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Public Interest; Defence or Offence? Assange's trial as a case study for reforms to the Official Secrets Acts

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In a recent article for Law 360, Immigration Partner Matt Ingham provided legal insight into the hotly debated decision of District Judge Baraitser in Julian Assange's extradition case, handed down on 4 January 2021.

Members of journalistic institutions and free-speech advocates have criticised Baraitser's judgement for stifling freedom of information and the press. However, three important factors demonstrate that this is an overstatement:

1. The nature of the charges which created the controversy;

2. Existing UK authorities; and

3. How the introduction of a public interest defence, giving greater deference to Article 10, would have affected the finding.

Test for Extradition:

In deciding whether to allow extradition, one question the court must address, as highlighted at paragraph 71 of the judgment, is whether the offences specified in the extradition request are extradition offences (*section 78(4)(b) of the EA 2003*). Section 137(3)(b) of the EA 2003 defines an extradition offence as "*conduct [which] would constitute an offence under the law of the relevant part of the United Kingdom ... if it occurred in that part of the United Kingdom".* The court has to be satisfied, to the criminal standard, that the conduct *would* constitute an offence under the law of England and Wales (paragraph 76).

The following analysis highlights that, if the government introduced the Law Commission's recommended model for a public interest defence to Official Secrets Act offences, then District Judge Baraitser could not have been satisfied to the criminal standard that Assange's conduct in the Second Strand of the charges against him would constitute a criminal offence in England and Wales. However, this would not have impacted the findings in relation to the Third Strand of charges, as discussed below.

Factors for consideration:

1) The problem with WikiLeaks; mass disclosure

Firstly, much of the journalistic community accept that The Third Strand of charges (Counts 1, 15 – 17)

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would constitute a criminal offence under English law; that is the mass publication of the information, unredacted, on the WikiLeaks website. As Judge Baraitser puts it "*In my judgment, notwithstanding the vital importance in guaranteeing freedom of the press, the provisions of the OSA 1989, where they are used to prosecute the disclosure of the names of informants, are necessary in a democratic society in the interests of national security*." (para 137) In this respect, it is accepted that Assange's mass dissemination of the classified information placed informants at real risk. The charges under the OSA thus satisfy the proportionality test for the purposes of Article 10 ECHR (paragraph 136).

By way of comparison, when Edward Snowden made unauthorised disclosures about the extent of state surveillance to the New York Times and the Guardian Newspaper in 2013, The Guardian, in particular, upheld their "role as careful facilitators, curators and moderators" of the information which was disseminated. As such, over the four years of reporting on the subject, none of the GCHQ documents were published in full, and in total, they published less than one per cent of the material disclosed to them (at 8.114). This lies in stark contrast to "*Mr. Assange's final, indiscriminate disclosure of all of the data, [which] newspapers who had worked with him from both sides of the Atlantic [have] condemned*" (paragraph 132). It was argued that the concept of responsible journalism, a cornerstone of free speech, was fundamentally undermined by such a mass data-dump.

2) The Disclosure by Ms Manning to Assange

Secondly, the real controversy related to the Second Strand of accusations, (paras 89-118). These charges relate to:

- Mr. Assange aiding and abetting Ms. Manning to disclose to him, unlawfully, the diplomatic cables, the Iraq rules of engagement and the detainee assessment briefs; (counts 3-4, 6-8, 18);
- the transmission of the same documents (counts 9-14);
- the overarching conspiracy relating to Mr. Assange unlawfully obtaining unspecified national defence documents (count 1); and
- the overarching allegation that Mr. Assange attempted to obtain national defence information stored on a government SIPRNet computer (count 5).

Judge Baraitser identified the equivalent offences under the OSA 1911, 1920, and 1989 (paragraph 90).

At paragraph 109, Judge Baraitser accepts that the relevant provisions of the OSA must be read and given effect to, in a way which is compatible with the ECHR, namely article 10. However, in this regard, her hands were tied by the House of Lords authority of *Regina v Shayler* [2002] UKHL 11 ("*Shayler*"). In that case, although Lord Bingham recognised the important role of the press in exposing abuses and miscarriages of justice, he ultimately concluded that the restrictions imposed by the OSA were directed to legitimate objectives and came within the qualification specified in Article 10(2). In doing so, he confirmed that neither a public interest defence nor a national interest defence were available to OSA charges.

Judge Baraitser therefore concludes that, "*whatever the beliefs of Ms Manning, the House of Lords in Shayler sets out why a motivation to act in the public interest would not avail her under s1 of the OSA 1989."* The judgment continues *"a Crown servant has other routes available to spark the intended debate, through lawful and authorised disclosure"* (paragraph 117).

She also noted the authority of *Brambilla and others v. Italy*, application 22567/09, 23 June 2016, reiterating that "*a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions"* (paragraph 116).

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This raises two questions: (1) if the "other routes" of disclosure really are adequate; and (2) if a public interest defence would really constitute an exclusive immunity, such as would render OSA provisions ineffective.

3) Law Reform

i) *Protected disclosures*

At paragraph 118, Judge Baraitser comments that "*The object of section 1 of the OSA 1989 is to deter members of the security forces from disclosing secrets and the scheme of the Act vests responsibility for authorising disclosure in trusted people who are in a position to make an objective assessment of the public interest.*" However, the Law Commission doubts the adequacy of the current mechanisms by which officials can raise concerns about alleged impropriety without making an unauthorised disclosure for the purposes of the OSA.

This lack of an external body which is sufficiently equipped to investigate concerns expeditiously and independently undermines the OSA's compliance with Article 10. Without an effective mechanism for receiving and investigating disclosures, such as could be provided by a Statutory Commissioner, the scheme provides insufficient protection for Article 10 rights.

ii) Public Interest Defence

Originally the law commission found that the cumulative weight of the problems with introducing a statutory public interest defence meant that the advantages of such a defence were outweighed by the disadvantages. The key problems identified were:

(1) the potential to undermine the relationship of trust between ministers and civil servants;

(2) the potential risk to others and to national security; and

(3) the inherently uncertain nature of the concept of public interest, which has the potential to impact on the criminal justice system as a whole, including by encouraging disclosures that are wrongly believed to be in the public interest

However, the feedback received in the most recent public consultation forced the Law Commission to reconsider the matter and informed their final view that, when combined with their detailed assessment of Article 10 ECHR, a public interest defence should be introduced.

In its review, published in September 2020, the Law Commission considered three models for the introduction of a public interest defence to OSA offences.

1. A subject matter approach, which would define public interest by reference to a list of factors either defining what can, or what cannot be considered in the national interest;

2. A twofold approach addressing both the subject matter disclosed and manner of disclosure;

3. A defence exclusively for journalists, taking section 170(3) of the Data Protection Act 2018 as an example.

The Commission concludes by recommending that "*A person should not be guilty of an offence under the Official Secrets Act 1989 if that person proves, on the balance of probabilities, that:*

(a) it was in the public interest for the information disclosed to be known by the recipient; and

(b) the manner of the disclosure was in the public interest."

The two stages of this defence, in part account for the fact that *"it is perfectly conceivable that a disclosure that was ostensibly in the public interest was disclosed in a more damaging way than was reasonably required"*

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(11.80 p261). Whilst this concern would arise in relation to the WikiLeaks disclosure discussed above, meaning that limb (b) of the defence could not be satisfied, it is arguable that it would not in relation to the Second strand of offence.

The availably of the defence could thus have appeased critics, as the disclosures made by Ms. Manning to Mr. Assange would not in themselves constitute a criminal offence. Indeed, Judge Baraitser accepts that "*had Mr. Assange decided not to assist Ms. Manning to take the information in the various ways described above, and merely received it from her, then the Article 10 considerations would be different*". Implicit in this statement is the assumption that it was in the public interest for the information to be disclosed to Mr Assange, which would satisfy limb (a) of the proposed defence.

Conclusion:

Even without the introduction of a public interest defence, the Law Commission has highlighted the " *real possibility that Shayler would be decided differently today (at 9.6 p191).* As Judge Baraitser's decision was taken in the magistrate's court, even the defence accepted that she was bound to follow *Shayler* (whether or not it was good law). However, as the case is appealed, the higher courts may take the opportunity to reassess *Shayler's* remit. It is worth remembering that this is an extradition case, which deals in the hypothetical scenario of the charges being brought in the UK on a summary basis. As such, Assange's case is unfortunately not the test case for lasting reform to the OSA. It does, however, platform the need for legislative change.

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