

Extradition and mental health in the spotlight: the case of Julian Assange.

ARNELL, P. and FORRESTER, A.

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Editorial title:

Extradition and mental health in the spotlight - the case of Julian Assange

Authors:

Dr Paul Arnell, Lecturer in Law, Robert Gordon University

Email: p.arnell@rgu.ac.uk

ORCID ID: <https://orcid.org/0000-0001-7874-2272>

Professor Andrew Forrester, Professor of Forensic Psychiatry, Cardiff University

ForresterA1@cardiff.ac.uk

ORCID ID: <https://orcid.org/0000-0003-2510-1249>

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The mental health of persons sought from the United Kingdom by way of extradition rarely makes front page news. Published data and research on the subject is next to non-existent. From reported cases, however, it is clear that since 2004 a considerable number of requested persons have put forward their mental disorders as grounds upon which their forcible transfer to a foreign country for trial or imprisonment should be prevented. These arguments normally fail, and the extradition took place. In some instances, the UK sought assurances about availability of appropriate treatment, detention conditions and travel arrangements from the requesting state prior to rendition. In all but a few exceptional cases, these cases failed to attract the attention of the press, politicians and public at large.

The attempted extradition of Julian Assange, wanted in the USA for alleged offences including obtaining and disclosing national defence information under Title 18 United

States Code section 793, bucks that trend. His case, along with those of Gary McKinnon (Arnell & Reid, 2009) and Lauri Love (Davies, 2018), have received considerable attention. In doing so, focus rightly lands on effect of mental disorders in the extradition process and, importantly, the question of whether the law adequately takes them into account in the context of competing considerations (Arnell, 2019).

Extradition is the legal process whereby accused and convicted persons are transferred between countries. Internationally it is generally governed by a web of bilateral extradition treaties, a well-known example being the UK-US Extradition Treaty 2003. Recently concluded between the UK and the twenty-seven remaining European Union countries – UK-EU 27 – is the Trade and Cooperation Agreement, Part III of which contains rules which largely mirror the European Arrest Warrant, with material exceptions. Within UK law the Extradition Act 2003 is the governing statute.

The Extradition Act 2003 was enacted in the wake of the September 11 terrorist attacks in the USA and the conclusion of the EU's Framework Decision on the European Arrest Warrant 2002. Both affected the nature of the UK's present law on extradition. Simply, there is a presumption that where a request is made to the UK by a country with which it has an applicable international agreement, an extradition will follow. Underpinning the process is the principle of reciprocity. This results in the UK being generally inclined to accede to requests, upon the assumption that in converse circumstances it will be able to gain custody of the individuals it seeks by way of the process.

This is not to suggest that extradition from the UK takes place without due consideration of every case where the requested person does not consent to being transferred. Nor that there are not explicit grounds upon which arguments can be put

forward in attempts to frustrate, or bar, extradition. What is clear, however, is that in the vast majority of cases requests are acted upon and the individual is transferred to the foreign state. Note here, though, that the UK has only entered into extradition agreements with legally kindred and friendly third countries which adhere to the rule of law and contain domestic human rights norms. There are no such treaty arrangements with, for example, Russia, China or North Korea.

The majority of extradition requests the UK received since 2004, and the entry into force of the European Arrest Warrant, have come from its former EU partners. Apart from EU countries, the USA ranks amongst the states making the greatest number of requests to the UK. It is these requests that have given rise to the most controversy, including where requested persons present with mental disorders.

There are three grounds within the Extradition Act 2003 upon which an argument relating to mental health may be made. These are oppression, human rights and forum. Mental health is explicitly referred to in the oppression bar to extradition, jointly with physical health. An extradition will be barred if it is held to be oppressive. It was the oppression bar which stopped Julian Assange's extradition in January this year (USA v Assange, 2021).

The human rights bar has also been held to be applicable where mental health is put forward, with the courts in essence holding that in exceptional cases extradition may be a disproportionate interference with a requested person's right to respect for his private and family life. A newer addition to the law, the forum bar to extradition, may stop an extradition where the connections to the UK of the individual and his alleged crime are such that it is not appropriate to extradite in the circumstances.

Whilst consideration of mental health disorders within extradition hearings is undoubtedly required, criticisms are legitimately levelled at the three over-lapping bars and the resultant body of overly and needlessly complex case law. The law's clarity and effectiveness are impacted. A case may be considered by the courts under one, two or all three grounds. A single bar, devoted to mental health alone and enacted with due consideration of the issues arising, and with the input of mental health professionals and those with experience of the process, is called for.

A second facet of extradition hearings affecting persons with mental disorders requiring consideration are the rules governing evidence. The law and practice in the area can fail to sufficiently and specifically to cater for mental health. The rules governing the admittance of new evidence on appeal are relevant here. This is because when cases where mental health has been put forward are appealed the rules only exceptionally admitting new evidence do not distinguish between mental health and other cases. The former may be subject to changes as part of their natural course, and there may be greater fluctuations in severity than with physical health disorders, for example. The extant evidential rules may not sufficiently take such changes over time into account.

A final aspect of extradition law and practice requiring close examination is the practice surrounding requesting state assurances. The issue of assurances arises where there are concerns over the medical and other treatment and circumstances a requested person will experience upon extradition. Here, a UK court will not-uncommonly seek assurances from authorities in the requesting country that those concerns will be met, be it by the availability of certain drugs, prison or hospital accommodation of a particular nature and so on. Whilst in themselves assurances may adequately address immediate concerns, an issue arising is possible future non-compliance. The lack of a

system for monitoring such assurances is a serious gap. While good faith and reciprocity here probably result in assurances being complied with, there have been reports of this not being the case (Stefanovska, 2017).

On January 4 2021 District Judge Vanessa Baraitser blocked Julian Assange's extradition on the grounds of his mental health, after taking the psychiatric evidence into account. In doing so, she accepted the expert opinions of three psychiatrists and rejected one. Professor Kopelman's opinion, for the defence, that Mr Assange suffers from a recurrent depressive disorder, sometimes accompanied by hallucinations, and often with ruminative ideas, Dr Deeley's opinion, also for the defence, that he suffers from autism spectrum disorder, and Professor Fazel's opinion that he presents a high risk of suicide were all accepted. She rejected Dr Blackwood's view, on behalf of the USA, that he exhibits a "rather self-dramatising and narcissistic aspect" and that his depression was of a "more ordinary" variety, noting the limited nature and relative brevity of his assessment. She held that attempts to prevent Assange's suicide in the USA could fail on account of his determination and intelligence, however other arguments against extradition failed (USA v Assange, 2021).

The USA has appealed that decision. The High Court will decide whether the District Judge was wrong in her decision. All three of the issues discussed above may well be the concern of the High Court and there is, of course, no way to foretell what the result may be. As Assange has been held in Belmarsh prison since being removed from the Ecuadorian Embassy in April 2019, with his bail applications denied, it appears almost certain that he will remain there until either freed (and likely subjected to deportation proceedings) or extradited to stand trial in the USA.

Approximately 1000 persons are extradited from the UK every year. While this number may lessen on account of Brexit, it is clear that hundreds of individuals will be forcibly removed from the UK, both nationals and non-nationals, to stand trial or be imprisoned abroad. The UK has a duty to take due cognisance of the mental health of requested persons in coming to decisions to extradite. Whilst Julian Assange's extradition has been barred on account of his mental health, there is no certainty that that decision will stand. While there is undoubtedly a need for research into the interplay of mental health disorders and extradition (Arnell & Forrester, 2021), this may be a time for root and branch reconsideration of the law and related practice itself. Cooperation between relevant mental health professionals in various countries is one such area that could be enhanced. This could add weight to assurances given by the requesting state and may increase the likelihood that they are adhered to. Related to this, consequences in the event of non-compliance could be agreed between countries, including the potential return of the individual in certain circumstances. As extradition law and practice stand, these important issues are not addressed.

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