

Crime brief

In the first of a new series focusing on criminal matters in & out of court, **David Walbank QC** tackles one of the most politically charged criminal cases of recent times

IN BRIEF

- ▶ The extradition regime, solemn treaty obligations and safeguards.
- ▶ Assurances and key questions.
- ▶ Leave to appeal refused.

The Lord Chief Justice recently handed down judgment in *Government of the United States of America v Assange* [2021] EWHC 3313 (Admin), [2021] All ER (D) 67 (Dec). Passions run high on both sides of this debate and never the twain shall meet. It relates to the ongoing saga of Julian Assange, the founder of the Wikileaks website, and the indictment laid against him by the US government for obtaining and disclosing defence and national security material. The Divisional Court heard the US's extradition appeal against the decision of a district judge in the Westminster Magistrates' Court to discharge Assange.

The procedural history is tortuous to say the least. As long ago as 2010, the Government of Sweden requested that Assange be extradited for sex crimes. An extradition order was made but Assange appealed all the way up to the Supreme Court which, in May 2012, dismissed his appeal: see *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 4 All ER 1249. In the meantime, though, Assange had jumped bail and gone to ground. In June 2012, he entered the Ecuadorian Embassy and remained holed up there for seven years until April 2019, when he was dragged out of his bolt hole and later convicted of the Bail Act offence and sentenced to 50 weeks' imprisonment. Three of the offences for which he was wanted in Sweden became time-barred and the Swedish prosecutor announced that she was discontinuing the prosecution of the fourth offence. However, by the time Assange had served his time for breaching his bail, the US Government had issued its own extradition request and he therefore remained in custody, pending the resolution of that fresh application. The allegations made against him by the US were summarised in a document which referred

to: 'His complicity in illegal acts to obtain or receive voluminous databases of classified information; his agreement and attempt to obtain classified information through computer hacking; and his publishing of certain classified documents that contained the unredacted 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.'

In January 2021, after an oral hearing lasting several weeks, a district judge decided all but one of the multiplicity of issues raised by the defence in favour of the requesting state, the US, but she found that Assange's mental state was such that it would be oppressive to extradite him because of the harsh conditions in which he was likely to be detained and the risk of him committing suicide. As a result, she ordered that he be discharged. The US then appealed on the grounds, among others, that the judge ought to have notified the requesting state of her provisional view, in order to afford it the opportunity of offering assurances to the court and, moreover, that the requesting state, the US, had since supplied the UK with a package of assurances in response to the judge's specific findings. In particular, there were now undertakings that Assange would not be subject to the highly restrictive regime of so-called 'Special Administrative Measures' and that he would not be incarcerated in a Super Max jail unless his subsequent conduct warranted it. There were further assurances that, if ultimately convicted, he would be transferred to his native Australia to serve out his sentence there. And there was, lastly, a promise that, if he were extradited in custody, he would have access to any clinical and psychological treatments as recommended by a qualified clinician at the prison where he was held.

In handing down the much anticipated judgment of the Divisional Court, Lord Burnett, the Lord Chief Justice, emphasised that in any extradition case, whether at first

instance or on appeal, the court has power to receive and consider assurances and that remains the case however late in the proceedings they are offered. But if they are late, the court will want to know why. Should the court conclude that they have been deliberately held back for tactical reasons or there has been bad faith, the court may well decline to receive them. Equally though, the court had to have one eye on the public interest in extradition. Delay in offering assurances could not be an automatic bar to their acceptance or someone accused or convicted of serious crimes might receive a 'windfall'. The court expressly acknowledged that the whole extradition regime involves the performance of solemn treaty obligations and is hedged about with safeguards. A requesting state should be given the chance to allay any concerns about the conditions in which the fugitive will be held. And here, if the assurances were spurned, there would be nothing to stop the US government issuing a brand new extradition request with appropriate assurances and the whole saga would begin again—subject only to any abuse of process.

Ultimately, the Lord Chief concluded that, if the assurances latterly offered by the US authorities had been before the district judge, she would have answered the key question differently and would have been duty bound to send the case to the home secretary. The appeal was therefore allowed, the order discharging Assange was quashed and the case was remitted to the Westminster Magistrates' Court with a direction that it be sent to the Secretary of State.

The Supreme Court has since refused him leave to appeal and his fate now rests in the hands of the Home Secretary, Priti Patel.

David Walbank QC is a member of Red Lion Chambers and the founder of the updating website www.crimecast.law on which he presents video case reviews of recent judgments. The site currently hosts more than 200 free-to-view videos.