

Julian Assange—a contest of jurisdictions

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Corporate Crime analysis: Abigail Bright, barrister at Doughty Street Chambers, and Giovanna Fiorentino, solicitor at Lansbury Worthington Solicitors, consider some of the legal issues surrounding the arrest of Julian Assange and the US extradition request.

What's the story so far?

On 11 April 2019, Julian Assange was arrested by UK police for two reasons:

- first, was a breach of bail, an offence contrary to the [Bail Act 1976 \(BA 1976\)](#), in which he had failed to answer a condition of bail ordered in 2012 that he present himself to a court as required. Rather than answer his conditional bail, he spent 2,487 days in the Ecuadorian embassy
- second, he was arrested pursuant to a provisional extradition request from the US government

Weeks later, Swedish prosecutors announced the re-opening of their investigation into alleged complaints of sexual offences by Assange and their intention to seek extradition of Assange from the UK. That announcement was tied to a particular date in time—after Assange has served a fifty-week sentence of immediate imprisonment for not answering bail. To date, the US, not Sweden, has fixed the Westminster Magistrates' Court—the court of first instance in extradition proceedings—with a request for Assange's extradition. Will Sweden crystallise into a formal legal request its stated intention to do the same? What might then happen?

Assange's lawyers surely have contributed to the law and practice of extradition jurisprudence. The Supreme Court's decision in *Assange v Swedish Prosecution Authority* [\[2012\] UKSC 22](#), [\[2012\] 4 All ER 1249](#) was that a public prosecutor was a judicial authority for the purposes of the European Council Framework [Decision 2002/584/JHA](#) and [section 2\(2\)](#) of the Extradition Act 2003 ([EA 2003](#)). The decision was applied in subsequent cases of interest to extradition and EU law practitioners, including *Openbaar Ministerie v Halil Ibrahim Özçelik* Case [C-453/16](#) and *Criminal Proceedings against Kossowski* Case [C-486/14](#). Recent developments in Assange's case—the seeming contest between Swedish and US prosecutors—doubtlessly will prove just as interesting as a contribution to this specialist area of legal practice.

What is the background to this extradition request?

The factual background to this extradition request can be stated briefly. A provisional request for extradition addressed to UK law enforcement authorities has been issued by a recognised and competent issuing judicial authority, the US government. [EA 2003](#) specifies, for the purpose of an extradition request, that the US is a 'category 2' territory. There is no magic or mystery to what is meant by issue of a 'provisional' request in extradition proceedings. Practically, it simply means that [EA 2003](#) provides that the US has sixty-five days in which to file with the Westminster Magistrates' Court a copy of accurate and adequate information which underpins this request for extradition. The period of sixty-five days runs from the date in April 2019 on which Julian Assange was arrested pursuant to that provisional request. Significantly, there is no requirement in law for the US government to state or to show that a prima facie (viable) case exists and can be served by US prosecutors against Julian Assange. The US government simply must establish that what [EA 2003](#) identifies is 'reasonable suspicion' of commission of a criminal offence apparently does lie against Julian Assange. Invariably, in practice, that is a requirement incumbent on US prosecutors to satisfy what is a low, easily met forensic threshold test. US prosecutors know this English test as 'probable cause'. There is no statutory requirement (or expectation of any other kind) as to the type or volume of service of information which is to be given by the US to UK law enforcement agencies, including the court of first instance. What the information must do is communicate clearly the nature—gist—of an allegation (if accused) or factual basis of a conviction and outstanding balance of a sentence still to be served (if convicted). It is sufficient that the US government outlines its case, no more and no less.

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As commonly happens in practice, the Extradition Unit of the Crown Prosecution Service is acting as the legal representative of the government of the US. The judicial authority of the US itself does not have a right of audience in a UK court (not exercised in this instance) for the purpose of initiating and prosecuting an extradition request issued by it. Julian Assange is a 'person' in extradition proceedings per the language of [EA 2003](#). All extradition proceedings start when information pursuant to an arrest warrant is put before the court of first instance in extradition proceedings, which sits at the Westminster Magistrates' Court. [EA 2003](#) specifies that an 'appropriate judge', a district judge, recognised as a serving member of the extradition judiciary sitting at that court, then makes material decisions in the case and identifies issues at a hearing.

What are the key considerations for the court in this case?

Separately to the court dealing with execution of the warrant for Assange's arrest pursuant to what was readily found to be a breach of [BA 1976](#), at this stage, the principal consideration for the court is sufficiency of served information. The key consideration arising is whether the court is satisfied that the issuing judicial authority has information in support of this request put before it, within sixty days of the date of arrest, which is sufficient to show why US authorities submit that 'reasonable suspicion' exists. In practice, the threshold for showing that this test is satisfied is a low bar to meet. Practitioners will recall that the US government remains a 'designated' category 2 territory for the purpose of [EA 2003](#). The US is a territory which bears no obligation to prove a prima facie case against a defendant—here, Julian Assange. Specifically, that result is by operation in Article 3 of the Extradition Order 2003 (Designation of Part 2 Territories), [SI 2003/3334](#). Initially, the impetus for the proposal, never introduced, to 'de-designate' the US arose from heated controversy regarding the fairness of distinct statutory arrangements in Anglo-US relations per the 2003 UK/US Extradition Treaty. The 2011 Extradition Review, which considered whether that particular statutory schema should remain or change, concluded that no change was needed. In the event—notwithstanding what seemed a swell of audible popular opinion to 'de-designate' the territory of the US for the purpose of [EA 2003](#)—Parliament did not follow through with that law reform.

What is the importance of extradition given the increase of cross jurisdictional crime?

Extradition is a measure of resort in criminal proceedings which can complement cross-border serious crime, including crimes with an international element—such as money laundering and terrorism. The facts of the initial criminal proceedings in Sweden against Assange tend to show how extradition is important in the context of cross jurisdictional crime. In November 2010, Marianne Ny, a Swedish prosecutor, applied for an order for the detention of Julian Assange on suspicion of rape, three cases of sexual molestation and unlawful coercion. A district court in Stockholm acceded to the application for that order so that the court issued a European arrest warrant (EAW), which specified on its face the alleged misconduct.

The Swedish Court of Appeal approved and upheld issue of the EAW as lawful, but reconstituted the EAW so that it specified other sexual offences:

- 'minor rape' (described as rape 'of a lesser degree')
- unlawful coercion, and
- two, rather than three, cases of sexual molestation

Assange had lived in the UK for some weeks at that time. The Westminster Magistrates' Court heard an extradition hearing in Assange's case in February 2011 at which Swedish authorities applied for extradition to Sweden. The issue of the extradition warrant was upheld as lawful. Assange appealed to the Administrative Court, Queen's Bench Division. In November 2011, the court upheld the extradition decision and rejected all four grounds of Assange's appeal. In December 2011, the High Court certified that Assange's case raised a point of law of general public importance to be decided by the Supreme Court, notwithstanding that they refused Assange permission to appeal. Permission to appeal was granted by the Supreme Court itself, but this appeal was dismissed in May 2012. Assange's conditional grant of bail was enlarged. On 19 June 2012, Assange walked in to the Ecuadorian embassy and on 16 August 2012, the Ecuadorian government granted Assange asylum.

The present developments in the Assange case, almost seven years later, show how extradition has prominence in combating cross jurisdictional crime, the occurrence of which is ever increasing.

How do you think this case could impact extradition procedure generally? Is extradition something corporate crime lawyers need to become more familiar with?

The US request pertaining to Assange has real potential to consolidate—if not materially advance—the law and practice of extradition procedure. The US request is before the Westminster Magistrates' Court while the indicated Swedish request is not presently before the court. In the event that a Swedish request does crystallise, a district judge sitting at that court must decide which of the two issuing judicial authorities should take priority—America or Sweden. The judge's decision as to the proper sequence or order of those two applications will determine whether the substantive merits, respectively, of the US request or the substantive merits of a Swedish warrant (if there is to be one) are heard first at that court. This is a matter of judicial decision—the order or priority of what may be competing requests for extradition is not predicted or proscribed by [EA 2003](#). A practitioner's defensible view might be that the court has reason to decide to entertain, first, the merits of a Swedish warrant. Whereas the US request is the first presently before the court—of which the court is now seized—a legitimate practical consideration is that a Swedish warrant is the first in time, which would have decided, had Assange not failed to answer the condition of his bail, that he surrender to lawful custody as required by an English court.

Interviewed by Alex Heshmaty.

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