paucity of prosecutions). There is an obvious difference between whether the facts of a given case fall within the definition of an offence and, if they do, the exercise of discretion as to whether to prosecute or not. This distinction does not however matter here given that Assange is not being prosecuted for mere publication. As set out at the outset of this section, Article 7 is ultimately aimed against arbitrary prosecution. There are two important protections afforded to Assange which are relevant here. The first is the protection conferred by the requirement that the prosecution prove that the material disclosed was potentially damaging to the United States or potentially useful to an enemy of the United States (for the reasons explained in Morison- *supra*). The second is his equal (if not greater protection) under the United States Constitution law [Kromberg at prosecution bundle CB 2 §§69-70]:

> "69. "Similarly, to the extent Assange believes that Title 18, United States Code, Sections 793 or 1030 is unconstitutionally vague, as the Shenkman Affidavit appears to assert, see Shenkman Aff. ¶¶ 29, 35, 41, he could challenge those laws and their application to him as "void-for-vagueness" under the Fifth Amendment to the U.S. Constitution. A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.
> 70. Assange could assert the above-mentioned arguments in a number of ways. He could file pre-trial motions with the trial judge, motions following closure of the government's direct case at trial, and again following the closure of all evidence in his case. If convicted, he would have a right to appeal these rulings once as of right to an appellate court as well as discretionary appeals up to the United States Supreme Court."

E. Article 10

343. The defence argument now appears to rest principally upon the submission that the allegations against Assange encompass activities which journalists routinely undertake such as '*cultivating sources, communicating with them confidentially, soliciting information from them, protecting their identities from disclosure, and publishing classified information'* [see defence skeleton at §11.10]. The defence also relies (§§11.8 – 11.14) on the submission that what Assange is being prosecuted for would penalise typical activities of journalists. For all of the reasons set out below, the Court ought to reject this premise.

344. The point is reiterated that it is not the function of this Court to determine whether the prosecution of Mr Assange would affect news gathering in the United States. The sole issue that arises is whether extradition to face the allegations in the request could amount to a flagrant breach of Article 10 rights such as to nullify the right altogether. As is clear, the considerations that apply to whether a qualified Convention right is breached in the domestic context is not the test which is applied in the extradition context.

345. Rather, the successful invocation of Convention rights in the extradition context requires the satisfaction of a stringent test. Where qualified rights, are concerned, it is necessary to show that there would be a flagrant denial or gross violation of the right, so that it would be completely denied or nullified in the destination country; see *Ullah [2004] 2 AC 323* at 24; paragraph 37 of Norris by Lord Phillips.

346. It follows that it is not open to the Court to examine whether US law operates in precisely the same way as English law or confers precisely the same protections. The Court is only concerned (to the extent that arises) with whether extradition would result in a flagrant breach of Article 10 so the right is nullified.

347. Part of the defence case is that all journalists cultivate sources and may solicit national security information from them (see for example § § 11.20- 11.21). The defence thus suggest that any illegality relied upon in the prosecution of Assange has to be separate from Ms Manning's criminal conduct. This appears to be a gloss on United States law (see Kromberg at CB2 §7 and the clear statement in *Bartnicki* cited above. After accepting the fact that the respondents in *Bartnicki* played no role whatsoever in the illegality 408 U.S. 665, 525 (1972), the U.S. Supreme Court stated:

> "It would be frivolous to assert-and no one does in these cases-that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Id.* at 691

348. The submission that Assange is in an analogous position to any responsible journalist or publisher is hopelessly unrealistic and not reflective of the indictment ranged against him. As is stated repeatedly, on behalf of the United States, Assange is being prosecuted for (i) complicity in Manning's unlawful obtaining of the material, (ii) conspiring with hackers to commit computer intrusions to benefit Wikileaks, and (iii) communicating the names of sources who had provided information to the United States.

349. The indictment must be considered as a whole. As set out in the previous section, the indictment makes plain that part of the allegations that Assange faces is that Wikileaks was operated, and that Assange personally encouraged, not the mere provision of national security information but *hacking* in order to *inter alia* provide stolen information, including classified national defence information. See additionally Kromberg CB2 §14 in the Affidavit in support of the second superseding indictment:

> "ASSANGE, however, did not just conspire with Manning to steal and disclose classified information. The evidence shows that, from the time ASSANGE started WikiLeaks, he and others at WikiLeaks sought to recruit individuals with access to classified information to unlawfully disclose such information to WikiLeaks, and sought to recruit - - and worked with -hackers to conduct malicious computer attacks for purposes of benefiting WikiLeaks."

350. In summary:

(1) **First**: as regards, Assange's role in obtaining classified materials, the request explains that this went far beyond the mere setting up of a dropbox or other means of depositing classified materials. The indictment makes plain, Wikileaks and Assange sought to encourage *hacking* that would benefit Wikileaks by recruiting and working with individuals with access to classified information or the ability to conduct malicious computer attacks. Thus, in *general* terms: "Assange encouraged sources to (i) circumvent legal safeguards on information; (ii) provide that information to Wikileaks for public dissemination and (iii) continue the pattern of illegally procuring and providing protected information to Wikileaks for distribution to the public [Dwyer at §11].

(2) **Second**: as regards Assange's complicity in criminality, in specific terms (related to Manning):

i. Manning responded to Assange's solicitation of classified materials [Dwyer at CB1 §19].

ii. Throughout the period of time that Manning was providing information to Wikileaks, Manning was in direct contact with Assange who encouraged Manning to steal classified documents and to provide them to Wikileaks [Dwyer CB1 §24 and 31].

iii. In furtherance of this Assange agreed to assist Manning in cracking an encrypted password hash stored on US Department of Defense computers. [Dwyer CB1 §25 and 28].

iv. Following direction and encouragement from Assange, Manning continued to steal documents from the US [Dwyer at CB1 §§25 and 28].

(3) **Third**: as regards the disclosure of the names of sources, in specific terms:

i. The only instances in which Assange is charged with the distribution of classified material to the public is "explicitly limited" to his publication of documents classified up to the secret level containing the names of individuals in Afghanistan, Iraq and elsewhere around the world, who risked their safety and freedom by providing information to the United States and its allies [Dwyer at CB1 §20]

(4) **Fourth**: as regards Assange's complicity in criminality, in specific terms (related to computer hacking by individuals other than Manning):

i. Assange sought to recruit and worked with other hackers to conduct malicious computer attacks for the purpose of benefiting Wikileaks. [Kromberg declaration in support of the second superseding indictment CB8 §14].

ii. Assange sought out and worked with other hackers to unlawfully obtain information [for example CB8 §§24/ 55/ 56]

351. Article 10 is a qualified right and the only Convention right to specify that it carries with it duties and responsibilities.

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

352. Two of the issues that the European Court will examine, when it comes determining, ex post facto, whether it was reasonably proportionate to prosecute a journalist for the sharing or publication of confidential material is (i) whether the journalist was engaged in responsible journalism and (ii) whether the journalist was a party to illegality; see *Gîrleanu v Romania* 2019) 68 E.H.R.R. 19 at [§84] and [§91]:

> "[84] However, the protection afforded by art.10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a

> professional activity which enjoys the protection of art.10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.
> [91]. The Court further notes that the applicant did not obtain the information in question by unlawful means and the investigation failed to prove that he had actively sought to obtain such information. It must also be noted that the information in question had already been seen by other people before the applicant."

353. Unsurprisingly, the European Court has also held that journalists are also bound to abide by criminal law: *Stoll v Switzerland* (2008) 47 EHRR 59 [102]:

> The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49 *in fine*, Series A no. 24). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III, and *Monnat v. Switzerland*, no. 73604/01, § 66, ECHR 2006-X).

In other words, a journalist cannot claim exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions: *Doryforiki Tileorasi Anonymi Etairia v. Greece* [2018] ECHR 187 [§61].

354. Indeed, in *Brambilla and others v. Italy* (application 33567/09, 23rd June 2016) the European Court, when considering journalists who had intercepted carabinieri radio communications in order to obtain information on crime scenes for the purposes of reporting, noted that "the concept of responsible journalism is not confined to the contents of the information which is collected, and/or disseminated by journalistic means. It also embraces, *inter alia,* the lawfulness of the journalists' conduct…" [§53], and re-iterated the principles set out in *Stoll* (above). In *Brambilla,* article 10 could not act so as to protect the journalists who had committed a criminal offence in order to obtain information more quickly, upon which they wished to report [§65] and no violation was found.

355. As is thus clear, neither United States law nor Article 10 confer a carte blanche upon a journalist or a prosecutor to break the law. Article 10 protects *responsible* and *lawful* journalism or publication – the allegations against Assange are at a very far remove from that:

    (1) First, Wikileaks' design and purpose was to encourage illegality, not just by the theft of information (including classified, national defence information) but also by

hacking into protected systems in order to obtain such information or engaging in malicious computer attacks intended to benefit Wikileaks. As a result, even if Wikileaks or Assange could be considered to have been acting as a publisher, such status does not confer immunity from engaging in unlawful conduct.

(2) Assange himself sought to encourage the provision of material by hacking (even going so far as to exhort individuals to join the CIA so as to provide material). None of the examples cited by the defence involve the encouragement by media outlets of individuals to actively undermine the operation of Government agencies by hacking or by joining them in order to be able to provide classified / national defence information.

(3) In the case of Manning, Assange solicited the mass and indiscriminate theft of material.

(4) In the case of Manning, Assange sought to assist her to crack the encrypted password hash so as to be able to break into Government computers under a different identity.

(5) In terms of the materials stolen, Assange then provided it to a series of random individuals and outlets, trusting them with its security and *initially* with its redaction.

(6) Finally, Assange, unlike the media outlets like the Guardian and New York Times to whom he entrusted classified material, published it wholesale with the names of individuals who had given information to the United States unredacted (thus putting them at risk of harm).

356. To the extent that the defence rely heavily upon the evidence of individuals like Mr Timm to suggest, essentially, that all journalists engage in illegal activity, two points can be made. Mr Timm does not decide the law; nor what, nor who will be prosecuted. As regards, Mr Timm, the Court is also respectfully reminded that aside that his evidence inherently lacked credibility, the organisation which he heads ("Free the Press Foundation") contributed $100,000 to Assange's costs. This is not merely an indication of the extent of his support for Assange's cause (or the Free the Press Foundation's support for it) but demonstrates him to have a vested interest in the outcome of these proceedings.

357. It is plain and obvious, that news outlets like the New York Times are not instituted for the purposes of encouraging illegality and do not involve themselves in the sorts of

criminal conduct alleged against Assange here (like attempting to crack an encrypted password hash or conspiring with hackers to engage in computer intrusions). To the contrary, Professor Feldstein agreed with the evidence of Mr Kromberg that it is 'well settled' that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information; see transcript of 8 September 2020 at page 52 [at 20] (where Mr Kromberg's affidavit was put to Professor Feldstein):

> Q. If we look at paragraph 7: "Contrary to the claims of Carrie Shenkman and others, such acts are illegal, are not protected by the US Constitution. There is a well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news carried. Regardless of whether one considers Assange to be a journalist, it is well settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information." You are a professor of journalism; do you agree with those words "it is well settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information"?
>
> A. Yes, I agree.
>
> And (at line 33):
> Q. …..Is a journalist entitled to hack into computers to get newsworthy material for political purposes?
> A. No.

358. Professor Feldstein agreed that the materials should not have been published unredacted [8 September transcript page 54- 55 /1 and 56/1]. He agreed what must be manifestly obvious - that a responsible journalist would not publish the unredacted name of an informant, knowing that might put him in deadly danger and when it was unnecessary to do so for the purposes of the story [56/11]. Professor Feldstein would only advocate for newsgathering that was within the bounds of law.

359. To this can be added two further points. **First**: for all of the suggestion about the width of the Espionage Act (and the suggestion that it could be used to penalise anyone who has reported on Wikileaks – See Timm, Transcript of 9 September 2020 at line 3) and the suggestion that the prosecution of Assange was intended by the Trump administration to be part of an aggressive campaign against the media – <u>Assange is the only person charged in this case</u>. **Second**: As is set out exhaustively in the Second Affidavit of Mr Kromberg, the focus of this prosecution is avowedly not Assange's publication of classified material, save where the disclosure revealed the names of sources [Kromberg prosecution bundle Tab 2at §20]. The Department of Justice has also made this clear: [Kromberg prosecution bundle Tab 2at §22 citing the announcement about the superseding indictment issued against Mr Assange]:

> "…The department takes seriously the role of journalists in our democracy …and it is not and has never been the Department's policy to target them for their reporting. Julian Assange is no journalist….
> Indeed no responsible actor- journalist or otherwise – would purposely publish the names of publish the names of individuals he or she knew to be confidential human sources in war zones, exposing them to the gravest of danger."

360. Put shortly – the allegations against Assange are put squarely on the basis that he is "no journalist". The suggestion [defence skeleton at §11.42] that Assange's alleged agreement to assist Manning to crack an encrypted password hash is not criminal because it was to protect Manning's identity is absurd. There is an obvious difference between a journalist who seeks to protect a source's identity (for example after they have provided information) and an attempt to gain unauthorised access to a computer so that the insider can acquire and convey with impunity (because their true identity is unknown) classified information. As Mr Kromberg's evidence makes plain [see Third Supplemental Affidavit at §11], the allegation is that Assange agreed with Manning to crack the encrypted password hash, not to protect Manning from having her identity revealed, but to facilitate the acquisition of the national defence information. That course might well have had the incidental effect of protecting Manning from discovery but that is not the allegation Assange faces and is a far cry from the steps a journalist might take to protect his or her source.

361. Moreover, the defence submission is premised upon the assertion that journalists *can* break the law in order to protect a source. That is unsustainable.

362. Equally absurd is the suggestion [defence skeleton argument at §11.46] that Assange's unredacted disclosure of the names of civilians who provided information to the United States is protected free speech because it represents an editorial judgement. To dress up the unconsidered and indiscriminate naming of sources, thus putting them at risk, as editorial judgement, is fantastical. Moreover, the US prosecution has relied not just upon the damaging nature of the disclosures but also that Assange knew that the dissemination of the names of sources could endanger them [see Dwyer at prosecution bundle Tab 1at §44].

363. The point made on behalf of the United States prosecution is that it was precisely because there was *no* judgement about redacting these names (in stark contrast to the position taken by the newspapers to whom the Wikileaks material was provided), that Assange is being prosecuted. The public position of those newspapers which partnered Wikileaks could not be more different to the position advanced by Mr Timm (as regards the suggestion that

publishing the materials unredacted was no more than an exercise of editorial discretion). As put to Professor Feldstein at page 54/14 and to Mr Timm at page 70/31]:

> "WikiLeaks has published its full archive of 251,000 secret US diplomatic cables without redactions, potentially exposing thousands of individuals named in the documents to detention, harm or putting their lives in danger. The move has been strongly condemned by the five previous media partners, the Guardian, the 21 New York Times, El Pais, Der Spiegel and Le Monde who have worked with WikiLeaks publishing carefully selected and redacted documents." …. "We deplore the decision of WikiLeaks to publish the unredacted State Department cables which may put sources at risk, the organisations said in a joint statement. Our previous dealings with WikiLeaks were with a clear basis that we would only publish cables which had been subjected to a thorough joint edited and clearance process. We will continue to defend our previous collaborative publishing endeavour. We cannot defend the needless publication of the complete data. Indeed, we are united in condemning it."

364. As this indicates, Mr Timm's evidence does not reflect the view of the mainstream media. This is scarcely surprising- the suggestion the Assange simply came to a *different* decision, about each name which was mentioned in the stolen information, from the New York Times or the Guardian based upon editorial considerations, has no foundation in reality.

1. *Assange would not be protected by Article 10 in the UK*

365. Assuming, *arguendo,* even if Assange was a publisher in the sense contended for by the defence, it is clear, as a matter of domestic law, that he could nonetheless be prosecuted pursuant to section 5 of the Official Secrets Act 1989 (to which there is no defence of justification). The law in the United Kingdom is much stricter than in the United States of America; and journalists may be prosecuted for publishing damaging classified material even if they acquired it passively.

366. Returning to the only issue which this Court can lawfully determine, whether Assange's extradition would result in a flagrant breach of Article 10, there are three principal points:

(1) Assange is not being prosecuted for mere publication or reporting;

(2) In the domestic context, Article 10 cannot be deployed as a defence to proceedings for any equivalent offence in the UK; it cannot be deployed so as to stop a prosecution and it cannot be deployed, post -conviction, so as to demonstrate that a prosecution was incompatible with Article 10; and

(3) Extradition would, in any event, only be barred on the basis that any right to freedom of expression would be completely nullified in the United States.

367. If Assange could be prosecuted in the UK without an issue arising under Article 10 then plainly his extradition would not involve a nullification of his Convention rights.

368. The English courts have considered how Article 10 intersects with offences which are directed at free speech on a number of occasions. The consistent approach has been to look at the offence created by the criminal provision in question and to ask whether that *offence* is proportionate to the aim of the legislation.

369. In short, Article 10 cannot, in domestic proceedings: (i) be relied upon as a defence in individual cases; (ii) in order to halt a prosecution properly brought and in respect of which there is sufficient evidence to put to a jury and (iii) to found a submission that a conviction based upon such a provision is incompatible with Article 10.

370. The general approach, in domestic law, where it is recognised that an offence may interfere with Article 10, is thus directed at an overview of the provision itself; *Attorney General's Reference* (No 4 of 2002) [2005] 1 AC 264, Lord Bingham of Cornhill, with whom Lord Steyn and Lord Phillips of Worth Matravers MR at 54.

> "In penalising the profession of membership of a proscribed organisation, section 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by article 10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of "profess". Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear. I would incline to hold subsection (1) to be proportionate, for article 10 purposes, whether subsection (2) imposes a legal or an evidential burden. But I agree with Mr Owen that the question does not fall to be considered in the present context, and I would (as he asks) decline to answer this part of the Attorney General's second question."

371. In *R. v Choudary* [2018] 1 W.L.R. 695, the defendants, were charged with offences of inviting support for a proscribed organisation ("ISIL"), contrary to section 12(1) of the Terrorism Act 2000. 12. The Crown's case, was that defendants invited support for ISIL in talks and by posting an oath of allegiance posted on the internet (in which they declared their allegiance to a caliphate, or Islamic State, declared by ISIL on 29 June 2014, and to its leader, or caliph, Abu Bakr Al-Baghdadi). In an appeal of a preliminary ruling, the defendants sought to challenge whether the trial judge's interpretation of the offence accorded with Article 10. The Court of Appeal's ruling demonstrates that the question is not whether the prosecution is compatible with Article 10 but the narrow question of the *provision* (under which the prosecution is brought) comports with Article 10.

372. The Court thus accepted that a prosecution for an offence contrary to section 12(1) of the 2000 Act engaged article 10 of the Convention, to the extent that it limited the right of an individual to express himself in a way that amounted to an invitation of support for a proscribed organisation. It also accepted that article 10 was engaged on the facts of the case [Sharp LJ at §66]:

> "[66] However, the right to freedom of expression is not absolute. Interference with that right may be justified, if it is prescribed by law, has one or more of the legitimate aims specified in article 10.2 , is necessary in a democratic society for achieving such an aim or aims (where necessity implies the existence of a pressing social need) and is proportionate to the legitimate aim or aims pursued.
> And at [68]
> [68]. The starting point in relation to an offence under section 12 is the fact of proscription. In other words, section 12 , like sections 11 and 13 , is concerned with activities associated with an organisation that has already been proscribed in accordance with the process laid down in the legislation, following a determination by the Secretary of State that it is concerned with terrorism, as defined. The terms of section 12(1)(a) itself are clear (see paras 50–52 above), and in our view the requirement that the interference must be prescribed by law is met. Further, section 12(1)(a) , like section 11 , is a measure that is clearly directed to a number of legitimate ends: preserving national security, public safety, the prevention of disorder and crime and the rights and freedoms of others.
> And at [70]:
> 70. When considering the proportionality of the interference, it is important to emphasise that the section only prohibits inviting support for a proscribed organisation with the requisite intent. It does not prohibit the expression of views or opinions, no matter how offensive, but only the knowing invitation of support from others for the proscribed organisation. To the extent that section 12(1)(a) thereby interferes with the rights protected under article 10 of the Convention, we consider that interference to be fully justified.

373. The same approach was taken in *Pwr and Others v Director of Public Prosecutions* [2020] 2 Cr. App. R. 11 whereby the Court of Appeal rejected an argument that the Crown Court was required by s.3 of the Human Rights Act 1998 to construe section 13 of the Terrorism Act 2000 in a manner consistent with Article 10. The Court also rejected the argument that because the offence was one of strict liability, it was incompatible with art.10 (because it permitted conviction of a serious offence without knowing illegality). The issue was whether the *offence* created by the provision was justified:

> 73. For those reasons I am satisfied that the s.13 offence is compatible with art.10 . It imposes a restriction on freedom of expression which is required by law: is necessary in the interests of national security, public safety, the prevention of disorder and crime and the protection of the rights of others; and is proportionate to the public interest in combating terrorist organisations.

374. Nor has the Court of Appeal accepted that there is any ability to make a submission that a prosecution is incompatible with Article 10 once evidence has been called or post-conviction. Both points were rejected in *R. v Choudary* (Anjem)(No.2) [2017] 4 W.L.R. 204 (Sharp LJ , William Davis J , Judge Stockdale QC) having regard to the Court of Appeal's prior judgment on the limits of reliance on Article 10 [27]:

> "….We would emphasise that consistent with the Court of Appeal's ruling, there is no room, or jurisdiction, to be more precise, for a judge to decide that although there is sufficient evidence on which a jury, properly directed, could convict of an offence contrary to section 12(1)(a), the prosecution should be halted, because on the judge's assessment of the facts, a conviction would be a disproportionate interference with a defendant's right to freedom of expression. This would be to go behind the decision of the Court of Appeal."

375. The Court of Appeal also rejected an argument that post conviction, a defendant could still argue that his prosecution none the less violated articles 9 and 10 of the Convention (and sections 3 and 6 of the Human Rights Act 1998):

> "The Court of Appeal did not simply decide that section 12 may consistently with article 10 of the Convention, criminalise invitations of support for proscribed organisations, even if they do not incite or are not liable to incite violence. The Court of Appeal decided by reference to the judge's broader interpretation of inviting support, that section 12 was compatible with articles 9 and 10 of the Convention: see further, *R v Choudary and Rahman* at paras 61–90. The jury in this case were properly directed on the law. If the jury concluded that as a matter of fact the defendant whose case they were considering, had knowingly invited support for ISIS, then he was guilty of an offence contrary to section 12(1)(a) of the 2000 Act. There was no room in those circumstances for a freestanding argument that such a conviction was none the less incompatible with articles 9 or 10 of the Convention."

376. This approach has been applied in the context of the Official Secrets Act in terms which are directly relevant to this case. In *R v Shayler*, it was ruled as a preliminary matter that that no public interest defence was open to a defendant in a prosecution pursuant to sections 1 and 4 of the Official Secrets Act 1989 and that the absence of such a defence was not incompatible with Article 10.

377. The House of Lords held that the absence of a public interest defence was not incompatible with Article 10, Lord Bingham at [23]:

> "In the present case there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression. There can equally be no doubt but that the restriction was directed to objectives specified in article 10(2) as quoted above. …"

378. As regards the aims pursued, Lord Bingham point to the overarching requirements of national security:

> " There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 , 118C, 213H–214B, 259A, 265F; Attorney General v Blake [2001] 1 AC 268 , 287D–F. In the Guardian Newspapers Ltd (No. 2) case, at p 269E–G, Lord Griffiths expressed the accepted rule very pithily: "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be

> regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

379. Lord Bingham also pointed [at 27] to there being no absolute ban on disclosure insofar as a former crown servant could also, make disclosure to a Crown servant for the purposes of his functions as such or make a disclosure to the staff counsellor (thus seeking authority to make a wider disclosure). The House of Lords also pointed to the obvious fact that authorisation was unlikely to be given where it would be liable to disclose the identity of agents or compromise the security of informers [30].

380. The House of Lords was thus satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the convention.

381. In these extradition proceedings, the prosecution has identified that Assange's conduct would amount to offences including aiding and abetting an offence under Section 1 of the 1989 Act or conspiracy to commit it. It has also been identified as constituting an offence pursuant to section 5 of the Official Secrets Act.

382. Section 5 of the Official Secrets Act (*Information resulting from unauthorised disclosures or entrusted in confidence*) expressly applies to individuals who are not the original leaker of the information. In other words, it applies to individuals who disclose materials which are protected from disclosure under section 1-3 of the Official Secrets Act 1989. It applies to those who are provided with materials by those to whom sections 1-3 apply, per section 5(3):

> (3) In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—
> (a) the disclosure by him is damaging; and
> (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging;
> and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

383. As noted above, the request sets out in detail not just the damaging nature of the disclosures but also that Assange knew that the dissemination of the names of individuals endangered them [see Dywer at CB1 §44].

384. The rationale for the section 5 offence is set out in the White Paper which underpinned the 1989 Act (Reform of Section 2 of the Official Secrets Act 1911 (1988) Cm 408, para 55). It was premised upon the view that an unauthorised disclosure committed by a newspaper could be just as harmful as the disclosure of the same information by a Crown servant [54]:

> "The objective of official secrets legislation is not to enforce Crown service discipline – that is not a matter for the criminal law – but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the unauthorised disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence". [Emphasis added]

385. The White Paper concluded, in cases involving someone who is not a Crown servant, that there ought to be a burden on the prosecution to prove not only that the disclosure would be likely to result in harm, but also that the person who made the disclosure knew, or could reasonably have been expected to know, that harm would be likely to result. Section 5 gives effect to this intention.

386. There is no public interest defence to this section and nor could Article 10 be pleaded as a defence to it. Rather, the offence is predicated upon the disclosure being damaging and that the defendant made it knowing, or having reasonable cause to believe, that it would be damaging. It complies with Article 10 because it is intended to criminalise the disclosure of knowingly harmful material.

387. The defence point [Skeleton at §11.6] that the Official Secrets Act has never been deployed to prosecute the act of publishing (as opposed to leaking) classified information is nothing to the point; domestic legislation specifically foresees and protects against the disclosure of damaging material in precisely the sort of circumstances of this case.

388. Likewise, the defence suggestion that it is recognised that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom is plainly no authority for the suggestion that *illegal* information gathering or complicity in criminal acts such as theft or computer misuse is protected.

389. As noted above, Article 10 is the only Convention right that carries with it responsibilities. In the context of free speech, Article 10 requires ex post facto examination of whether the conduct that is prosecuted falls with the tenets of responsible journalism; see *Gîrleanu v Romania supra* (Judgment at [84] and [91]).

390. This demonstrates the outer limits of the protection Article 10 confers. It is unarguable that the right to freedom of speech trumps the right to life or the right to be safe on the part of sources of information *a fortiori* when the decision to reveal them was not part of any editorial balancing exercise or necessary for the purposes of any story. In summary, to the extent that Article 10 confers any protection upon a journalist it protects those acting in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible and lawful journalism. The prosecution of Assange (limited as it is

to the publication of the names of sources and to his being party to criminality) falls a considerable distance outside Article 10's sphere.

391. In addition, *Shayler* makes plain that the absence of a 'public interest' defence to Official Secrets Act offences in the United Kingdom is not incompatible with Article 10. The defence submissions sidestep the hurdle this creates in submitting that extradition would entail a breach of Article 10 rights.

392. The obstacle created by *Shayler* appears to be dealt with, in part, at section 15.17 of the defence skeleton argument ("US Law is not Article 10 compliant"). However, the defence accepts as it is bound to, there is no public interest defence to any offence under the Official Secrets Act 1989. Thus, the defence suggests that Assange's extradition would be incompatible with Article 10 because under the Official Secrets Act regime there is provisions for leakers to raise concerns about the matters which they seek to disclose or makes provision for authorisation to be sought in order to make a disclosure.

393. That *Shayler* proceeded on this basis (and took into account that such avenues existed having regard to Article 10) that potential leakers (within the Services) could raise concerns and to seek permission to make specific disclosures simply does not address Assange's position. He is accused of complicity in criminal activity in terms of the obtaining of the material from Manning (the person in a position to raise concerns internally should she have wished). As was also made clear in *Shayler*, such a process would (obviously) not likely authorise the revelation of names of sources.

394. Once again, there is an air of complete unreality about this defence submission. Such a process foresees concern about specific information held by a leaker who thinks that it ought to be disclosed. What is at issue here is a conspiracy between Manning and Assange to steal what the United States describes as a *vast* amount of classified material and Assange's publication to the public at large of the names of sources. This is very far removed from the sort of information envisaged to be the subject of such a process in *Shayler* or which might be the subject of consideration by the Ministry of Defence or Secret Service pursuant to an application by one of its servants or a former servant to disclose information. The unreality of the defence case crystallises at paragraph 15.23 of the defence Skeleton 2:

> "In short, had these events occurred in the UK, Mr Assange would never have been in the position of receipt of classified information because Manning would have had other (article 10-compliant) avenues open to her to serve the public interest."

395. In short, no process envisaged by *Shayler*, would have authorised the indiscriminate publication of a vast amount of classified material or the publication of the names of sources. The suggestion that a court upon judicial review might sanction it, is absurd.

396. Whilst it does not arise on the facts of this case, assuming for the sake of argument that Ms. Manning was acting as a whistle blower, it will come as no surprise to this Court that there are in fact a number of whistle -blowing avenues open to members of the military in the United States and which would have been open to Ms Manning other than stealing and disclosing to Assange the classified national defence information. [40]

397. It is respectfully submitted that the defence case does not raise even an arguable point that extradition would constitute a flagrant denial or gross violation of Assange's Article 10 right, so that they would be completely denied or nullified.

2. *First Amendment rights*

398. Mr Kromberg has fairly indicated that the prosecution may seek to *argue* that Assange as a foreign national is not permitted to rely on the First Amendment, at least as it concerns defence information, or is not entitled to rely on the First Amendment as a defence to his complicity in Manning's criminality or as a defence to publishing the names of sources [See Kromberg at CB2 §71]. This does not demonstrate that Assange will be punished on account of nationality or his opinions or prejudiced at trial on account of them. First, they are possible arguments of law that may be utilised at a trial to define the outer limits of Assange's right to rely on free speech in any prosecution. They are arguments which may or may not be taken and which may or may not be accepted by the Court. There is an obvious difference between a legal process that will judge the availability of certain rights to defendants and those rights being removed for prejudicial reasons like nationality or political opinions. There may be objective reasons for determining that one group of individuals is entitled to rights based upon their nationality, whilst non-nationals are not. In this jurisdiction, extradition is a case in point - only British nationals are entitled to rely upon Article 6. Foreign nationals are not; *Pomiechowski v District Court of Legnica,*

[40] At the time, Ms Manning could have availed herself of the MS Military Whistleblower Protection Act, 10 U.S.C. § 1034, administrative procedures for such communications." Id. § 1034(b)(1)(B). The statute also forbids restricting a member of the armed forces from making a lawful communication to a Member of Congress or an Inspector General. Id. § 1034(a). Directive 7050.06 established Department of Defense policies and procedures to implement the Military Whistleblower Protection Act. Army Regulation 20-1 prescribed the responsibility and policy for the selection and duties of inspectors general throughout the Army, and it also addressed the protections under the Military Whistleblower Protection Act.

Poland and another [2012] UKSC 20; see also *R (Al Rawi & Others) v The Secretary of State for Foreign and Commonwealth Affairs & Anor* [2008] Q.B. 289 §78.

399. At §11.56 of the defence skeleton argument, reference is made to *USAID v Alliance for Open Society* (2020) 140 SC 2082. To be clear, this case concerned foreign affiliate organisations that received funds from the United States Government in order to fight the spread of HIV/ AIDS abroad. It was a Policy Requirement by the United States that such organisations should have a policy explicitly opposing prostitution and sex trafficking. The Plaintiffs sought to invoke the First Amendment to bar the Government from enforcing the Policy Requirement against the plaintiffs' legally distinct foreign affiliates. The Supreme Court referred in the course of its judgment to it being long settled, as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. The same position is correct as a matter of English law- the protection of the Human Rights 1998 is restricted to those within the physical territory of the UK (subject to very limited exceptions).

V. HEALTH

400. Section 91 of the Act reads:

> Physical or mental condition
>
> (1)This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
> (2)The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
> (3)The judge must—
> (a)order the person's discharge, or
> (b)adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied.

401. The issue is whether Assange's mental condition is such that it would be unjust or oppressive to extradite him. There is no submission made that his physical health would fulfil the condition or that he is unable to properly instruct lawyers making it unjust to extradite him. It follows the only issue is whether it would be oppressive to extradite him because of his mental condition.[41]

402. The defence submission is that it is oppressive to extradite because:

[41] Section 22 of the Defence Submissions, pages 226 - 240

(1) there is a high risk of him committing suicide;

(2) inappropriate conditions of detention would exacerbate the underlying illness and risk of suicide; and

(3) it would expose a person suffering from mental illness to harsh conditions of detention.

A. The Defence psychiatric evidence

1. *Professor Mullen*

403. It is of note that at the very last minute the defence declined to call Professor Mullen when the prosecution still required him to be called and had made no concession as to him not being called. His evidence was not subject to cross examination and was abandoned by the defence. It can only be assumed his evidence had become unfavourable to the defence and it was decided tactically not to call him. It is startling that in the defence submissions reliance is still placed on his evidence (as if nothing had happened). The appropriate course for the court is to entirely ignore his report.

2. *Professor Kopelman*

404. The evidence of Professor Kopelman should be given very little or no weight as it was clear, and he was forced to admit, he had failed in his duty to the court to be impartial. The passage at transcript page 57 to 59 on the 22nd September 2020 shows this:

> A. This is about, this is about the revelation of my handwritten notes.
> MR LEWIS: Yes, it is ---
> JUDGE BARAITSER: Professor, just listen to the question and try and answer it if you can.
> MR LEWIS: Yes. Now, when you met with Stella Morris, did she tell you she was the current partner of Mr Assange and she was the mother of two of his children?
> A. She did, yes. I did not put that in the first report because it was not known.
> Q. And that is in fact if we need it, it is set out in your handwritten notes, bundle page 25 728. We do not need to turn that up.
> A. Well, I am not going to dispute that.
> Q. No, you said that. Now, why did you not put that in your report?
> A. Because it was not known in the public domain and I discussed with the legal team and we decided that we did not need to mention it. We would mention that he had a partner who was strongly supportive to him and by the time of the second report she had gone public about that and that is why I included it in the second report.
> Q. Do you agree that fact that she was his current partner and had two children by him is relevant to the risk of committing suicide?
> Um, you mean that if you have a partner you may or you may not be more at risk?
> Q. Yes.
> A. Uh, yes.
> …

Q. But you do not even mention the two children in your report do you?
A. I do mention but in another context. At that point I did not reveal that she was the mother of his two children.
Q. And you must admit, it must be terribly relevant because even if we go a page and a couple of pages back, page 19, in relation to Ms Dreyfus, and I am picking it up on the third paragraph from the bottom, he, that is Mr Assange, told Dr Dreyfus that what stopped him from suicide was the fight for his son's safety and wellbeing. He could not leave his son unprotected.

Q. I know that, Professor, but what I am saying is, it is an obvious relevant factor to put in your report that his partner and two children, is it not?
A. This was not in the public domain at that point and she was very concerned about privacy so we decided not to put it in. As soon as it became in the public domain I included it.
…
Q. But what I am saying is why did you not? You know your duty, your first duty is to the court and it does not matter whether it is embarrassing or confidential, is it not?
A. Yes, OK, but she was very concerned about privacy and I was trying to respect that.
…
A. Well, maybe I did not perform my duty to the court there but I was trying to be diplomatic and respect her privacy.
…
Q. Because she is naturally going to want to say helpful things to Mr Assange, is she not?
A. Yes.
Q. And the court should be aware of that when assessing the veracity of her account to you. Do you agree?
A. Yes,

405. Professor Kopelman put his partiality towards the defence above his duty to the court when he failed to put in his report that Stella Morris was the partner of Assange and the mother of two children conceived in the embassy. It follows:

(1) Professor Kopelman deliberately suppressed in his report a highly relevant factor to the question of likelihood to suicide;

(2) If what he says is true, the defence lawyers improperly advised him he could conceal such relevant fact from his report; and

(3) Contrary to his assertion he disclosed the fact when it was made public he still suppressed the detail until access to his handwritten notes showed he knew all along. In any event it is improper to wait for such a revelation to be made public as it might never have been. It was only the defence calculation it was better to make it public in support of a bail application that brought the matter to light publicly.

406. His entire reliability as an expert witness is in question when it is clear he agreed with defence lawyers to conceal relevant information from the court.

407. In addition, his attitude to being asked for an objective yardstick was extraordinary:

Q. Professor, I want to sort out a yardstick for diagnosis. It is right, is it not, that you have used the World Health Organisation classification in Mental and Behavioural Disorders (ICD 10)?

> A. Could I make a comment here? I am not a great fan of what I call "those bloody books" (ICD and DSM), so I make a clinical diagnosis on the basis of my clinical experience and was in the research literature.[42]

408. Without the yardstick of the established body of works and guidelines it is difficult for the court to assess reliability and consistency of his diagnosis. He went on to say:

> Q. Professor, rather than you read it out, I will just ask the questions and rather than read it, please try and help the court with your understanding because you are an expert in this. So, could you run off, then, what you think in IC10 the other common symptoms are without looking at them in the book?
> A. I am sorry, I have a clinical notion of depression. I do not carry all the ICD criteria in my head, but they are things like loss of confidence and self-esteem. They are ---
> Q. You can close the book if you want, Professor, rather than ---
> A. No, I do not want to close it.

409. It is strange an expert psychiatrist would not instantly know the ICD criteria and this casts doubt on his expertise given he retired from NHS practise 5 years ago and is not a forensic psychiatrist.

410. Despite using the common acronym for Assessment, Care in Custody and Teamwork "ACCT" in his report several times, and is used hundreds of time throughout the medical notes Professor Kopelman was unable to even remember what the acronym stood for:

> Q. At the top of page 37, 11 May, his weight was recorded, 85 kilograms, he was placed on "ACCTM"; what does that acronym stand for?
> A. When people who are thought to be a suicide risk are monitored.
> Q. What is the actual ---
> A. I cannot remember exactly, it is in Professor Fazel's report.
> Q. You use it quite a lot; it appears about four or five times.
> A. It is commonly used in prisons, and they talk about it as "ACCTM", and it is monitoring ---
> Q. You cannot help us with what it actually stands for?
> A. I cannot remember off-hand.
> Q. Assessment, Care in Custody and Teamwork?[43]

411. Professor Kopelman was selective in the details he extracted from the medical notes. For example:

> Q. If we also look at 12 April, page 10 in the notes; we have yours page 37, 12 April. We see from the notes: "Is the patient at risk of self-harm? No. Suicide ideation. No. Suicidal plans. No. Is there any intention to follow through with the plans, suicide or self-harm? No." You have omitted a lot of that from your note of 12 April. Can you tell us why you have not put that in?
> A. These are assessments that sometimes get repeatedly put in the file and if we go back to page 6, that had already been documented. As I say, I cannot put everything in.[44]

[42] Transcript 22nd September 2020, page 13, lines 23 - 27
[43] Transcript 22nd September 2020, page 34, lines 1 - 9
[44] Transcript 22nd September 2020, page 34, lines 27 - 32

412. He omitted important information that could be used to evaluate if Assange was exaggerating his condition and knew what to exaggerate such as reading the British medical Journal:

> Q. Well, you were told that Mr Assange reads the British Medical Journal, were you not?
> A. I was told different things. I was told he reads the British Medical Journal. I was told he reads Nature. I was told he reads New Scientist. I think it was New Scientist, but yes, I have been told that.
> Q. But you did not, nowhere in your report, in your first or second report, have you commented that Mr Assange reads the British Medical Journal, have you?
> …
> Q. But, Professor, surely alarm bells must have rung then because Mr Assange, a clever and articulate man, who reads the British Medical Journal, with a strong incentive to feign or exaggerate symptoms and who will not see a psychiatric until he is discussing the psychiatrist with his legal team. Did that not ring any alarm bells with you as to exaggeration, potential exaggeration of what he might say to you?
> A. Mr Assange reads the British Medical Journal because as Joseph Farrell told me, he is very preoccupied by his state of health. He is a little bit hypochondriacal and I suspect that is why he read it.

413. He omitted important information that the consultant psychiatrist at the prison noted Assange had no suicide plans:

> Q. Just going back to one of the things we agreed earlier, that close observation is extremely important in checking on things and here, we have a close observation from a consultant psychiatrist. It is a pretty important observation, is it not?
> A. Well, it is, if accurate, it is an important observation that there are no self-harm plans but you know, I cannot put everything down. It is debatable whether I should have put that or not in my mind.[45]
> …
> Q. I want to look at 29 April. Your page 37, our page 21. After he states the near death experience, why do you admit from your appendix the words "he appears very relaxed and considerate of his terminology and communication and importantly, he denied any thoughts of self-harm"? Why do you admit that?
> A. Um, it is arguable that I should have put in about being very relaxed and considerate. I have elsewhere recorded where he does not have self-harm plans. If you look in the middle of the page, I put "no self-harm plans" where Dr Deeley had evaluated him.[46]

414. In cross examination Professor Kopelman made a very telling slip. Instead of saying his 'diagnosis' he said his 'argument' indicating that he was arguing for the defence:

> Q. So, why did you not put that comment in? Because this is at a very relevant period of your diagnosis.
> A. It is still actually well before I first saw him and it is true, I omitted that, <u>I included things that might be against my argument</u>, looks very well, coherent, good colour. So --- Oppressive because of a high risk of suicide;[47]

415. This is demonstrated when the Professor made a comment that betrayed his impartiality when he refused to agree with the proposition put:

> Q. 14 of 49 might help you. You do say "interacting with fellow cellmate, appears to have been enjoying the conversations and to play pool." In fact it is a little bit more detailed than that: "Mr

[45] Transcript 22nd September 2020, page 37, lines 10 – 14; 23 - 28
[46] Transcript 22nd September 2020, page 40, lines 9 – 14
[47] Transcript 22nd September 2020, page 42, lines 14 - 17

> Assange had been observed to be up and about most part of the shift. He was observed watching TV, particularly racing, in the afternoon. He has maintained good interaction with fellow cellmate and appeared to have been enjoying the conversations. He went to the yard for fresh air and exercise and played pool in the association room with other inmates. He enquired about his medication and why he has not had it. It was explained to him." That observation, Professor, is not consistent with a man who is unable to function owing to severe depression and psychotic symptoms, is it; or to thinks of suicide a hundred times a day?
> A. It does not rule out his thinking about suicide a hundred times a day.

416. No sensible, impartial consultant would not agree that the observation was inconsistent with a man thinking about suicide a hundred times a day.

417. He also showed partiality when changing the emphasis from his handwritten notes to his report:

> Q. But why did you not put it down so the court can evaluate whether it is right or not? Because I would put to you, Professor, that there is a quantitative difference between "would commit suicide" and "a suicidal risk".
> A. Yes, OK, perhaps I should have – well, I should have used the exact words that she had used but her meaning was clear to me.[48]

418. And omitting matters that were contrary to his diagnosis:

> And Stella Moris told you, five lines up from the bottom in your handwritten notes, "Not aware of hallucinations". Do you see that?
> A. I do not see it but I know that it is there.
> Q. Well, let me just ---
> A. I know that it is there.
> Q. You know that it is there.
> MR LEWIS: Do you have that, my Lady?
> JUDGE BARAITSER: Yes, I have it.
> MR LEWIS: Right. That is not in that paragraph and it is a very important point, is it not, Professor?[49]
> …
> Q. She said, "Not aware of hallucinations." It is a material fact. You do not put it in. Is that because it did not suit the case you are advocating for?
> A. No, it is an error of omission.[50]
> A. It is an omission, yes. I was surprised that she said that, that she had only visited him five times in Belmarsh …

419. Moreover, Professor Kopelman relied heavily and exclusively on the defence 'experts'. He said:

> Q. Because you rely heavily in your opinion on what these defence experts say, do you not?
> A. Yes.[51]

420. Professor Kopelman grudgingly accepted that if the court accepted the prosecution evidence on prisons that it would change his opinion. But even then he did not do so in an open matter as an expert should, but remained an advocate for the defence:

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[48] Transcript 22nd September 2020, page 60, lines 22 - 25
[49] Transcript 22nd September 2020, page 61, lines 2 - 13
[50] Transcript 22nd September 2020, page 61, lines 18 - 19
[51] Transcript 22nd September 2020, page 70, lines 17 - 18

> Q. Well, I am not going to debate this with you, Professor. I am just going to say this. I am not going to go through every paragraph, but would you agree, if the medical care in the United States of America is sufficient, then the risks you have opined about are greatly reduced, if not eliminated.
> A. If the medical care in the United States is sufficient, but beyond the US lawyers I have also seen reports from the Department of Justice Inspector General in 2017, the Commissioner on Constitutional Rights in 2017, the Marshall Project in 2018, and there are many people who say that the care is very much suboptimal, there is a lack of staffing, there are mis-diagnoses and a lack of treatment facilities.[52]
> …
> JUDGE BARAITSER: So, was the answer to that question if that were to happen then yes, I would change my opinion? Is that your answer?
> A. If it were, if that really were to happen I would have to look again to some aspects of my opinion but I would not have to look at all of them.

421. In the light of the above the court should approach the evidence of Professor Kopelman with caution and it is respectfully submitted little or no weight as to his predictions of what might happen if Assange were to be extradited.

(a) *The razor and two cords*

422. Nearly all the diagnosis of Professor Kopelman is based on a self-report by Assange. It is clear there are external incentives on Assange that may make him exaggerate his conditions. It is very puzzling and suspicious that no evidence of hallucinations was ever reported by the prison medical team and that Assange never mentioned them to anyone but his own doctors. It is suspicious that Assange would not speak to a prison psychiatrist until he had spoken first to his lawyers.

423. It is also strange that if the finding of the razor was thought to be linked to a suicide attempt the prison medical staff did not note it. In response to this Professor Kopelman said:

> A. When I went through them again it did strike me as odd and I wondered if there was something I had not received. But, yes, I take the point that in this report every time I mentioned it, I should have said, "He told me that."
> Q. That is fine. But can I just take the common sense approach that really it beggars belief, <u>if the circumstances were such to indicate the razor was to be used as a suicide attempt</u> that the attempt that the authorities attempt that that authorities would not put that in these very detailed notes.
> A. Well, there is some very strange things that do and do not go in the notes, but it is odd that it is not there.[53]

424. It is accepted a razor was found. The logical position is that *if* the prison authorities had thought this connected to a suicide attempt it would have been recorded in the notes as such. Instead it was just recorded as a disciplinary infraction. It follows the enormous weight given to it by Professor Kopelman may be unfounded. That it is unfounded is supported by the fact that Assange's details of two cords being in his cell and that they disappeared, was found nowhere in the evidence.

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[52] Transcript 22nd September 2020, page 74, lines 20 – 27; page 75 lines 21 - 24
[53] Transcript 22nd September 2020, pages 29 - 30, lines 30 - 2

425. An example of the entrenched (partial) view of Professor Kopelman is given in relation to the two cords:

> MR LEWIS: Professor, we have just been dealing with the razor. You also said he found two cords on one occasion I think you said?
> A. That is my understanding, it was two cords ---[54]
> B. Q. What were the circumstances in which those cords were found?
> A. I do not actually know; he just said they had disappeared from his cell, implying that someone had found them and taken them.
> Q. Had they been deliberately concealed?
> A. That is the clear implication of what he had been telling me.
> Q. If they had been found, which indicated a potential suicide risk, it would again beggar belief that the authorities would not have put that in the extremely detailed notes we have?
> A. They have given a detailed summary; the notes are not always to detail, but it is surprising they are not there.
> Q. Professor, we would say, as you rely heavily on the hidden razor and the two hidden cords as potential suicide indicators, <u>if the circumstances of them being found do not indicate a genuine suicide risk, surely that would alter your diagnosis</u>?
> A. <u>No</u>, ….

426. The lack of any supporting evidence whatsoever, and no mention in his medical notes concerning two cords, indicates that the self-report by Assange on this point is unreliable. Professor Kopelman did not investigate or challenge this self-report or mention it to the prison authorities. This is notwithstanding the 'external incentive' Assange is undoubtably under.

3. *Dr Crosby*

427. Dr Crosby was unquestionably partial to Assange's cause. It is surprising that she denied this:

> Q. Would it be fair to say that you are fairly sympathetic to Mr Assange's cause?
> A. No, that would not be fair to say at all.
> Q. When you came over to examine him in the embassy on five separate occasions, did you come over to England for other reasons, or just to examine him?
> A. It was four occasions, I believe. The primary purpose was to examine him, but I actually had business with colleagues and combined the purpose of my trips.
> Q. Who paid for it?
> A. Up until now I have paid for my trips.[55]

428. Dr Crosby paid personally for 5 trips to the United Kingdom to examine him. She would visit with members of Assange's legal team. She used the term that he was 'confined' to the embassy.

429. But most importantly Dr Crosby has <u>no</u> psychiatric qualification. She is an 'internist'. Her opinion compared to that of Professor Fazel or Dr Blackwood has little or no weight.

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[54] Transcript 22nd September 2020, page 31, lines 33- 34
[55] Transcript 24th September 2020, page 49, lines 19 - 26

4. *Dr Deeley*

430. Dr Deeley's report was very late and alone amongst the psychiatrists. He diagnosed Assange as being on the autism spectrum from observing one 2 hour interview, carried out by another, where Assange refused to engage with two components of the adult autism assessment[56].

431. Notwithstanding the credentials of Dr Deeley in diagnosing autism it is submitted his diagnosis is very thin. To diagnose someone as being on the spectrum in middle age is very unusual as it presents as a condition from birth. It also complicated when the person being assessed is currently suffering from depression.[57]

432. Dr Deeley is not a forensic psychiatrist and goes to prison rarely[58]. It was strange that when shown Assange answering questions on a question and answer program and being told he hosted a TV chat show, Dr Deeley instead of recognising these facts were inconsistent with someone on the autism spectrum, simply gave an argumentative answer:

> Q. So, we are going to move away from 2b in a moment but I just want to understand your answer to this, that a person who has got the ability to be on a question and answer programme, host a televised chat show, you are saying is still consistent with a failure to initiate or sustain conventional interchange are you?
> A. Yes.

433. Indeed, when Dr Deeley was asked for the evidence for trait 3d it is hard to give any credence to his answer. He based trait 3d on:

> Q. If we go down, "Mrs Assange does not recall Mr Assange engaging in unusual sensory-seeking behaviours or displaying unusual idiosyncratic negative responses to specific centrist stimuli during childhood. However, she reported that as a baby he would look intently at the complex pattern scarves when she draped over the neck covering his crib in hot weather". Now that, on that one observation, you have found that there is - that the trait which you have set out at paragraph 27.3 - at 3d is satisfied, is that right, on that one paragraph?
> A. I could also add, actually, that Dr Dreyfus has provided additional information about sensory sensitivities exhibited by Mr Assange in adulthood.
> Q. Well, let us just look at this passage for a moment. This is all about a baby in its crib looking at a coloured - a baby in its crib looking at a pattern of the scarves. How old was the baby at that time?
> A. It would be a baby in a crib, so most likely below the age of one year.
> Q. But you do not know?
> A. Well, if it - I think that is a reasonable assumption.
> Q. Well, it is just reasonable, all right.
> A. Below the age of three years.
> Q. And were there toys in the crib at the same time?
> A. Well, they are not described.
> Q. So he could have been looking at toys?[59]

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[56] Dr Deeley found this refusal highly unusual. See Transcript 23rd September 2020 at page 17 lines 1-2.
[57] Dr Deeley accepted it was not normal but could be done if circumstances required it. See Transcript 23rd September 2020, pages 27, lines 1- 2
[58] Transcript 23rd September 2020, pages 14 - 15,
[59] Transcript 23rd September 2020, page 34, lines 1 - 16

434. You do not have to be any sort of medical expert to know that the diagnosis of a trait based upon the hearsay evidence that as a child Assange would "look intently at the complex pattern scarves when she draped over the neck covering his crib in hot weather" is flawed. There is no examination of what baby Assange was looking at, for how long or in what circumstances. It is redolent of an expert who grasps at anything to support his point.

435. The best conclusion is that Assange is a high functioning individual who may present some mild autistic traits.

B. The Prosecution psychiatric evidence

436. It is submitted the evidence of Professor Fazel and Dr Blackwood is to be strongly preferred. They are both forensic psychiatrists.

1. *Professor Fazel*

437. Professor Fazel is probably the world's leading expert on suicide in prisons. His published work was referred to by all the other psychiatrists. He carefully explained that a 'high risk' of suicide meant an elevated risk from the normal population. Not a high probability it would occur. He said:

> Yes. I think it is important to clarify this. So, usually when psychiatrists talk about high risk they mean it is more than the general population of similar age and gender. So, it means it is elevated. And then it is important also to contextualise what that means because if the comparison group has a very, very low risk then high risk has to be seen in that light. So, for instance, for prisoners in England and Wales, about one in a thousand prisoners will die from suicide in any one year. So, when you talk about high risk or an elevated risk of suicide in prisoners that has to be borne in mind. It is still, we are talking about you know, an increase maybe from one, to two, three, or four usually ---
> Q. A thousand?
> A. --- for out of a thousand, yes, so it is less than one per cent risk in any given year. And I think that has not been clarified previously and I think that is important to understand the context of suicide risk. The other thing about suicide risk, and I think this is also very important to state upfront, is that it, something that changes, so it is not something you can say today I can anticipate someone's suicide risk in six months, you have to understand that suicide risk is a dynamic.[60]

438. Professor Fazel was clear on the risk of Assange committing suicide:

> A. That is right, yes. And it is even rarer in US prisons than it is in prisons in England and Wales. But generally speaking, it is a rare outcome and that is an important part of the context here.
> Q. And at 5.9, you come to the view that Mr Assange's mental condition is not sufficiently severe that it removes his capacity to resist suicide?
> A. That is right.[61]

[60] Transcript 23rd September 2020, page 54, lines 8 – 14
[61] Transcript 23rd September 2020, page 55, lines 1 - 6

439. He was clear that a shorter than life sentence, which Assange will obviously get, will help prevent any suicidal risk:

> Q. Just one or two points in re-examination. You were asked about the risk factors. Would a sentence to a much shorter term shorter term than life imprisonment modify the risk in your opinion?
> A. Yes, it would.[62]

440. On autism he did not agree with Dr Deeley:

> A. Well, I was not, I did not, I did not come to that view, but with the caveat that I would have only come to that view if it was clear-cut and I think that is why in my view none of the other experts, apart from Dr Deeley, came to that view because it is not clear-cut and as clinicians, we all have training in diagnoses, including experiencing people with autism spectrum disorders and we are able to recognise it if it is clear-cut and I think that we would agree and I would agree that there are traits there. They are traits that are evident from the history and also from interview and that is, I think, as far I would go.[63]

2. ***Dr Blackwood***

441. On the capacity to resist the impulse to commit suicide Dr Blackwood was very clear. He said:

> A. No, I thought he was moderately depressed without significant somatic symptoms at the time that I saw him and I did not think this was a severe depressive disorder with psychotic symptoms.
> Q. And what were your findings as to risk of suicide in the event of a decision to extradite him to the United States?
> A. Yes, I think there is some risk of suicide but that risk has clearly been very carefully managed in Belmarsh prison and the risk factors that pertain to his suicide risk are modifiable and he engages closely with treatments available to manage that risk.
> Q. And what about his capacity to resist the impulse to commit suicide?
> A. Yes, I believe he retains that capacity.[64]

442. On autism he did not agree with Dr Deeley:

> Q. Who has diagnosed him with being on the autistic spectrum. What do you say about that?
> A. I have anxieties about making such a diagnosis in a 49 year old man where there has never been, despite the amount of medical attention he has attracted and psychiatric attention he has attracted, there has never been such a diagnosis historically. Four other experienced psychiatrists, including myself, have reviewed him and although we think there are traits of the disorder, we do not think he goes over the categorical diagnostic line. So even if he does have an autistic spectrum disorder and he gets into that categorical box, then for me he is at the very mildest end of that diagnostic spectrum.[65]

443. Dr Blackwood gave a concise and measured conclusion:

> Yes. I noted that he was at some elevated risk of suicide. I bear in mind, as we do, those of us who work consistently in prisons, about that low base rate of one in a thousand in prisons in England and Wales, so it remains a very unusual event, although we look after, for example, in Wandsworth, multiple people who go through similar proceedings to this. So although he certainly talked about there being increasing risks where he would be extradited, I think that that risk is modifiable and manageable.

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[62] Transcript 23rd September 2020, page 76, lines 16 - 20
[63] Transcript 23rd September 2020, page 80, lines 33 - 5
[64] Transcript 24th September 2020, page 3, lines 14 - 23
[65] Transcript 24th September 2020, page 9, lines 14 - 22

> Q. And insofar as risk is concerned, I think you have read the transcript of Dr Deeley, he disagreed with Professor Fazel. When you talk of high risk, what do you mean, or a risk? A. Yes, of elevated risk compared to other men of his age in the prison setting.
> Q. Thank you. And then just finally just going over to the extradition decision, your paragraph 56. Did you reach the view that there was a substantial risk of suicide?
> A. No. I think there is undoubtedly some risk of a suicide attempt linked to extradition, but I do not think this reaches the strict threshold of substantial risk.
> Q. And what about his capacity to resist the impulse to commit suicide?
> A. I think even in the context of a worsened depressive state than the one that we have observed, that he would still retain the capacity to resist that impulse.
> Q. And if he were extradited to the United States, do you think his medication would change?
> A. No. I am aware there is a range of opinion about this in front of the court about the nature of the treatment setting in America, both pre-trial and perhaps post-conviction, but I think we would expect there to be broad equivalents in terms of medication and access to something equivalent to what he has engaged well with in Belmarsh prison.[66]

3. *Dr Daly*

444. Dr Daly did not give direct evidence. She is the prison consultant psychiatrist who saw Assange on a daily basis and is perhaps best to opine on his condition. She opines he is not a suicide risk.

C. Conclusions on the psychiatric evidence

445. Far from the conclusions urged in the defence submissions, it is submitted the psychiatric evidence comes to this:

(1) Assange suffers from moderate depression;

(2) If he is on the autistic spectrum it is extremely mild;

(3) He has the capacity to resist committing suicide; and

(4) A shortersentenceshorter sentence will greatly reduce any fear of suicide.

D. The application of the medical evidence to the statutory criteria

446. The definitive case is *Turner v Government of the United States of America* [2012] EWHC 2426 (Admin) cited above at paragraph [156] above.

447. It follows that this court must find:

(1) There has to be a "substantial risk that Assange will commit suicide";

[66] Transcript 24th September 2020, page 10, lines 1 - 22

(2) The mental condition of the person must be such that it removes Assange's capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition; and

(3) There is a risk Assange will succeed in committing suicide whatever steps are taken is sufficiently great to result in a finding of oppression.

448. On the expert evidence there is neither a substantial risk Assange will commit suicide, nor that he does not have the capacity to resist the impulse to commit suicide, but in any event there are sufficient steps that can be taken in the United States of America.

449. It follows the application under section 91 must fail.

450. Moreover, this case is substantially different from *Love v United States of America* [2018] 1 WLR 2889. In that case the following facts were found:

> 80. I also accept Professor Baron-Cohen and Professor Kopelman's evidence that he would attempt suicide before extradition to the United States. Both are of the opinion he would be at high risk of suicide. I accept Professor Baron-Cohen's oral evidence that Mr Love's intention is not a reflection of a voluntary plan or act but due to his mental health being dependant on him being at home with his parents and not being detained for an indefinite period.
> …
> [57] … The evidence of Professor Baron-Cohen and Professor Kopelman is clear; Mr Love's mental condition is such that it removes his capacity to resist the impulse to commit suicide…

451. It follows condition (4) of Aikens L.J's formulation was satisfied in *Love* in contradistinction to this case.

452. And at [64] (which the court accepted) the evidence that :

> Were he elsewhere he would just not survive . . . If [he] goes to prison in America he will die. I am quite sure of that.
> …
> [68] The judge did not expressly comment on this evidence but in the light of what she said about the experts, we have no reason to doubt that she accepted it. Her principal concern was with measures that might be in place to prevent suicide.

453. It follows condition (5) of Aikens L.J's formulation was satisfied in *Love* in contradistinction to this case.

454. There is no family network that Assange is totally dependent upon. It is impossible to find he would cease to function in the same way as the court found would happen to the severely autistic Mr Love.

455. The prosecution submissions on the conditions of detention are set out above in the section on US prison conditions dealt with in Article 3. It is submitted the prosecution evidence

is to be preferred but in any event the detention does not make it *oppressive* to extradite him.

VI. ABUSE OF PROCESS

456. The prosecution has already served a comprehensive skeleton argument on abuse of process showing the defence application is misconceived. Those submissions dated 17 February 2020 are adopted in their entirety and accordingly not repeated here. Abuse of process is a final residual discretion in those rare cases where the statutory bars or human rights issues are not engaged.

457. The defence say the proceedings are an abuse of process in three ways.[67]

(1) First it is asserted that the charges are political offences and contravene Article 4(1) of the Treaty. This argument has been exhaustively considered in the February hearing. It is misconceived. This court cannot take notice of the treaty as it is not part of the law of England and Wales. In any event this is a relative political offence outwith Article 4(1). As a matter of law it cannot amount to an abuse of process for the reasons previously given.

(2) Secondly, the defence assert the prosecution is for ulterior motives and not in good faith. This is covered entirely under the extraneous considerations and human rights issues and is not repeated here.

(3) Thirdly, it is submitted by the defence that the request fundamentally misrepresents the facts ("*Zakrzewski* Abuse") "Lies, Lies and more Lies"[68] as counsel for Assange called it at the February hearing. It is asserted that the request misrepresents that Julian Assange materially assisted Chelsea Manning in accessing national security information; and then by misrepresenting that there was a disclosure of the names of particular individuals who were thereby put at risk.

458. It follows only the *Zakrzewski* Abuse is dealt with here, not the other two heads for the reasons just given.

[67] Defense Closing Submissions at 1.3
68 Transcript 25th February 2020, page 8, line 29.

459. In *Zakrzewksi v. Regional Court in Lodz, Poland* [2013] 1 W.L.R 324 the Supreme Court (per Lord Sumption at §13, emphasis added) set out the conditions in which the Court's abuse jurisdiction may be invoked in relation to the description of the conduct:

(1) the jurisdiction "is exceptional". The statements in the [warrant] Request must comprise "statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally)".

(2) the true facts required to correct the error or omission "must be clear and beyond legitimate dispute". The abuse of process jurisdiction "is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court".

(3) the error or omission must be material to the operation of the statutory scheme.

(4) the sole juridical basis for the inquiry into the accuracy of the particulars in the [warrant] Request is abuse of process. The materiality of the error in the warrant will be of critical importance.

460. It is clear beyond argument that the defence approach is an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the request. The alleged inaccuracies are denied and are therefore trial issues. This court cannot determine contentious issues of fact upon which to ground an abuse of process.

461. There are three areas raised by the defence:

(1) The "most wanted list";

(2) The "passcode hash" allegation; and

(3) Risk as to sources.

462. Each of these arguments is an impermissible attempt to litigate trial issues.

463. As a starting point, Gordon Kromberg has responded to the oral accusations made by counsel for the defendant at a hearing on 25th February 2020 to the effect that descriptions or allegations in the request are "knowingly false", "utter rubbish", and "lies, lies and more lies". These allegations are categorically denied [Kromberg 4, §3]. To maintain an allegation without probable cause, or to knowingly make a false statement or introduce false evidence would expose the Mr. Kromberg to professional sanction by the bar authorities and Department of Justice [Kromberg CB8, §4].

A. The Most Wanted List

464. In relation to the most wanted lists, the defence contention is a simple evidential dispute, of a type that the extradition courts should not, indeed cannot, entertain.

465. The prosecution case is:

(1) On its website "Wikileaks expressly solicited classified information for public release" [Dwyer, CB1 §5 second superseding indictment §2];

(2) Evidence gathered shows that the most wanted list was intended by the defendant to "encourage and cause individuals to illegally obtain and disclose protected information, including classified information to WikiLeaks contrary to law" [Dwyer CB1 §§14-16, Kromberg CB8 §19, §22]. It was intended to recruit individuals to hack into computers and/or illegally obtain and disclose classified information [second superseding indictment §3, Kromberg 5 CB13 §18]. This was accompanied by public declarations given by the defendant himself at, for example, conferences [Dwyer CB1 §16, second superseding indictment §§3-6]].

(3) Manning responded to the list. She performed searches which are directly related to material requested on the most wanted list [Kromberg 2, CB3 §12, 87 Dwyer CB1 §19-21], and the material provided by Manning was *consistent* with the list [Kromberg 2, CB3 §13].

466. The first defence submission is that the allegation that Ms Manning's disclosure was given in response to the Wikileaks "most wanted" lists is contradictory to the evidence given in Ms Manning's Court Martial [defence final skeleton §12.10].

467. This assumes that the US prosecution is somehow bound to accept the account given by Ms Manning in her own defence or mitigation. As need hardly be said, this is not the position. After Ms Manning's guilty pleas, a "providence enquiry" was initiated to ensure that the plea was voluntary and grounded in fact. This was a limited enquiry into the facts which Ms Manning had *chosen* to admit and she was not subjected to exhaustive questioning about the offences or surrounding circumstances [Kromberg 1, CB2 §§142-3, Kromberg 4, CB8 §42]. Thereafter Ms. Manning refused to testify before a grand jury and has been found to be in contempt [§§145-156]. The second affidavit of Gordon Kromberg [CB3 §§12 and 13] maintains the factual position of the prosecution. Ms. Manning is alleged to have responded to requests made in the most wanted list. The defendant's

submissions as to this issue amount to an evidential dispute of the kind that is irrelevant in extradition proceedings.

468. Thereafter, the defence argument lists a series of points which are classically trial issues and classically **not** for this court to consider [part 2 §91]:

(1) That the most wanted list is said to have been offline between January to March 2010 [defence final skeleton §12.12];

(2) That the "list" was not "linked to from the WikiLeaks submission page", or could not be navigated from the Wikileaks site [defence final skeleton §12.13(i)]

(3) That there is "no *suggestion* that Manning ever searched for or accessed the 'list'". This submission is also wrong. In its original form [defence skeleton argument part 2 §91] it was formulated as "there is no **evidence** that Manning ever searched for or accessed…". Of course, no such "evidence" would be required to accompany an extradition request, nor would a court in this country ever request such evidence. Recognising this, in the defence final submissions have been reformulated to assert that there is no *suggestion* Manning responded to or accessed the list. In fact, it is clear that the prosecution case is, as noted above, that Manning performed searches related to material requested on the list [Kromberg 2, CB3 §12, Dwyer CB1 §19-21], and that the material provided by Manning was consistent with the list [Kromberg 2, CB3 §13].

(4) That Manning in an "online confession" claimed an alternative motivation [defence skeleton §12.13(iv). In the same way that the US prosecution need not be bound by Manning's self serving and unchallenged evidence at her Court Martial, nor are they bound by a previous "online confession".

(5) *That the list was a public collaboration* [defence final submissions §12.8]. The contrary was never alleged. The prosecution case is that the defendant used the list to encourage and cause individuals to illegally obtain and disclose information to Wikileaks [Dwyer §16, Kromberg 4 §19]. The defendant posted the list on Wikileaks and encouraged others to break the law and provide information in response [Kromberg 4, CB8 §19- 20, Dwyer, CB1 §16].

(6) The fact that the Iraq and Afghan War Diaries, or the Guantanamo detainee assessment briefs, or the State Department cables were never on the list [defence

final skeleton §12.14] is an irrelevance. Indeed, it has never been asserted that they were [Dwyer CB1, §§15-6, Kromberg 4, CB8 §21].

(7) In this regard, it is incorrect to suggest, as the defence do, that the allegation has "morphed" by reference to Mr. Kromberg's fourth affidavit [defence final skeleton argument §12.18, by reference to Kromberg 4, CB8 §22]. It has not. Indeed, Mr. Kromberg repeats and explained the allegation in his fourth affidavit by reference to Mr. Dwyer's original affidavit. The allegation is consistent.

469. This defence argument amounts to a simple disagreement with the prosecution case, namely, a classic triable issue.

470. Because the defendant's submissions represent an evidential *dispute* there is no matter of fact relied on by the defendant in furtherance of the abuse argument which is clear beyond legitimate dispute (*Zakrzewski* [supra]). Indeed, Mr. Kromberg notes that the defendant would be able to ventilate his submission that the Most Wanted List did not solicit relevant databases. [Kromberg 4, CB8 §23].

B. The encrypted password hash

471. It should be noted that the scope of new count 2 (previous count 18) has been broadened by the second superseding indictment. Count 18 now encompasses the defendant's agreement to recruit, and agreement with, other hackers in addition to Manning (Teenager, Jeremey Hammond, Sabu, Laurelai) to commit computer offences to benefit WikiLeaks. The *Zakrzewski* abuse relates only to one element of the count – the agreement to crack an encrypted password hash.

472. The submission on the encrypted password hash is also broken down into essentially two criticisms. Mr Summers QC for Assange said to the court on 25th September 2020:

> "It advances two essential propositions. Firstly, the alleged passcode hash conspiracy was impossible but secondly, even if it were possible it was of no possible utility to the purpose being attributed to it."

(a) Impossibility of breaking the password using the hash provided

473. The entire defence submission is predicated on the assertion that it was impossible to break the user's password from the hash which was provided to Assange. This assertion was undermined in cross examination.

474. On cross examination Mr Eller said:

> Q. And in fact, if we just look back into your statement and we look at page 10 and look at the text which went between Mr Assange and Ms Manning and we pick it up fifth, sixth item down, Mr Assange at 16.02:23, "We have rainbow tables for LM." So, that means that Mr Assange was saying, "We've got rainbow tables which we can use to crack LM." That is right, is it not?
> A. That is what it sounds like, yes.[69]

475. It follows there was an agreement to at least try and crack the password and that they intended to crack the password.

476. Mr Eller then accepted that in 1999 Microsoft's security bulletin MS99-056 showed that there was a vulnerability allowing the password to be cracked from the hash. The materials put to him in cross examination showed it was indeed possible to crack a password from a hash value. He went on to say there was a patch to prevent this. The important thing being there is no evidence the patch was applied to Manning's computer or that Assange or Manning new, if it had been applied to the computer.

477. In any event Mr Eller accepted:

> Q. Right. But are you aware Mr Assange has publicly boasted he is fantastic hacker?
> A. I am not.
> Q. And would you agree that a skilled hacker can sometimes break even the strongest encryption?
> A. Yes.[70]

478. It is obviously a triable issue. It is impossible for this court to find that there is the clearest of evidence, beyond legitimate dispute, that the password could not be cracked. In any event impossibility is not a defence under US or United Kingdom law.

(b) No useful purpose

479. The second limb of the defence submission is that there was no useful purpose in cracking the password as it belonged to an ftp user. The defence contend that the allegation that the agreement to decrypt the passcode hash was in order for Manning to log into military computers under a username which did not belong to her is "entirely misleading".

480. However, Mr Eller in cross examination accepted there was a purpose that was in furtherance of the conspiracy:

> OK. Well, I think we can just leave it for the moment because the point I want to make to you, would you agree that the ability interrogate Ms Manning's user profile, namely bradley.manning, was of considerable forensic use in proving what she had done?
> A. Yes.
> Q. OK. Now if you use, if you access the same computer or use the same computer using a local unidentified account such as the FTP user account, you could hide all that activity without it being traceable to your domain user profile account, could you not?[71]
> A. That is correct.

69 Transcript, 25th September 2020, page 39, lines 29 - 34
70 Transcript, 25th September 2020, page 43, lines 3 - 6
71 Transcript, 25th September 2020, page 46, lines 8 - 11

481. And later:

> Q. So we would say, would you agree with this, there is a clear and tangible benefit for Ms Manning to access the databases through an anonymous FTP user account? 7
> A. If that is what she was intending to do, yes.[72]

482. It follows there was a clear purpose in furtherance of the conspiracy, namely to avoid detection by Manning. This is exactly how it was put in the Request and again it is impossible for this court to find that there is the clearest of evidence, beyond legitimate dispute, that the cracking of the password for the ftp account would serve no useful purpose.

C. Alleged risk to sources

483. The defence argument in this regard again mischaracterises the prosecution case; then misrepresents the evidence, and thereafter seeks to frame the request as "known to the US Government to be completely and utterly misleading". In fact, the US case is consistent and accurate, and there can be no suggestion that the request is misleading in a manner material to the statutory scheme such as to give rise to an abuse of process.

484. Ultimately, this is yet another trial issue. The Indictment specifically avers he caused a grave and imminent risk of harm to sources. Damage, or potential damage, is a necessary ingredient in both jurisdictions. The affidavit in support of the Request shows a risk of harm was caused and that accords with common sense.

485. There are only three sets of documents which the defendant is to be prosecuted for **publishing** (and, even then, the publication charges are limited to those documents "containing the names of individuals, who risked their safety and freedom by providing information to the United States and our allies," *see* counts 15-17). These are the Afghanistan significant activity reports ("SARs"), the Iraq significant activity reports and the Diplomatic Cables. To the extent that the defence skeleton argument raises issues concerning the rules of engagement, and the Guantanamo detainee assessment briefs [defence skeleton argument §12.46] this is an irrelevance. There is no allegation relating to the publication of these documents, and the issue of risk of harm to towards sources is an irrelevance.

72 Transcript, 25th September 2020, page 47, lines 6 - 8

1. *The US case re disclosing individuals' identities*

486. The US government case on risk of harm to sources, and damage caused by publication is as follows:

(1) The publication of the "Afghanistan war-related significant activity reports, Iraq war-related significant activity reports, and U.S. State Department cables containing names of human sources who provided information to U.S. and coalition forces and to U.S. diplomats. ASSANGE communicated these documents to the public by publishing them on the internet via Wikileaks, thereby creating a grave and imminent risk that the human sources he named would suffer serious physical harm and/or arbitrary detention. ASSANGE knew the disclosure of these classified documents would be damaging to the work of the security and intelligence services of the United States of America. These disclosures damaged the capability of the armed forces of the United States of America to carry out their tasks; and endangered the interests of the United States of America abroad." [Dwyer, §8, CB1].

(2) "The significant activity reports from the Afghanistan and Iraq wars that ASSANGE published included names of local Afghans and Iraqis who had provided information to U.S. and coalition forces. The State Department cables that WikiLeaks published included names of persons throughout the world who provided information to the U.S. government in circumstances in which they could reasonably expect that their identities would be kept confidential. These sources included journalists, religious leaders, human rights advocates, and political dissidents who were living in repressive regimes and reported to the United States the abuses of their own government, and the political conditions within their countries, at great risk to their own safety. According to information provided by people with expertise in military, intelligence, and diplomatic matters, as well as individuals with expert knowledge of the political conditions and governing regimes of the countries in which some of these sources were located, by publishing these documents without redacting the human sources' names or other identifying information, ASSANGE created a grave and imminent risk that the innocent people he named would suffer serious physical harm and/or arbitrary detention." [Dwyer §39 CB1]. This is also reflected in Kromberg 1, §25 at CB2.

(3) The request provides **examples** of documents which were published by Assange and which contained the unredacted names of co-operating individuals put at risk. These include C1 (revealing the identity of an Afghan source who gave details of a planned attack on coalition forces) C2 (identifying an Afghan source who identified a weapons supplier), D1 (identifying Iraqi sources who provided information on an IED attack) D2 (identifying an Iraqi source who had turned in weapons to coalition forces and faced threats as a result), A1 (a Diplomatic Cable identifying an Iranian source who required protection) and others [Dwyer CB1 §§41-2, Kromberg 1, CB2, §§39-42, §§44-5]. The Taliban explicitly stated that it was reviewing Wikileaks publications in July 2010 – **which must relate to the Afghanistan SARs** – to identify spies whom they could "punish [Kromberg 1, CB2 §42]. The publication of the cables also endangered Chinese nationals [Kromberg 1, CB2, §§49 – 54], and Syrians [Kromberg 1, CB2 §§55 – 59].

(4) As a result of the Wikileaks publications, hundreds of at risk people were identified, and some were relocated. Some have "disappeared" (although the United States at this point cannot prove that their disappearance was the result of being outed by WikiLeaks), some were arrested and/or investigated [Dwyer §43 CB1, and Kromberg 1 §§28-34, CB2].

(5) As to any efforts at harm minimization "it does not matter if Assange took measures to protect sensitive information in some of the documents. As alleged in the extradition request, he still published the names of local Afghan and Iraqis who provided information to U.S and coalition forces, which created a grave and imminent risk that the individuals he named would suffer serious physical harm. If Assange wants to defend against these allegations by offering evidence of efforts he undertook to protect other sources, he is free to raise this issue in United States courts. But his evidence of those efforts does not suggest that the United States' allegations were false" [Kromberg 3, §33, CB8].

(6) As to the contention that Assange was not the first person to publish the Diplomatic Cables unredacted, this does not show the request to have been false or misleading. The publication by Wikileaks did cause a risk of harm, as it posted the unredacted names of numerous sources on a high profile website [Kromberg 3, §37, CB8]. As the US have noted – Assange may attempt to challenge whether his publication of unredacted cables created a risk to individuals in the US courts, but the merits of

such a defence are for the US courts to resolve [Kromberg 3 §37, CB8]. It is beyond doubt that what is alleged and legitimately so is that the publication of the cables by Assange put people at risk. It is not a *Zakrzewski* abuse for Assange to say in response simply that he disputes this.

(7) Furthermore, Assange and Wikileaks had published diplomatic cables which contained names marked "strictly protect" before any other party published the unredacted cables. Indeed, of the Diplomatic Cables published by Assange by 30th August 2011, numerous cables contained names of individuals classified as "Strictly Protect", numerous cables were classified as CONFIDENTIAL or SECRET, and most importantly specific classified cables have been identified as containing the unredacted names of individuals who risked their safety by providing information to the US Government and who faced a grave risk to their safety by the disclosure of their names [Kromberg 3 CB8 §38, and Kromberg 6 §4]

487. As to the improper allegation that the request is knowingly false and "lies, lies and more lies", this is denied [see Kromberg 3, CB8, §§3-4]. For the US prosecutors to lie or to issue a knowingly false extradition request would be a disciplinary, if not criminal offence.

488. The short response to this limb of the *Zakrzewski* abuse is that it is Mr Assange's defence; it is a trial issue *par excellence*.

489. It is of note that the five media partners with whom Wikileaks worked drew a distinction between their handling of the material and WikiLeaks's treatment of it: The Guardian newspaper published on 2 September 2011[1]; The New York Times published on 25 July 2010[2]; and The New York Times magazine published on 26 January 2011[3].

490. The foregoing contrasts the actions of the defendant with those of reputable media outlets. He is described as a source not a journalist. He was warned not to publish the names of informants and others in danger if they were identified. He, according to his former media partners, deliberately chose to do so (in contradistinction to what any self-respecting and professional journalist would do).

2. *The Iraq and Afghanistan SARs*

491. There is *no defence evidence* to contradict the essential allegation that the publication of the SARs revealed the names of participating locals, thus endangering them. Even if,

arguendo, such evidence could be produced it would be classic material for the trial given the repeated assertion of the US case – with examples – that individuals were named and put in danger.

492. Evidence from, for example, Hager, to the effect that WikiLeaks were "serious" about their redaction efforts is irrelevant to these proceedings. The fact is that any redaction of the Iraq or Afghanistan SARs was inadequate. Mr. Assange's wish to call witnesses as to the nature of the redaction is, at best, a trial issue and at worst mitigation.

493. As to the material identified by the defence [defence final skeleton argument §12.75(i)]:

(1) The assertion that a US claim that 300 lives could be endangered by the publication was "later shown [to be wrong]: they had discovered the 300 names in their own copy of the documents" comes from two interviews with the **Assange himself** [Q3, and Q4]. In essence, the defendant's submission is "the prosecution claim harm was caused, I deny this, this amounts to a *Zakrzewski* abuse". For obvious reasons this is utterly untenable.

(2) It is **misleading** to state that the Senate Committee on Armed Services reported in August 2010 that "the review to date has not revealed any sensitive sources and methods compromised by disclosure". The letter also states, entirely consistently with the case as presented to this court, that "The documents do contain the names of cooperative Afghan nationals and the Department takes very seriously the Taliban threats recently discussed in the press. We assess this risk as likely to cause significant harm or damage to the national security interests of the United States and are examining mitigation options…". It is clear from the letter that, contrary to the defence case, the Afghan significant activity reports **did** contain the unredacted names of co-operating locals, who were put at risk.

(3) Reliance on Professor Sloboda [at §12.75(i)] to establish that no harm took place is also misplaced. As analysed below, Professor Sloboda's evidence made good the US case as to damage. He was simply unaware of the fact that names **were published** and accepted that, given the situation in Iraq at the time, this would have led to those named being placed in danger.

494. In any event, **the defendant's own witnesses' evidence** makes good the US case that sources were put at risk:

(a) *Regarding the risk posed*

495. Professor Sloboda – in an area which he was competent to give evidence on as an expert– accepted that responsible publication would include "not naming people who had given information to the US government" [Tr. 17.9.20 p14(14)]. The situation in Iraq was such that anyone who had co-operated with the US would be put in danger by the publication of their name [Tr. 17.9.20 p15(4)].

(b) *The publication of names – Afghan SARs*

496. Professor Sloboda accepted that Wikileaks **was aware** that the publication of the Afghanistan SARs was flawed had involved the disclosure of names:

> "Q: …what was the steep learning curve?
> A:I think it must refer to the learning curve, it was realised that it was - there was some information revealed in the Afghan war logs that a future leak should avoid."
> Q. It was the names of individuals who had co=operated with the Americans yes?
> A: I am told so, yes.
> …
> Q: That is why I am asking you, Professor, what the very challenging exercise and steep learning curve is that you are referring to in your statement?
> A: I believe it was just a sense that there needs to be a better process next time round.
> Q: A better process of redaction?
> A: Yes, redaction.
> Q: Because the previous process of redaction was flawed?
> A: Clearly it was what [per the transcript but believed to be "not"] as it should have been, yes"

(c) *The process post Afghanistan*

497. Professor Sloboda's evidence was that, after the difficulties with the Afghan War Logs, Wikileaks entrusted the redaction of the Iraq War Logs to Professor Sloboda and his partner, neither of whom were journalists, neither of whom have any background in national security, redaction or source protection and neither of whom had undergone any sort of vetting procedure [Tr. 17.9.20 pp10]. The risk of sensitive information being disclosed was obvious.

498. As of mid August 2010, the logs were completely unredacted. It would be impossible to redact the logs by hand. None of the traditional media (and presumably Wikileaks itself) could come up with a process for redacting the logs [Tr. 17.9.20 p16], so IBC came up with a process whereby all words in that were not in an English dictionary were to be automatically redacted. Professor Sloboda was unable to say whether the software would require a human to go back over the redacted logs to make sure there was no risk arising [Tr. 17.9.20 p18]. The entire redaction process (of 400,000 SARs) took a maximum of

two months [i.e. Mid August to October 2010]. By the time of publication of the logs, he had only "scratched the surface" of what they revealed [Tr. 17.9.20 p18].

(d) *The publication of names – Iraq SARs*

499. Professor Sloboda was not aware that the Iraq logs contained unredacted names. He could not explain how that had happened. He guessed (calling it "conjecture") that the software had allowed names to remain when the SARs were published [Tr. 17.9.20, p21].

500. Professor Sloboda therefore accepted in his evidence that Wikileaks appreciated that the redaction process for the Afghanistan SARs was flawed and identified co-operating individuals. The result, is that, in relation to the Afghan SARs, the defence evidence supported the US case. This would not even raise a trial issue, still less a *Zakrzewski* abuse.

501. The defence evidence as to the Iraq SARs was to the effect that an attempt was made to redact. There was no evidence to contradict the key assertion that any redaction process was flawed and that *co-operating individuals were in fact named.* This is classic trial evidence. There is no *Zakrzewski* abuse.

502. Furthermore, the defence submissions are misleading and knowingly so. It is said that the request is inaccurate as US government officers gave evidence at the Manning Court Martial that the Iraq and Afghan SARs did not disclose **key** human intelligence sources [§12.46]. This, however, has never been the US case [Kromberg 3, §27, prosecution bundle Tab 8]. The SARs did, however, disclose the names of co-operating locals such as to put their lives in danger. The officers in question did **not** give evidence that no sources were named in the reports, simply that no **key** sources were. In fact, as identified in the request, co-operating sources were named [Kromberg 3 §26, CB8]. The evidence given at Manning's Court Martial also identified that the names of co-operating locals **were disclosed** [Kromberg 3, §28, CB8].

503. There is nothing inconsistent about the evidence, on the one hand, that these people were not "key" human intelligence sources, and the case of the US government that they were co-operating locals whose lives were endangered. To argue to the contrary is fallacious. It is not, and has never been suggested that the sources who lives were put at risk were "key" sources. That they co-operated with coalition or American officials was sufficient to place them in danger. It is irrelevant whether their co-operation was considered "key" or not.

504. Furthermore, as Professor Sloboda accepted, Wikileaks had no vetting procedure in place in relation to the person(s) to whom access was given to unredacted data [Tr. 17.9.20, p11]. The complete and unredacted Iraq War Logs were handed to the IBC, for example, without any vetting procedure. Four people had access to the material. Two of those people have never even been identified [Tr. 17.9.20 p13].

505. Ultimately:

(1) The US case is consistent in that names of co-operating individuals were published in the Iraq and Afghan SARs. This placed them at risk. Examples have been provided.

(2) The defence evidence as to redaction, when tested, only served to support the US case. At the very best, it highlighted that this issue may be a trial issue and fundamentally not an issue of *Zakrzewski* abuse.

3. ***The Diplomatic Cables***

506. The essence of the defence argument is that, because there is evidence of another website publishing the cables hours before Wikileaks did, these proceedings should be stayed as abusive.

507. It is important that the Court notes this argument can **only** relate to the publication of the cables. It is an irrelevance to the Iraq and Afghan SARs.

508. The defence rely heavily on Prof Grothoff and the timetable to be distilled from his evidence [defence final skeleton argument §12.48 et seq]. Much of what Professor Grothoff was able to say was based on hearsay and internet research and, on some occasions, on what Wikileaks themselves said. There are passages relied on by the defence from Professor Grothoff's evidence which go far beyond his expertise as a computer scientist and indeed beyond his own possible knowledge. See for example:

(1) [defence skeleton argument §12.48(ii)] "The … key to this 'obscurely' located file … had been '*reluctantly'* shared by Mr Assange with one of the media partners, David Leigh of the Guardian". This is a plain attempt to introduce the defendant's own narrative via the backdoor of Professor Grothoff, who can have no possible knowledge of how reluctant or otherwise Assange was to share the password. His evidence was taken from Mr. Leigh's book.

(2) [defence skeleton argument §12.57] "WikiLeaks did so in circumstances where, **according to WikiLeaks**, '*the full database [was already] downloadable from hundreds of sites*'.

509. It is not proper or possible for the defence to rely on Professor Grothoff's summary of Wikileaks' own case as if it is objectively verifiable fact, or the basis of a *Zakrzewski* abuse argument.

510. Nonetheless, from the extradition request and accompanying affidavits, and the evidence of Professor Grothoff and other publicly available material served (assuming the various blogs, and tweets relied on by the defence are accurate), the following timetable can be distilled, omitting the colourful narrative of the defence submissions :

(1) In the **Summer of 2010** David Leigh and the Guardian were given access to the unredacted Diplomatic Cables by Assange. The cables were in a file on the Wikileaks website. Access to (at least parts of) the unredacted cables was also given to 50 other organisations, according to Wikileaks [Grothoff XX Tr. 21.9.20 pp21-1]

(2) On **28th November 2010** Wikileaks and other media partners released redacted versions of the cables. There is no count on the indictment reflecting this publication.

(3) In **November and December 2010** Wikileaks is the subject of online attacks and encourages the process of "mirroring" that is to say the copying of the website and its hosting on numerous servers, to ensure that the website remained available.

(4) On **1st February 2011** David Leigh published his book. Mr. Assange and Wikileaks (in this case through Professor Grothoff) assert that this book published the title of the password to the Diplomatic Cables file, which could not be changed. David Leigh denies this (describing Mr. Assange's version of events as "a complete invention") and asserts that he had always been told it was a temporary password. This file existed on numerous mirrored Wikileaks websites held on different servers.

(5) Between **23rd and 30th August 2011** Wikileaks publishes a series of the cables (around 134,000), advertising them via its twitter account including in fully searchable versions [Prof Grothoff XX Tr. 21.9.20 p28 et seq]. Mr. Assange claims that these cables were "unclassified" [defence skeleton §12.69]. The evidence from

America is that 140,000 cables have been obtained which were downloaded to the Wikileaks website as of 30th August 2011. These cables are still being reviewed, but numerous cables have been identified which were classified to CONFIDENTIAL or SECRET levels and contained names marked "Strictly Protect". The US has also identified specific classified cables which "*contained the unredacted names of individuals who had risked their safety and freedom by providing information to the United States, and who faced a grave risk to their safety and freedom from the disclosure of their names*" [Kromberg 6, §4]. Wikileaks advertised the release of these cables and thereafter boasted of releasing them again in "searchable format" [Grothoff XX Tr. 21.9.20 pp29-30]. Professor Grothoff could not say whether the cables contained names marked strictly protect or not [Prof Grothoff XX Tr. 21.9.20 p33(28)].

(6) On **25th August 2011** Der Freitag published an article stating that an encrypted copy of the cables was available on the internet. It did not reveal the location or the means by which the file might be accessed.

(7) On **29th August 2011** Der Speigel published an article stating that the cables were on the internet and that the password had been accidentally revealed by an external contact.

(8) At around 22:00 on **31st August 2011** Nigel Parry tweeted that David Leigh's book contained the password for the file containing the Cables [eg Grothoff XX Tr 21.9.20 p39].

(9) At **22:27 GMT on 31st August 2011** Wikileaks posted a tweet identifying that a Guardian journalist had revealed the password to a file containing the cables.

(10) At **23:44 GMT on 31st August 2011** Wikileaks issued an editorial in which they identified Mr. Leigh's book as containing the password to the file and showed readers of the editorial on its twitter feed which chapter and whereabouts the password could be found. The Wikileaks twitter feed has a far greater reach than Nigel Parry [Professor Grothoff XX Tr. 21.9.20 p42-3]. Wikileaks also calls a "Global Vote" on whether or not to release the entire cache of cables on its own site [Professor Grothoff XX Tr. 21.9.20 p43].

(11) Mr. Parry claims in his blog that an internet user named NIM_99 uploaded the cables to the internet shortly before midnight on **31st August to 1st September**

2011. However, Professor Grothoff could not find any evidence of this posting using the Wayback Machine [Professor Grothoff XX, p40-41, p55]. There is no evidence (other than Mr. Parry's blog, unsubstantiated by the expert called by the defence) of a posting at this time.

(12) On **1st September 2011** at **11:23 GMT** a user named "Yoshima" uploaded the cables to the Pirate Bay Website [Professor Grothoff XX Tr. 21.9.20 p41]. **This is the earliest that Professor Grothoff can say the cables were "put up"** [Professor Grothoff XX Tr. 21.9.20 p44(32-34) ad p45(1-10)]

(13) On **1st September** 2011 Crytome.org published the cables on the Cryptome website at an unknown time [Grothoff XX Tr. 21.9.20 p 41].

(14) At **13:09 GMT on 1st September 2011** a user named "Draheem" posted the cables to the Pirate Bay Website [Professor Grothoff XX Tr. 21.9.20 p41].

(15) On **1st September 2011 at either 7.58pm or 5.58pm** [depending on time zone] "MRKVAK" tweeted that searchable cables were available at cables.MRKVA.EU [Grotfhoff XX Tr. 21.9.20 at pp35-8].

(16) At **01:20 on 2nd September 2011** Wikileaks published the entire cache of cables, labelling it "Cable Bomb" or "Cable Gate 2". Wikileaks mirrored the site to make sure that the cables stayed online [Professor Grothoff XX Tr. 21.9.20 pp43-4]. Professor Grothoff accepted that the Wikileaks twitter account and website had "significant global reach" and that in the immediate aftermath of the publication the website was struggling to deal with the traffic accessing it - indicating that either a vast number of people were trying to access the material on the site, or that it was being made the subject of a DDoS attack in an attempt to render the site inoperable [Professor Grothoff XX Tr. 21.9.20 p44].

(17) By the early hours of **2nd September 2011** Wikileaks had published *searchable* versions of the cables which were attracting significant global interest [Professor Grothoff XX Tr. 21.9.20 p44]. Professor Grothoff did not agree that the Wikileaks posting was in a more searchable format (as indicated in media reports at the time) but he did accept that it made the material "more visible" [Professor Grothoff XX Tr. 21.9.20 p46].

511. The essence of the *Zakrzewski* argument therefore is:

(1) The defendant accepts publishing a full, unredacted version of the Diplomatic Cables to the internet at 01:40 on 2nd September 2011. It was published shortly afterwards in searchable format. It contained the names of individuals who had co-operated with US authorities and who would be put at risk by the publication of the cables. Wikileaks's publication of the cables at that time was heavily trailed on its social media accounts and website. It made the material far more visible [conceded by Professor Grothoff].

(2) However, because there is evidence of a website with far less presence/visibility on the internet publishing the material 14 hours earlier, the proceedings amount to a *Zakrzewski* abuse.

512. Such an argument must fail: -

(1) Firstly, the request is not misleading. The allegation that Assange published the full and unredacted cache of Diplomatic Cables in September 2011 is accepted by the defence.

(2) Secondly, the defendant had been publishing unredacted cables, including cables with names marked "strictly protect" and cables that put named sources at risk, by **30th August 2011**, prior to any other website or individual publishing the cables [Kromberg 6, §4].

(3) Thirdly, that other less visible parties might have also published contemporaneously (on the evidence, 14 hours previously) is immaterial. It is clear that the allegation against the defendant, made consistently, is that his publication put others in danger. Professor Grothoff accepted the greater reach and presence of Wikileaks. This is not a case of "republishing" material which was well known and already widely distributed. The evidence indicates Mr. Assange was refusing to be "scooped", and actively promoting the material to as wide an audience as possible.

(4) Fourthly, the defence reliance on *Attorney-General v. Guardian Newspapers (No. 2) [1990] 1 A.C 109* is misplaced. This case was not a criminal case and it did not, and did not purport to, find that "republication of material already in the public domain is not a criminal offence" [as is stated in the defence final skeleton argument, §12.59]. Surprisingly, given the reliance placed on the case, no citation is given as to where the relevant issues of criminal law were discussed in the case. This is because they were not.

(5) Rather, the case concerned a former member of MI5 who had published a book "Spycatcher". This had been published in the United States in July 1987, and in Australia in October 1987. Publication had also taken place in Ireland, Canada and other countries. The Observer and The Guardian sought to publish articles commenting on the contents of the book. By the time of the ruling the book and its contents had been disseminated on a world wide scale, and the information contained therein commented on by newspapers throughout the world [see for example the ruling of Scott J at first instance at 171D]. One of the issues to be decided was whether the material relating to the contents of the book was held in confidence.

(6) The height of the findings of the in *Guardian Newspapers* was that – on the facts of that case – the material which was the subject of an injunction was already in the public domain and therefore no longer confidential, and that accordingly no further damage could be done by its publication. No injunction could therefore be granted against The Observer and The Guardian newspapers, both of whom wished to comment on the contents of the book. Lord Keith of Kinkel concluded so but stressed that "I do not base this upon any balancing of public interest…nor upon any possible **defences of prior publication…**but simply upon the view that all possible damage to the public interest has already been done" [at 260E]. There was no discussion of the criminal law or its ambit. There was no statement that "republication is not a criminal offence". Whether a disclosure is damaging will be a matter of fact and degree in each case.

4. *The defence commentary on Mr. Kromberg's affidavits*

513. The five defence contentions set out in their response to the Kromberg affidavits [defence final skeleton argument §12.61] are, once again, classic matters for trial evidence, or disputes on the periphery that might, at best go to mitigation:

(1) Whether Assange was reluctant to engage in harm minimisation [point 1, defence final skeleton argument §12.61(i)] is at best a trial issue;

(2) Whether Assange bears any responsibility for the publication of the password by virtue of distributing the material, and the password in the first place [point 2,

defence final skeleton argument §12.64] is a peripheral issue, and irrelevant to the key, and agreed, fact that he did publish the cables.

(3) Whether Assange's narrative or Leigh's as to the reasons for the publication of the password is to be believed [point 3, defence final skeleton argument §12.67] is of marginal relevance and could not sustain a *Zakrzewski* abuse.

(4) The defence contention that the cables released in the period 23 – 30 August were "unclassified" [point 4, defence final skeleton argument §12.69] is another classic evidential dispute. The US evidence [Kromberg 6 in particular, which is not cited in this part of the defence skeleton argument] is that cables have been identified, published by Wikileaks prior to August 30, 2011, which were classified, and which contained the unredacted named of co-operating individuals who were put at risk. It is not open to the defence simply to dispute this and label the proceedings abusive. Such disputes are settled at trial. That, indeed, is the *purpose* of a trial.

(5) The fifth and final point made by the defence is that the US request makes "unspecific and unsubstantiated" allegations of the risk of harm to individuals caused by the publication of the cables [point 5, defence final skeleton argument §12.73 et seq]. This submission is wrong in both law and fact. As a matter of law, it would appear that the defence request that the US authorities provide the evidence that they wish to rely on at trial to substantiate the allegations set out in the request. As this court will know, this is not how the extradition procedure operates. It is not incumbent on the US authorities to "substantiate" the case that has been clearly set out in the request and associated documents. As a matter of fact, the request **does** set out specific instances of individuals who were exposed to the risk of harm. Yet again, the defence submissions run **plain contrary to the evidence** in this case. By way of example, the court need only look to the first affidavit in this case of Kellen Dwyer at §41 [CB1] for five examples of individuals who were named, and put at risk, by the publication of the cables.

514. The opinion of Professor Grothoff that it is "unfair" to accuse Assange of publishing the cables [relied on at defence skeleton argument §12.58] is, firstly, an opinion which is outside his expertise and, secondly, plainly a trial matter, if relevant at all. In any event it is the opinion of an supposedly independent expert who, in fact, had previously been an initial signatory to a letter to the President of the US demanding the cessation of proceedings who claimed, when asked about it, that he had forgotten signing it. This

despite his having been reminded of the document by defence lawyers only two days previously, and neither the defence team nor Professor Grothoff, having thought it appropriate to bring the matter to the Court's attention [Tr. 21.9.20 p15-16]. It is, plainly, the opinion of a partial supporter of Mr. Assange.

515. The defendant relies heavily on steps which, he claims, were taken to prevent the publication of articles relating to the availability of the cables. This is an irrelevance and could not form the basis of a *Zakrzewski* abuse.

516. The defence argument that it is unnecessary for harm to be established as a matter of US law is also wrong. In order to be convicted on counts 15, 16 and 17 of the indictment, Assange must be convicted of disclosing "National Defense Information". US caselaw establishes that documents must satisfy three criteria to be "National Defense Information". Firstly, they must relate to military matters or related activities of national preparedness. Secondly. The information must be "closely held" by the US government and thirdly the information must be "***potentially damaging to the United States or potentially useful to an enemy of the United States***" [Kromberg 5, CB13 §83].

517. Therefore:

(1) In relation to the SARs the clear case of the US is that individuals were named and put at risk. The defence disputes this. This is a matter for trial. No *Zakrzewski* issue arises.

(2) In relation to the Cables, the American prosecuting authorities have confirmed that the case against this defendant is that he *placed sources at risk of harm – regardless of whether other actors released the information a day or two before him* [Kromberg 4, CB8 §37]. Indeed, Wikileaks also published cables between 23rd and 30th August 2011, before Cryptome and the Pirate Bay, which named co-operating sources and put them at risk [Kromberg 6 §4].

518. The issue of revealing the identity of those named within the materials Wikileaks published is Mr Assange's defence; it is a trial issue at best.

VII. DEFENCE SUBMISSIONS PART D – THE SECOND SUPERSEDING INDICTMENT

519. At the outset of the hearing in September, the defendant argued that all new conduct set out in the second superseding indictment should be "excised" by this Court.

520. The defendant maintains that the "new" conduct contained in the second superseding indictment should be "excised" from the request. This submission raises two issues:

    a. Firstly, whether a jurisdiction exists for such excision; and

    b. Secondly, assuming that there is, whether there is any justification for excising conduct in this case.

A. The jurisdiction

521. The starting point is the statute. Section 137(7A) of the 2003 Act requires that this court must consider "the conduct specified in the request for the person's extradition". It is not correct to say [defence skeleton §24.13] "*Non sequitur* that [s137(7A)] restricts the court's power to excise or ignore conduct *within* the request". This is precisely what it does.

522. In accusation cases, the power to excise parts of the conduct specified in the request has been exercised in the context of an analysis of extradition offences, in order to allow for extradition on some conduct, where other conduct would not amount to an extradition offence:

523. In *Dabas v. Spain* [2007] 2 A.C 31 per Lord Hope at §51 (emphasis added):

> "…The second observation, which I make with reference **to the test of double criminality in section 64(3)** , is this. A judge may conclude that this test is not satisfied because part of the conduct which is said to constitute the offence mentioned in the Part 1 warrant occurred before it constituted an offence under the law of the relevant part of the United Kingdom if it occurred there. The question is whether in that situation he has no alternative other than to order the person's discharge under section 10(3) . **In my opinion it would be open to the judge in such circumstances to ask that the scope of the warrant be limited to a period that would enable the test of double criminality to be satisfied. If this is not practicable, it would be open to him to make this clear in the order that he issues when answering the question in section 10(2) in the affirmative**. The exercise that was undertaken by your Lordships in Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147 , 229–240, shows how far it was possible to go under the pre-existing **procedure to avoid the result of having to order the person's discharge in a case where part of the conduct relied on took place during a period when the double criminality test was not satisfied**. It can be assumed that the Part 1 procedure was intended to be at least as adaptable in that respect as that which it has replaced…."

524. In *Osunta v. Germany* [2008] 3 W.LR 26 at §22, per Treacy J:

> "…It seems to me that the argument that effect should be given to extradition arrangements and that the court should seek to avoid discharging a warrant where serious offences are alleged is a powerful

> one, as is the need to trust the judicial arrangements in other jurisdictions. If excision is necessary to achieve justice in those circumstances then I find it hard to understand how an excision relating to temporal matters should be acceptable whereas one relating to matters of geography should be unacceptable."

525. The defence cites *Zada v. Italy* [2017] EWHC 513 as authority for the proposition that the power to excise is not limited to consideration of extradition offences. In fact, that issue was left undetermined in *Zada* [see §67], but this may not matter a great deal. The Courts may have little difficulty in extending the power set out in *Dabas* to include the power to excise any conduct which falls foul of the statutory scheme. There is, however, no example to be found of the Courts excising the conduct from an extradition request notwithstanding that it would satisfy the statute and ordinarily form the basis of an extradition order.

526. What is required, rather, is for the Court to consider the conduct within the statutory framework. If some of the conduct would fall foul of the statute by, for example, failing to satisfy dual criminality, then excision may take place to remove the offending conduct and to allow extradition to take place on the remainder. This is the clear intention of the courts in *Dabas* and *Osunta.* The Court has no power, however, to excise conduct from the request *which does not offend the statutory scheme.*

527. It is not open, therefore, to the Court to excise swathes of conduct contained in the request as a case management power. The situation is entirely different to the Court's discretion to refuse to hear evidence from witnesses (which is a proper exercise of the Court's case management powers). If the conduct is contained in the request, it must be considered.

528. Were the defence complaints concerning the further conduct to have any merit, the appropriate remedy would be to allow the defendant sufficient time to advance any relevant arguments. The defendant has repeatedly said that he will not ask for such time.

B. The merits of the application

529. If, contrary to the above, the Court considers that it has a jurisdiction to excise conduct from the request as part of its case management powers, the Court should conclude in any event that the application in this case has no merit. The defendant asserts, in essence, that he would wish to raise issues but has been prevented from so doing by the lack of time to prepare. A brief analysis of the issues raised show them to have no merit:

    (1) Passage of time [defence skeleton §24.21]. This issue has, in fact, been raised in relation to the request as a whole. There is nothing preventing the defendant from raising the passage of time in relation to the new conduct, indeed it is understood

that he does. There can be no suggestion that the conduct should be excised as the defendant is unable to raise the passage of time – he can and he does. In any event, as set out above, the passage of time argument is entirely without merit and can be summarily dismissed.

(2) Forum [defence skeleton §24.23]. It is hard to see how, even though a trial in 2012 in Southwark named Sabu as a conspirator, this defendant could legitimately raise the issue of forum. This is particularly so since the new conduct is part and parcel of count 2 on the indictment, which could not realistically be tried in the UK. It is of particular note that the defendant does not even attempt to set out how the relevant factors identified in s.83A could be determined in his favour, such that it would be contrary to the interests of justice to order extradition by reason of the forum bar. Again, there is no realistic prospect of the forum bar being raised.

(3) Human rights/article 6. In a single paragraph, the defendant asserts that his "Convention right, to be informed promptly and in detail of the nature and cause of the accusation against him (Article 6(3)(a)), has manifestly be violated by the holding back of these allegations until late 2020". There can be no sensible suggestion that the prosecution of conduct dating back to 2009 amounts to a *flagrant breach* of the defendant's article 6 rights. Indeed, the remainder of the request – in respect of which no article 6/delay point is taken - seeks extradition for conduct dating to 2009. This argument is hopeless and contradicts the submissions made by this defendant in relation to the remainder of the request.

(4) *Tollman* abuse of process [defence skeleton argument §24.25]. Two matters are raised as amounting to a "Tollman abuse of process". Firstly that *Teenager*, mentioned in the second superseding indictment, was known to the US at the time of the first request and that the Icelandic interior minister is said to have asked FBI agents, investigating Teenager's claims, to leave Iceland. Secondly, that in October 2019 Hammond (also cited in the second superseding indictment) was summonsed before a Virginia District Grand Jury investigating Mr. Assange and was held in contempt for refusing to testify. The prosecution cannot see how either of these matters could amount to a "Tollman abuse" and the defence have not explained how. This suggestion can also be safely ignored by the court.

(5) Breach of duty of candour [defence skeleton argument §24.26 and 24.27]. Two issues are raised – firstly that Teenager is said to be "Iceland1", and to have been

diagnosed with "psychopathic personality disorder" and also to have been prosecuted for sexual offending, a prosecution which Mr. Assange is said to have "assisted". Secondly, that publicly available information indicates that Sabu was an informant acting for the FBI at the relevant time (this is, in fact, particularised in the indictment), but that the request does not state that this was the result of a plea deal whereby he escaped prosecution for various criminal offences. Neither of these matters would need be particularised in an extradition request, nor does their absence lead to a breach of candour such as to abuse the court's process. The suggestion that they do is absurd.

(6) *Zakrzewski* abuse [defence skeleton argument §24.28]. Other than to say that the request is "materially misleading in its description of Mr. Assange's conduct" there is *no explanation at all* in the defence submissions as to how the second superseding indictment, or the request accompanying it, could amount to a *Zakrzewksi* abuse. The defence skeleton provides no particulars at all. The potential for any *Zakrzewski* argument can also therefore be readily dismissed.

530. Accordingly, the defendant has failed to show that there is any realistic submission that he would wish to make in relation to the additional conduct, still less one that he has been prevented from making by date of service of the new material. There is no need to excise any of the conduct of the request, even if such a jurisdiction exists.

VIII. CONCLUSIONS

531. For the reasons set out above all the defence submissions must fail.

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Clair Dobbin

Joel Smith

20 November 2020