IN THE HIGH COURT OF JUSTICE

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

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

BETWEEN:

JULIAN ASSANGE

Applicant

-v-

GOVERNMENT OF THE UNITED STATES OF AMERICA

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

REPLY TO FIRST RESPONDENT'S SUBMISSIONS

** Unless otherwise stated, all references are to the 'Agreed Permission Hearing Bundle for Hearing on 20 May 2024', filed and served on 15 May 2024*
*** References to 'AB' are to the 'Authorities Bundle for Hearing on 20 May 2024'*

1. **Preliminary points**

1.1 The Court has made a finding on the basis of Mr Kromberg's statement 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'* [Tab 1, p51, §176]. The Court's express finding was that '*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)'* [Tab 1, p52, §178].

1.2 The Court therefore found that, absent an adequate assurance, there was an arguable case of a real risk of discrimination on grounds of foreign citizenship contrary Section 81(b). So the real issue is whether an adequate assurance has

been provided to remove the real risk identified by the Court. It is submitted that no adequate assurance has been made:-

(i) Firstly, no express promise has been made that Mr Kromberg will not take the point about foreign citizenship, though his indication that he might take the point was the very reason for the Court's finding at §178. The only undertaking is that the Applicant '*will have the ability to raise and seek to rely upon at trial…the rights and protections given under the First Amendment'* [Tab 4, p74, §1]. This does not, and cannot, debar Mr Kromberg from taking the point that the First Amendment does not apply to foreign citizens.

(ii) Secondly, the US take no issue and certainly have not rebutted the clear evidence from Prof. Grimm that a US court could raise the point of its own initiative and that there is a line of Constitutional law to support the point.

1.3 The US has devoted much of its submissions to suggesting that this Court was wrong to make the finding it did because the protection under Section 81(b) concerns '*nationality and not citizenship'* [tab 8, p103, §10]; because the issue is '*unlikely to arise'* [tab 8, p104, §§11-12]; and because if the Applicant was debarred from relying on the First Amendment, '*his foreign citizenship would be just one factor'* [tab 8, p104, §13]; and finally, '*because of the equal protection clause in the US Constitution'* [tab 8, p105, §14], as to which they proffer no expert evidence at all. In the end, these are all points for a substantive hearing, given that the Court has already ruled that there is an arguable point that there is a real risk of discrimination under Section 81(b) absent an adequate undertaking. In any event, they are not sound points. And the Court's finding that there was an arguable case, absent an adequate undertaking, was correct.

The Evidence of Prof. Grimm

1.4 The US object to the evidence of Prof. Grimm at §5, and then proceed to rely on it at footnote 8, at §13, and at footnote 9 [tab 8, pp102, 104]. Indeed they even assert that Prof. Grimm is correct where Mr Kromberg is wrong on one of the points [tab 8, p104, footnote 9]. The reason for providing the evidence of Prof. Grimm was that this Court had identified the need for expert evidence on US law, and the District Judge had erroneously sought to make her own interpretation of US law. In other words, it became apparent that expert evidence of foreign law was necessary in the light of the Court's finding that there was an arguable case under Section 81(b); and in order to address the significance of the assurance and its adequacy. That was not foreseeable at the time of the extradition hearing.

1.5 It is respectfully submitted that Prof. Grimm's evidence should be admitted. And it makes clear that, contrary to the First Respondent's submissions [tab 8, p101, §4], the First Amendment could be invoked in respect of all the charges of both obtaining and publishing; see Prof Grimm at §3(b)(i):-

'The Superseding Indictment charges seventeen violations of the Espionage Act, each of which pertains to activities that it can be argued are entitled to protection under the First Amendment to the United States Constitution, which has been held to protect newsgathering and publication activities.' [Tab 7, pp91 – 92].

The *Armah* point

1.6 In answer to the *Armah* point, the US has now conceded that no undertaking can be given to disapply US constitutional law [Tab 8, p101, §3]. Moreover, Mr Kromberg's statement, and Prof. Grimm's evidence, makes clear that there is a line of constitutional authority for the proposition that foreign citizens do not have First Amendment rights in relation to national security matters. Given those matters, the real risk remains that the foreign citizen disentitlement bar will be applied. And it is accepted by the US that the assurances cannot be interpreted to disapply US constitutional law. So, given that US constitutional law does permit,

and indeed may impel such discrimination, the real risk of the application of the foreign citizen disentitlement principle remains.

1.7 In what follows, we will deal in turn with these two core issues:-

(i) Firstly, the arguments that there is no arguable case under Section 81(b), despite the High Court's initial finding to the contrary.

(ii) Secondly, such arguments as have been put forward as to the adequacy of the assurance to remove the real risk of discrimination contrary to section 81(b).

2. US Submissions on the absence of a real risk

Submission that the Court was wrong to request assurances because nationality is place of birth, not citizenship [Tab 8, pp 103 – 105, §§10, 13 and 18]

2.1 The first point taken by the US is that the High Court was wrong to equate prejudice on grounds of foreign nationality with discrimination on grounds of foreign citizenship. This is a novel submission, unsupported by any authority, which seeks to go behind this Court's ruling. It was never argued at the hearing or in any pleadings so far. If it has any substance at all, it is a matter for consideration at the full hearing.

2.2 But, in fact, it has no substance. The protection enshrined in section 81(b) replicates a well-established protection from discrimination in refugee and extradition law. As such, it must be given a broad and purposive construction that accords a full measure of protection. To discriminate on grounds that a person is a foreigner, whether on the basis that they are a foreign national or a foreign citizen, is plainly within the scope of the prohibition.[1] '*Prejudice at trial*'

[1] In refugee law, discrimination on grounds of nationality **includes discrimination on grounds of citizenship,** but is wider in ambit. See *UN Refugee Handbook* at §74 – '*the term nationality is not to be understood only as*

must include exclusion on grounds of citizenship from fundamental substantive rights that can be asserted at the trial. On the US argument, trial procedures could discriminate on grounds of citizenship.

2.3 Moreover, the examples in footnote 5 do not support their submission. Example 1 is not about trial rights. Example 2 is about jurisdiction, not procedural rights. Example 3 (citing *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20) is about extension of time at the appellate stage and the need for a discretion to extend time. It concerns the interpretation of the ambit of Article 6(1) itself, and the meaning of the words '*civil rights and obligations'*. Moreover, the asymmetry arising from the extra rights of UK citizens to seek extensions of time has now been removed by statute.

Submission that discrimination is unlikely to arise

2.4 At §11-12, the US repeats matters of which the Court was fully aware when it gave its initial ruling. It is not as if this Court had not read the whole of Mr Kromberg's relevant §71, or that the passage relied on by this Court was taken out of context.

2.5 At §12 the US states that '*there can be no "serious possibility" of prejudice on the basis of nationality when the issue of nationality (or even citizenship) is not dispositive and may, in fact, never factor into a US court's legal analysis'* [Tab 8, p104]. In essence the US seeks to suggest that the issue of nationality may not ultimately be relevant because Mr Assange may be precluded from successfully deploying the First Amendment for other reasons. That is to elide two separate issues – Mr Assange's ability to rely upon the First Amendment at all as a foreign national (a procedural issue), and the ultimate success of any First Amendment argument if he is entitled to rely upon it (a substantive issue). This Court's

citizenship' [AB, tab 27, p920]. Similarly, Hathaway in *The Law of Refugee Status* recognises that discrimination on grounds of nationality includes discrimination on grounds of citizenship. Broadly, the protection from discrimination on grounds of nationality includes protection from discrimination on grounds of status as '*foreigners'* or '*non nationals'* [AB, tab 26, p918].

decision is concerned with the former procedural issue of Mr Assange's access to First Amendment protections.

2.6 Further, at §13, the US states that non-US citizenship '*may just be one factor in denying the applicability of First Amendment rights'* [Tab 8, p104]. But the fact remains, and the US accepts, that non-US citizenship is one of three relevant factors. And it is an important factor in this case. They have not foreclosed that real possibility – which this Court recognised in its initial ruling.

New reliance on the Fourteenth Amendment

2.7 At §14, the First Respondents make an assertion, unsupported by any expert evidence, that the provisions of the equal protection clause would rule out denial of due process rights in the US on the basis of nationality or citizenship [Tab 8, p105]. This point is made for the first time at this stage. Its application to the facts of this case needs careful examination. If it were the knockout point they now assert it to be, then one is entitled to ask why Mr Kromberg made the assertion he did at §71 of his affidavit. Moreover, Prof. Grimm clearly does not consider that the Fourteenth Amendment rules out the argument that Mr Kromberg indicated he might well make.

3. The Assurance

3.1 The substance of the assurance itself is in the words of the second sentence, which qualifies and explains the first. It states that '*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'* [Tab 4, p74, §1].

3.2 Despite the general statements, the US has given no indication as to how the prosecution interprets these words and how they will apply them. There is no indication as to what approach the Assistant US Attorney, Mr Kromberg, will take at trial in response to any motion or argument where the Applicant relies on

the First Amendment. No undertaking has been given that Mr Kromberg will not rely on the foreign citizen disentitlement principle.

3.3 But even if he were to give an unequivocal assurance of the position he would take, it would still be subject to the overriding power of the Court to raise the issue of the foreign citizen disentitlement principle.

3.4 **So, turning to position of the Court,** there is no doubt that the Court remains free to raise and apply the foreign citizen disentitlement principle. As the text of the 'assurance' itself makes clear: '*A decision as to the applicability of the First Amendment is exclusively within the purview of the US courts'* [Tab 8, p74, §1]. The US states that the so-called assurance is adequate because the judges will take '*solemn notice'* of it [Tab 8, p101, 104-105, §§2, 13 and 19]. But the US accepts that the assurance '*cannot bind the court'* (§3). '*Taking solemn notice'* of an assurance that was expressly stated not to bind the courts cannot operate as a guarantee that the court will apply US law in a way that permits the Applicant to rely on the First Amendment, despite his foreign citizenship. This point is made quite clearly by Prof. Grimm. And Prof. Grimm's evidence is not contradicted by any statement from Mr Kromberg himself or anybody else.

Conclusion on this part

3.5 For these reasons, the assurance does not remove the serious possibility that the Applicant will be prejudiced by the application to him of the foreign citizen disentitlement principle.

4. Proposed confinement of permission to Counts 15 – 17

4.1 Prof. Grimm's evidence is quite clear that the First Amendment would apply in the case of a US citizen to all of the counts in the Superseding Indictment involving allegations of obtaining or publishing national security information (see §1.5 above). It is an error to confuse the limits of Article 10 – on which the

High Court has spoken, and the Strasbourg Court must now adjudicate – with the ambit of the First Amendment of the US constitution, on which Prof. Grimm's evidence is clear.

4.2 Therefore, the Court is respectfully invited to grant leave generally and not to confine it to specific counts in the extradition request.

4.3 In any event, even were the Court to accept the First Respondent's position on Article 10, it simply has no application to the Section 81(b) ground. Prof. Grimm's evidence is clear that First Amendment protection could apply to each of the Espionage Act counts on the indictment. The Applicant therefore faces prejudicial treatment on the grounds of nationality in respect of each of those counts.

EDWARD FITZGERALD KC
Doughty Street Chambers

MARK SUMMERS KC
FLORENCE IVESON
Matrix Chambers
15 May 2024