

ARNELL, P. 2021. Julian Assange extradition: freedom of British media to expose US state secrets is at stake. [Newspaper article]. *Press gazette* [online], 2 March 2021. Available from: <https://www.pressgazette.co.uk/julian-assange-extradition-appeal/>

Julian Assange extradition: freedom of British media to expose US state secrets is at stake. [Newspaper article].

ARNELL, P.

2021

Julian Assange Extradition

Dr Paul Arnell, Law School, Robert Gordon University, Aberdeen

The extradition of Julian Assange to the United States was blocked on January 4th, yet he remains incarcerated in Belmarsh.

The High Court will now consider the US application for leave to appeal; Assange's freedom depends on the outcome, but also at stake are important principles relating to freedom of expression and the threat of extradition and punishment for journalists or publishers who expose US state secrets.

The decision by District Judge Vanessa Baraitser to block his extradition delighted Assange's supporters, free speech advocates and those seeking to hold the US to account for its nefarious foreign policy adventures – albeit they felt it was the right judgement given for the wrong reasons.

Assange faced a US trial for alleged espionage and conspiracy to commit computer intrusion and, if convicted, the prospect of a very lengthy sentence in the unforgiving US prison system, where solitary confinement is commonplace in national security cases.

The District Judge did not, however, base her decision on an assault on the freedom of expression and journalistic freedom. Nor did an argument that the Trump Administration was motivated by overtly political considerations affect the judgment.

The District Court case turned upon Assange's vulnerable mental health and the likelihood of his detention in a US facility giving rise to a real risk that he might attempt suicide. The judge held that Assange's intelligence was such that he could circumvent any suicide-prevention measures put in place by the US prison authorities. His extradition, therefore, was held to be oppressive on the basis of his mental health and barred.

Relief for Assange and his supporters was short-lived. The prosecution, upon the instruction of the US Department of Justice, immediately intimated its intention to appeal. It has now finalised its application to the High Court. Assange's lawyers are deciding whether to cross-appeal aspects of the decision that went against him so legal proceedings may be far from over.

Decisions on leave to appeal are favourable where the grounds put forward are reasonably arguable. If an appeal does take place, the prosecution must convince the High Court either that the District Judge was wrong or introduce a new issue or evidence which would have led her to make a

different decision. In both cases the arguments will focus upon Assange's mental health and risk of his suicide in the context of the US prison system.

If Assange's legal team cross-appeals, the issues in front of the High Court will be considerably wider. It is here that concerns of free press advocates could be addressed.

One of the arguments rejected at first instance was that based on the freedom of expression. This could be put to the High Court in the hope of a decision barring his extradition on that basis. Such a development would undoubtedly provide some reassurance to journalists and editors on both sides of the Atlantic, and indeed beyond.

Indeed, the Assange litigation could culminate in an extradition precedent offering a degree of protection to journalists and publishers based upon the right to freedom of expression. To date, that right has not found a place in extradition law.

Freedom from torture and inhuman treatment, the right to respect for private and family life and the right to a fair trial alone have been accepted by judges as potentially blocking an extradition.

If that were to happen, courts would most likely be obliged to undertake a proportionality exercise, whereby the interference with the freedom of expression would be weighed against the public interest in extradition. Whilst this would not offer guaranteed protection, it would at least make such an argument tenable.

On the other hand, the court may decide not to consider the freedom of expression as a factor assisting Assange. In that case, the law remains the same. The US rules on espionage and computer intrusion could be similarly applied in the future and there would be no UK extradition precedent to put forward in opposition.

For now, this danger may be more apparent than real; first, the scale of disclosures made by Wikileaks are such that they may not be replicated and secondly, the Biden administration may be reluctant to pursue a journalist or publisher by way of criminal sanctions in future, if only to maintain goodwill amongst the Press.

Nevertheless, journalists and publishers should keep a close eye on the case – whether freedom of expression has a role in extradition law turns on the upcoming High Court decision.

There are three options open to it:

If the appeal is ultimately allowed by the High Court the case would then move to the Secretary of State to consider the final extradition order. Alternatively, it could dismiss the appeal, which, barring a further appeal to the Supreme Court, would result in Assange becoming a free man. A third scenario is that the High Court could direct the District Judge to decide the relevant question again. In that case, there would be a reconsideration of the effect of Assange's mental health, should he be extradited.

Only if Assange cross-appeals, and the argument on the basis of freedom of expression is accepted, will the law come to contain a precedent offering journalists and publishers some possibility of protection in future.

However, the High Court is not the only venue where Assange's fate may be decided. So too is Washington DC.

The election of Joe Biden and his likely Attorney General Merrick Garland could well play a role. Whilst the US Department of Justice stated that it will continue with Assange's extradition, this was prior to the appointment of Garland. He is a known advocate of the First Amendment protecting free speech so there is at least a possibility that he will order the US charges against Assange to be dropped.

Assange's case does not exist in a vacuum. A reboot of the overall US-UK relationship, the refusal to return Anne Sacoolas to the UK and the ongoing case of Mike Lynch, co-founder of Autonomy Corporation, may also affect what happens in Washington.

Whilst the extradition of Assange appears to be reaching its dénouement it is wise to be cautious. The Supreme Court and the European Court of Human Rights could yet have a role to play. There is the possibility that the case could stretch out for some considerable time yet.

In the midst of the legal niceties, press freedom concerns and political machinations it is appropriate to remember that Assange has not been convicted of any crime in the United States. He has spent over 500 days in Belmarsh prison since April 2019. He has served his sentence for breaching his bail conditions.

Pending the conclusion of his case it is not unreasonable to release him on bail, require him to surrender his passport and allow him to live with his partner and their two young children.