IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case Nos: AC-2022-LON-001745 & 1476

IN THE MATTER OF APPEALS UNDER S.103 & 108 EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Applicant

v

GOVERNMENT OF THE UNITED STATES OF AMERICA

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

APPLICANT'S SUBMISSIONS REGARDING ASSURANCES

Introduction

1. In a sworn declaration, the prosecutor, Mr Kromberg, has said that '*concerning any First Amendment challenge, the United States could argue that foreign nationals are not entitled to protection under the First Amendment, at least as it concerns national defence information*'. As this Court observed (§178), although there existed no expert evidence on the issue, it was plainly put forward on the basis that Mr Kromberg thought it was a tenable argument under US law.

2. '*If such an argument were to succeed, it would (at least arguably) cause the Applicant prejudice on the grounds of his non-US citizenship (and hence on the grounds of his nationality)*' under s.81(b) of the 2003 Act (judgment §178).

3. '*The concerns that arise under these grounds may be capable of being addressed by assurances (that the Applicant is permitted to rely on the First Amendment, that the Applicant is not prejudiced at trial (including sentence) by reason of his nationality)*' (judgment §237). The Court clearly contemplated an undertaking that amounted to a promise that the Applicant would be '*permitted to rely on the First Amendment'* and would not '*be prejudiced at trial (including sentence) by reason of his nationality'*.

4. The undertaking now given (by the US Embassy) does not begin to address the concerns raised by the Court or provide any reliable promise as to future action. It is that '*ASSANGE will not be prejudiced by reason of his nationality with respect to which defenses he may **seek** to raise at trial and at sentencing. Specifically, if extradited,*

*ASSANGE will have the ability to raise and **seek** to rely upon at trial (which includes any sentencing hearing) the rights and protections given under the First Amendment of the constitution of the United States. A decision as to the applicability of the First Amendment is exclusively within the purview of the US Courts*'.

5. In summary, it is submitted that:

   a. This is not an assurance at all. It assures only that Mr Assange '*may **seek** to'* raise the First Amendment. It does not even assure that Mr Kromberg will not oppose that argument.

   b. Even if it did purport to be an assurance of outcome, which it does not (that the First Amendment could be employed by Mr Assange), it could not be a binding one. Based on the principle of the separation of powers, the US Court can and will apply US law, whatever the Executive may say or do.

   c. Even if it were a binding assurance of outcome (not to apply US case law concerning foreign nationality to Mr Assange's particular case), it would be a species of promise that, for public policy reasons and reasons of principle, this Court should not accept.

6. To assist the Court assess the purported assurance now given, for the purposes of determining arguability at this permission stage, the Applicant has provided expert evidence from Professor Grimm (Professor of Law at Duke University; retired US District Judge) dated 25 April 2024. That evidence shows, *inter alia*, that:

   a. This is an issue that affects all of the Espionage Act charges Mr Assange faces, because all of them are ones to which the First Amendment potentially applies (§3(b)(i)).

   b. There is a line of authority that is supportive of Mr Kromberg's assertion that a foreign national does not possess First Amendment rights, at least in relation to national security cases (§3(b)(i)-(v)). The authorities are cited. These authorities '*could well lead a court to rule in favour of such an argument*' (§3(b)(v)). If the argument were to prevail, then '*Assange will have been treated differently by reason of his nationality*' (§4(v)).

   c. Nothing in the assurance would prevent the US Prosecutor from opposing, based on these authorities, Mr Assange's attempt to rely on the First Amendment (§4).

   d. The decision as to the applicability of the First Amendment to foreign citizens is a matter exclusively for the US Court to decide (§5(b)(i)).

e. As a matter of fundamental US constitutional principle, founded on separation of powers, the US Court may apply US law of its own motion, and cannot be prevented from doing so by the position adopted by the Prosecution (§5(b)(i)-(v)): '*Nothing in the First Assurance forecloses the ability of the U.S. court independently to … determine whether Assange may rely on any constitutional rights*' (§5(b)(i))).

This is not an assurance of outcome at all

7. The US is not required to assure that the Applicant's First Amendment arguments will succeed. However, it is required, pursuant to this Court's judgment, to assure that (like any US citizen), he will be '*permitted to rely on'* the First Amendment, and receive a decision from the US Court on its merits. What needs to be conclusively removed is the risk that he will be prevented from relying on the First Amendment on grounds of nationality.

8. The first statement that '*ASSANGE will not be prejudiced by reason of his nationality with respect to which defenses he may* ***seek*** *to raise at trial and at sentencing*' is not an assurance. It is an assertion (argument) about the consequences which the US Embassy maintains follow from what is promised in the second statement. Put otherwise, the first statement is expressly qualified (hence '*specifically…*') by what follows in the second statement. The Court is respectfully reminded that US assurances are subjected, post-surrender, to principles of strict construction (see Grimm, §6(b)(i)-(ii)). That fact has been recognised by this Court (see ***Assange v USA*** [2022] 4 WLR 11 at §52-54: '*the USA may be expected to apply the strict letter of an assurance which it has given*'). Mr Assange will receive only what has been '*specifically'* assured (in the second statement).

9. The second statement is that *'ASSANGE will have the ability to raise and* ***seek*** *to rely upon at trial (which includes any sentencing hearing) the rights and protections given under the First Amendment of the Constitution of the United States'.* Leaving aside the potential for pre-trial motions being excluded (Grimm §4(b)(ii)), an assurance that Mr Assange may '*raise and seek to'* rely upon the First Amendment is not a promise that he will be permitted to rely upon it. The ability to '***seek*** *to rely upon'* the First Amendment means nothing; any defendant whose counsel can open their mouth can '*raise and seek to rely upon…the First Amendment'.* Again, the Court cannot (and the US Court will not) liberally interpret the '*carefully chosen'* words of the assurance (Grimm §6(b)(i)-(ii)).

10. Absent an assurance as to how the prosecutor will act in response, the ability to raise and rely on the First Amendment means nothing.

It is not binding on the US Court

11. Assume, however, that the assurance *did* promise unambiguously that Mr Assange would be permitted to rely upon the First Amendment, in the same way a US citizen would. It would still not be a '*binding'* assurance (***Othman v UK*** (2012) 55 EHRR 1 at §189).

12. As Professor Grimm attests, based on separation of powers, the US Court can and will apply US law, whatever the Executive may promise or do. The US Attorney has no power to prevent the US Court from applying US law, *sua sponte*. Indeed, the assurance itself explicitly recognises this (the third statement is that '*A decision as to the applicability of the First Amendment is exclusively within the purview of the US Courts*'). So, it remains entirely possible that the US Court charged with Mr Assange's trial will direct itself, on any constitutional motion, that in accordance with US jurisprudence he does not in fact have First Amendment rights because he is a foreign national. There is, after all, a line of authority that supports this position.

Armah

13. Assume, next, that the assurance *was* intended to be binding on the US Court (to disapply US case law concerning the constitutional status of foreigners), it would then be a species of promise that, for public policy reasons and reasons of principle, this Court should not accept.

14. A promise to disapply US law (as opposed to an Executive promise to exercise Executive powers one way or other), made in order to obtain extradition, is improper and should not be accepted. That is because it inevitably involves a violation of the principle of separation of powers and of the rule of law itself.

15. These principles are supported by a series of authorities going back to the House of Lords in ***Armah v Ghana*** [1968] AC 192, holding that it is '*wrong in principle'* to accept assurances which promise to disapply the national law of the requesting state. That follows as a matter of fundamental principle underlined by the reasoning of the majority of the House (per Lord Upjohn at p262D-263F; per Lord Reid at p235G-236B; per Lord Pearce at p256E-G):

    a. Lord Upjohn said: '*…The Divisional Court in this case unanimously held that the existence of certain decrees in Ghana…would make it oppressive and unjust to return the appellant to Ghana….But the Divisional Court accepted the undertakings of the Government of Ghana (1) that if tried and acquitted the appellant would not be taken into protective custody and would be free to leave Ghana; (2) that the appellant would be tried under the Criminal Procedure Code and not under the Corrupt Practices (Prevention) Act, 1964. The bona*

fides of the Government of Ghana and of its Attorney-General are not for one moment in doubt, but I think it is wrong in principle to permit such undertakings to be given or to take them into account. The appellant can surely come to the superior court (where alone, of course, section 10 arises) and say: 'My liberty is at stake, I am a British subject, judge [the] laws of the country to which my return is sought as they stand. It is most unjust to me that to attain their ends the Government should unilaterally be permitted to say that I alone of all the inhabitants am to be freed from those laws which I submit would make it oppressive and unjust to return me.' So I think that the matter should be judged upon the laws as they stand…In addition, it was readily conceded that the word 'undertaking' is a misnomer; it is no more than an expression of intention. Speaking generally, and not with any special reference to the Government of Ghana, there may be a change of government who may not feel bound by the acts of their predecessor. There may be a genuine difference of opinion as to the proper interpretation of the undertakings. Finally, it might in some circumstances be the duty of a government to depart from its expressed intention in the discharge of its duty in the good governance of the country and its inhabitants as a whole. So far as the researches of counsel have gone such undertakings have been offered and accepted only on one occasion before and I hope they will never be accepted again. Had it been necessary I would have held that the Divisional Court erred in principle in accepting any undertakings; that as they would plainly have released the appellant in exercise of the discretion apart from such undertakings an order under section 10 should go…'

b. Lord Reid said: '*…in general it appears to me to be very undesirable that a foreign government should be encouraged to offer not to apply the ordinary law of its country to one of its own subjects if he returned to that country. There may not be the same objection to the foreign government stating that it does not intend to take certain executive action with regard to the accused person and it might be proper to accept an undertaking on the lines of s. 3 (2) of the Extradition Act, 1870. But any undertaking or statement of intention is liable to create misunderstanding and perhaps acute difficulties in the event of a change of circumstances…*'

c. Lord Pearce said: '*…I have some doubt as to how far it is right to accept undertakings from another government in this respect and to regard them as curing the situation under section 10. It may well be that such undertakings might be satisfactory for the purpose of curing executive action and such a temporary upheaval as the need for protective custody; but if it were a matter of the normal state of the criminal administration I would doubt whether it is right for our courts to attempt by undertakings to obtain for a fugitive offender special treatment as a condition for his being sent back for trial…*'

16. These ought to be uncontroversial principles. The Irish Supreme Court has, for example, long adopted them: ***Bourke v Attorney General*** [1972] IR 36, per Ó Dálaigh CJ at p64-66: '*…The bona fides of the Attorney General for England and Wales are not, for one instant, in doubt; but the desirability of accepting any such undertakings in extradition matters has been gravely questioned by the highest English court [in Armah]…*'

17. ***Othman*** (supra) likewise holds that the Court must have regard to '*whether the [assurance] concerns treatment which is legal or illegal in the receiving state*'. It is not proper or lawful for the US to offer and for the UK to accept an assurance that the US would not apply the ordinary law of the requesting state, i.e. in respect of the rights of foreigners under the First Amendment.

18. This Court has repeatedly recognised the ***Armah*** principle. See for example:[1]

    a. ***R v SSHD, ex parte Launder (No. 2)*** [1998] QB 994 at p1006G. The ***Armah*** principle (which was not doubted) did not, on the facts, inhibit reliance on an assurance from the Chief Executive of the Hong Kong SAR that Launder would not be re-surrendered to China; because the decision (discretion) whether or not to entertain future extradition proceedings was an Executive one, and exercising it was not inconsistent with Hong Kong law. Simon Brown LJ stressed that '*there is no question here of the chief executive disapplying provisions of H.K.S.A.R.'s domestic law'.*

    b. ***Lodhi v HMP Brixton*** [2001] EWHC 178 (Admin) at §88. The ***Armah*** principle (which was not doubted) did not, on the facts, inhibit reliance on an assurance from the Dubai prosecutor to recall witnesses at a re-trial; because the decision (discretion) whether or not to do so was a prosecutorial one, and exercising it was not inconsistent with UAE law. Brooke LJ stressed that '*this, in our judgment, is a quite different situation from that considered by the House of Lords in Armah ... where what was being undertaken by the requesting government did not comply with the ordinary law of its country'.*

    c. ***Ahmad and Aswat v USA*** [2006] EWHC 2927 (Admin) at §59-63. The ***Armah*** principle (which was not doubted) did not, on the facts, inhibit reliance on an

---

[1]. True, there are dicta in ***Shankaran v India*** [2014] EWHC 957 (Admin) which regards Lord Upjohn's remarks as *obiter* and unsupported by other members of the Appellate Committee. That dicta is manifestly wrong. Lord Upjohn's remarks were part of the *ratio* for rejecting the assurances in ***Armah*** and both Lords Reid and Pearce concurred in the result and the reasons for it. It is ***Shankaran*** which is *obiter* (the undertakings approved in that case were undertakings offered by an arm of the Executive on a matter within Executive competence: see §55ff.). That is quite different from an *ultra vires* undertaking by the requesting state not to apply the law of the land. And, in any event, ***Shankaran*** offers no *reason* for disapproving the established ***Armah*** principle that a requesting state should not be encouraged to disapply the normal laws to a requested person.

assurance that the US would not apply Military Order No. 1 (which provided for trial by military commission in Guantanamo of someone designated an enemy combatant) to Mr Ahmad's case; because the decision (discretion) whether or not to engage the Military Order No 1 was a Presidential (Executive) one, and exercising it was not inconsistent with US law. Laws LJ stressed that '*there was no question of the relevant undertaking being to do other than apply the ordinary law of the requesting state*'.

d. ***La Torre v Italy*** [2007] EWHC 1370 (Admin) at §30. The ***Armah*** principle (which was referred to as '*important observations'*) did not, on the facts, inhibit reliance on an assurance from the Italian Minister not to apply a particular prison regime to La Torre; because the decision (discretion) whether or not to do so was a Ministerial one, and exercising it was not inconsistent with Italian law. Laws LJ stressed that '*it does not promise to disapply the ordinary law; it concerns discretionary 'executive action''.*

e. ***Dewani v South Africa*** [2014] EWHC 770 (Admin) at §3-4. The ***Armah*** principle (which was not doubted) did not, on the facts, inhibit reliance on an assurance from the South African prosecutor that Dewani would be free to return to the UK in the event that he was found unfit to plead (and that proceedings to determine whether he did the act would not be undertaken); because the decision (discretion) whether or not to do so was a prosecutorial one, and exercising it was not inconsistent with South African law. Lord Thomas CJ stressed that '*the court must consider and analyse the undertaking given. Is it an undertaking to suspend the law of a state, or is it an undertaking that can properly be given by a prosecuting authority or the state in some other capacity as to the action it can take under the existing laws of that foreign state?'.*

19. In the present case, the problem which has caused this Court to seek assurances cannot be solved by the exercise of Executive discretion. There is no escape from the conclusion that US case law appears to provide (and Professor Grimm confirms that it provides) for treatment which operates as a bar to extradition under s.81(b). The US Executive is not empowered to erase that case law from existence.

Conclusion

20. The problems with the assurance in this case which seeks to avoid the consequences of that case law, are multi-fold. It does not in fact rule out the application by the US Court of the foreigner disentitlement bar to the Applicant, and even if it did it would be an undertaking recognised to be offensive to public policy, and reasons of principle, to disapply the '*ordinary law*' in order to obtain extradition. It is submitted that, for the

purposes of permission, there exists at lowest an *arguable* issue surrounding the adequacy of the assurance to meet the risk acknowledged by this Court.

Death penalty

21. To be clear, the same issues do not arise in respect of the death penalty assurance. It, by significant and conspicuous contrast, constitutes **(a)** an unambiguous Executive promise not to charge any capital offence, **(b)** which is a matter within the sole purview of the Executive, and which a US court cannot overrun, and **(c)** the making of which involves no disapplication of US law.

Tuesday, 30 April 2024

Edward Fitzgerald KC

Mark Summers KC

Florence Iveson