IN THE WESTMINSTER MAGISTRATES' COURT

AN APPLICATION BY JULIAN ASSANGE

RULING OF THE SENIOR DISTRICT JUDGE (THE CHIEF MAGISTRATE)

EMMA ARBUTHNOT

RULING NO. 2

13TH FEBRUARY 2018

Introduction

1. On 6th February 2018 I gave a ruling that the arrest warrant issued under section 7 of the Bail Act 1976 (**"**the Act**"**) was valid even though the underlying extradition proceedings had been discharged and no section 6 Bail Act prosecution for breach of bail had been initiated. By agreement it was decided that the public interest arguments would be considered at a later stage.

Issue

2. This application is made by Mark Summers QC instructed by Birnberg Pierce that I consider whether it is in the public interest that proceedings against Julian Assange should be initiated under section 6 of the Act.

3. He contends that the court should now find that any proceedings for failing to surrender are disproportionate and not in the public interest and that in the circumstances the section 7 Bail Act warrant should be withdrawn.

Hearing on 6th February 2018 - preliminary issues

4. The first question raised by Mr Summers was whether in principle I could hear argument in relation to proportionality and public interest in the absence of Mr Assange. Mr Watkins for the extradition unit of the Crown Prosecution Service argued I should not. There were no authorities directly on the point and nothing in the Criminal Procedure Rules or in Practice Directions which give guidance either way. I decided I should consider the arguments relied upon by Mr Assange at this stage. I warned Mr Summers that I might decide that the best time to consider whether or not a section 6 charge should be put to Mr Assange would be when he attended court.

5. Mr Watkins had attended to make observations on behalf of the extradition unit of the Crown Prosecution Service. Mr Summers argued that Mr Watkins' role had come to an end and that I should not hear submissions from him as he was not instructed by the criminal unit of the Crown Prosecution Service. I agreed with Mr Summers that the extradition unit of the Crown Prosecution Service had no role to play at this stage of the proceedings although I did ask Mr Watkins to confirm various details relied on by Mr Summers.

Documentation

6. I was assisted by a second bundle of documents and a further argument both provided by Mr Summers on behalf of Mr Assange. Mr Watkins provided me with the Swedish Public Prosecutor's announcement of 19th May 2017 in which she said she was discontinuing the prosecution against Mr Assange. I was also given the Swedish Court of Appeal judgment of September 2016. In the light of Mr Summers' reliance on the observations of the UN Working Group on Arbitrary Detention, I obtained a copy of that group's opinion and the original court file which had a record of the submissions and decisions made when Mr Assange appeared in court in December 2010.

Email correspondence

7. Between the hearing on 6th February and the date of the reserved ruling there was email correspondence between Mr Watkins, Mr Summers and myself about whether the Crown Prosecution Service was able to say whether they would invite the court to consider section 6 proceedings if the defendant had been arrested and brought to court and the court had decided not to initiate proceedings of its own volition. The answer was yes, depending on the circumstances on the day.

Background

8. The background to this application is set out in the ruling I gave on 6th February 2017.

Submissions - summary

9. Mark Summers QC contended that that I should consider the public interest now rather than when Mr Assange is arrested. In summary he relied on five points:

10. The first was that Mr Assange had reasonable grounds for taking the course he did because he feared being sent to the United States. The second was that the UN Human Rights Council Working Group on Arbitrary Detention ruled that Mr Assange's situation in the Ecuadorian Embassy was disproportionate and unreasonable. Thirdly, at all stages Mr Assange had been willing to be interviewed by the Swedish prosecutor and if this had happened this would have brought the proceedings to an end at a very early stage. Fourthly, the last five and a half years might be thought adequate if not severe punishment for the actions which he took. Fifthly, I was reminded that the law had changed since Mr Assange's request and he would no longer be extradited for an investigation.

11. I am grateful to Mr Summers for the usual clarity of his written and oral submissions.

Decision

12. My approach to this argument has been to consider the factors for and against pursuing the section 6 proceedings. It seems to the court that as part of the weighing up of the proportionality of the proceedings I have to have regard to the seriousness of the failure to surrender, the level of culpability as I find it at this stage of the proceedings to be and the harm caused including the impact on the community. If the court considers the factors against the proceedings outweigh the factors in favour then

one outcome might be the withdrawal of the section 7 warrant for Mr Assange's arrest. I consider Mr Summers' five points below.

The first point

13. Mr Summers argued that Mr Assange's failure to surrender was justified. He said he was not seeking to downplay the effect on justice but Mr Assange's case was exceptional. At the time, Chelsea Manning had been arrested and was in solitary confinement and Mr Assange feared being rendered to the United States. The United States had opened an investigation into him and some officials were calling for the death penalty. This might amount to a reasonable excuse (although he accepted that that might be for another day). These considerations which were extraordinary should play into the interests of justice test. Also Ecuador, a friendly foreign State, had considered Mr Assange's fears and declared them to be well founded and that the risks to him were and remain real.

14. I accept that Mr Assange had expressed fears of being returned to the United States from a very early stage in the Swedish extradition proceedings but, absent any evidence from Mr Assange on oath, I do not find that Mr Assange's fears were reasonable. I do not accept that Sweden would have rendered Mr Assange to the United States. If that had happened there would have been a diplomatic crisis between the United Kingdom, Sweden and the United States which would have affected international relationships and extradition proceedings between the states.

15. Rather than rendering Mr Assange to the United States, if the US had initiated a request to extradite Mr Assange from Sweden, Sweden would have contacted this court and the judiciary here would have had to consider the request. Mr Assange would then have been able to raise any bars to extradition including fair trial and conditions of detention.

16. The position now is that the Swedish proceedings are at an end. If Mr Assange surrenders to the section 7 warrant, this court would consider whether a prosecution for failing to surrender should be launched. The Crown Prosecution Service which has a right to invite the court to consider proceedings could do so. If the United States initiates extradition proceedings, Mr Assange would have the ability to raise any bars to the extradition and challenge the proceedings just as he did with the Swedish proceedings.

The second point

17. Mr Summers pointed out that the United Nations' Human Rights Council Working Group on Arbitrary Detention had ruled in an Opinion in December 2015 that Mr Assange had in effect been forced to choose between two impossible situations. The parties making submissions to the Working Group were a "source" (on behalf of Mr Assange), Sweden and the United Kingdom.

18. The "source" claimed that Mr Assange was being subject to arbitrary detention and this arises "where a state forces an individual to 'choose' between confinement and risking persecution, confinement and the ability to apply for asylum".

19. The Working Group considered that various articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights had been breached and that Mr Assange had not been guaranteed due process or a fair trial during the period from detention "in isolation" in Wandsworth Prison, "the 550 days under house arrest, and the continuation of the deprivation of liberty in the Embassy".

20. The Group's conclusion is at paragraph 99 headed Disposition. The deprivation of liberty during the three periods above is described as arbitrary. The Working Group asked Sweden and the Government of the United Kingdom to assess Mr Assange's situation to "ensure his safety and physical integrity, to facilitate the exercise of his right to freedom of movement in an expedient manner, and to ensure the full enjoyment of his rights guaranteed by the international norms of detention".

21. I have read the Opinion. The group appears to have based its conclusions on some misunderstandings of what occurred after Mr Assange's arrest.

22. In trying to work out what weight I should give to the views of the Working Group, I have had to consider the beginning of the extradition process conducted at the City of Westminster Magistrates' Court in relation to Mr Assange.

23. The "source" told the Working Group that Mr Assange was detained for (a.) ten days in isolation in Wandsworth Prison from 7th December 2010 to 16th December 2010, (b.) for 550 days under house arrest and (c.) thereafter in the Ecuadorian Embassy.

24. In relation to Wandsworth Prison, paragraph 86 makes the point that there is arbitrariness in this deprivation of liberty, because "the individual has been left outside the cloak of legal protection, including the access to legal assistance". The implication is that Mr Assange was detained in isolation in Wandsworth Prison without recourse to a lawyer.

25. In paragraph 89 of the Working Group's opinion it says that it considers that Mr Assange has not been guaranteed the international norms of due process and the guarantees of fair trial during these three different moments ((a.) (b.) and (c.) above).

26. The Working Group found that this "initial deprivation of liberty then continued in the form of house arrest for some 550 days". The Working Group described his living conditions as "harsh restrictions, including monitoring using an electric tag, an obligation to report to the police every day, and a bar on being outside of his place of residence at night".

27. The Working Group goes on to say that it "has no choice but to query what has prohibited the unfolding of judicial management of any kind in a reasonable manner from occurring for such an extended period of time". It is not clear whether the Working Group understood there to be no judicial management exercised or whether it believed that the judicial management which occurred was not reasonable.

28. These references by the Working Group to the beginning of the extradition proceedings have led this court to check the original court file.

29. The court file notes that Mr Assange was arrested on 7th December 2010 and brought to the court the same day; he was represented by a barrister, John Jones, later QC, a

leading specialist in extradition before his untimely death in 2016. On 7th December 2010 Mr John Jones suggested (on instructions from Mr Assange and in his presence) a number of bail conditions including a condition of residence, a curfew and reporting to a police station (quite apart from the securities and sureties). On 7th December 2010 bail was refused and Mr Assange was remanded in custody.

30. Mr Assange appeared one week later on 14th December 2010. This time he was represented by Geoffrey Robertson QC. This specialist in human rights with a lifetime of experience in the criminal courts suggested the same bail conditions as Mr Jones had offered the week before. Mr Robertson put forward the conditions of residence, curfew and reporting (and various others). The judge then granted Mr Assange bail with those conditions.

31. The district judge's decision was appealed to the High Court by the Crown Prosecution Service and on 16th December 2010 the High Court added a £200K security to the conditions but confirmed the other conditions put forward by Mr Jones and Mr Robertson. Mr Assange was released from Wandsworth Prison on conditional bail the same day.

32. It was said by the "source" to the Working Group that Mr Assange was held in isolation in Wandsworth Prison. I have not thought it appropriate to contact the prison to find out whether he was held apart from the rest of the prison population; what I can say is that the Working Group was quite wrong when it implied that Mr Assange had been left outside the cloak of legal protection. Quite the opposite, he was represented at the first and second hearings, by leading counsel at the second and the bail package put together by his defence team led to his release on conditional bail. At no stage do I understand that that bail package was challenged in court. There were minor variations on certain dates to accommodate hearings in London and changes to Mr Assange's address but no changes to the residence, curfew or reporting.

33. As I hope is clear from the above, the "house arrest" and "harsh restrictions" referred to by the Working Group which went on for 550 days were proposed by Mr Assange himself. Mr Assange was staying in a country house, he had to be indoors at night and had to attend the police station to sign on daily. I do not find those restrictions harsh and there was certainly no such suggestion during the currency of the extradition proceedings. The court (rightly as it turned out) had a fear Mr Assange would not surrender himself to the court and to ensure his attendance the conditions suggested by his lawyers were put in place. If the court had not been able to grant him conditional bail, he would have been remanded in custody.

34. There was judicial management during this period of the proceedings and such management was reasonable. Mr Assange could appeal at any point or apply to vary the bail and it would appear from time to time that it was varied.

35. The Working Group considered Mr Assange's stay in the Embassy as a "prolongation of the already continued deprivation of liberty that had been conducted in breach of the principles of reasonableness, necessity and proportionality" (paragraph 90). I do not consider the 550 days on conditional bail to be a period of deprivation of liberty

but a restriction to Mr Assange's freedom. I consider the same in relation to his decision to live in the Ecuadorian Embassy.

36. It is true that he has restricted freedom in the Ecuadorian Embassy, but there is a distinction between being held in Wandsworth Prison and living in the Embassy. Firstly, he can leave the embassy whenever he wishes; secondly, he is free to receive, it would seem, an unlimited number of visitors and those visits are not supervised; thirdly, he can choose the food he eats, the time he sleeps and exercises. He can sit on the balcony (I accept probably observed by the police and his supporters) to take the air. He is not locked in at night. Importantly for a man who spends a great deal of time on his computer, he is free to use multi-media, whether his computer or a mobile telephone, in a way that prisoners are not allowed to do. I suspect if one were to ask one of the men incarcerated in Wandsworth Prison whether conditions in the Ecuadorian Embassy were akin to a remand in custody, the prisoner would dispute the Working Group's assertion.

37. My reading of the Working Group's opinion led me to look at the dissenting opinion of one of the members of the Working Group. This member of the group had extensive criminal law experience at all levels of court. He said of Mr Assange's situation that it was self-confinement and 550 days of restriction of liberty rather than deprivation of liberty and was not within the mandate of the Group.

38. Finally, the Working Group defines arbitrary; it explains that the detention can be authorised by domestic law and still be arbitrary. The definition includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

39. I do not find that Mr Assange's stay in the Embassy is inappropriate, unjust, unpredictable, unreasonable, unnecessary or disproportionate.

40. For reasons which must be clear I give little weight to the views of the Working Group.

The third point

41. Mr Summers said that ordinarily the effect of absconding is to interfere with the criminal process. This case was far from that paradigm. Mr Assange had sought to engage with the process and asked to be interviewed. There was delay between 2012 and 2016 in which nothing happened. Delay was a justified concern of the Working Group. The interview with Mr Assange took place and then the investigation came to a sharp end. This is a significant factor in the interests of justice assessment of the effects of his non-appearance. Mr Assange was not a defendant waiting out the investigative process.

42. Mr Assange's offer to make himself available to be interviewed by the Swedish prosecutor from an early stage is confirmed by his Swedish lawyer, Mr Samuelson (tab 3 of the latest bundle). The lawyer explained that from the earliest stage the prosecution were told that Mr Assange was willing to engage with the investigation by being interviewed. As soon as Mr Assange was interviewed the Swedish prosecutor dropped the case. Mr Samuelson spoke about seeing but not being able to

copy certain texts which he said undermined the case against Mr Assange. It was Mr Samuelson's view that the prosecutor's refusal to interview him earlier or give them copies of the texts disadvantaged Mr Assange.

43. Mr Summers relied on a chronology at tab 6 and at tabs 4 and 5 copies of emails in which a Crown Prosecution Service lawyer gives reasoned advice to the Swedish prosecutor in January 2011 that she should not seek to interview Mr Assange in the United Kingdom. Mr Summers also relies on an exchange of emails in October 2013 when the Swedish prosecutor was considering withdrawing the EAW; the Crown Prosecution Service's response was to send the link to Sweden about developments in the United States and ask whether that affected their views.

44. At Mr Summers' request I have not heard from the Crown Prosecution Service and I cannot determine from the extracts of correspondence whether the lawyer in the extradition unit acted inappropriately. It is too speculative to wonder what would have happened to the Swedish case had Mr Assange been interviewed earlier.

45. Mr Assange's failure to return has already led to three of the accusations becoming time barred in August 2015. The fourth accusation of rape ("lesser degree" as it was termed by the Swedish authorities) would have become time barred in 2020 had the request not been withdrawn.

46. The Swedish prosecutor in her statement of 19th May 2017 explains that in the circumstances executing the decision to extradite Mr Assange to Sweden is not expected to be possible in the foreseeable future. She points out too that the proportionality of the Swedish decision to arrest him has been repeatedly examined by the Swedish courts.

47. In 2015 the Supreme Court in Sweden considered the public interest in the investigation as well as the risk that Mr Assange would evade legal proceedings against him. In 2015 the court decided that the continued arrest warrant was proportionate despite the amount of time passed.

48. Ms Ny explains that on 14th to 15th November 2016 Mr Assange was interviewed by two Ecuadorian prosecutors. The Swedes received the translation of the interview in March 2017. Further investigative measures were taken and it was then not possible to take any steps which would move the investigation forward. She said on 19th May 2017 that it had become less proportionate to maintain the arrest of Mr Assange in his absence. She ends by saying that the continuation of the legal proceedings would require Mr Assange's personal appearance in court and there was no reason to continue with the investigation.

49. Mr Assange relies upon the offers he made to be interviewed by the Swedish authorities in the United Kingdom. I note that the Crown Prosecution Service advised the Swedish authorities that there were downsides to this approach. I noted from the Swedish Court of Appeal judgment in September 2016 that the Ecuadorian Embassy had refused to allow an interview between Mr Assange and the prosecutor to take place.

50. A request for mutual legal assistance was sent by Sweden to the United Kingdom and Ecuador in Spring 2015. Whilst the United Kingdom accepted the request, Ecuador did not. The Swedish government then took a separate initiative which resulted in an agreement on mutual legal assistance in criminal matters between Sweden and Ecuador in late summer 2015. The agreement came into force in December 2015, but the request then made by Sweden for legal assistance was refused by Ecuador on technical grounds. A new request (the third) was sent and accepted on 16th March 2016. As part of the agreement Mr Assange was not to be interviewed by a Swedish prosecutor but by an Ecuadorian one and then the questions had to be submitted to Mr Assange in advance.

51. Mr Assange's complaints that the investigation was not being proceeded with in a timely manner have been considered by the Swedish courts on a number of occasions. Mr Assange was able to put his views to those courts and was represented at those hearings. The appeal courts ruled against him. The investigator has made her decision.

52. Mr Summers argues that the failing to surrender has had no effect on the proceedings and has not brought them to a grinding halt. I do not agree. If Mr Assange had gone back to Sweden when he should have done after he had exhausted the appeal processes in this country, the Swedish prosecutor would have questioned him, then either prosecuted him five years ago or discontinued the proceedings. The complainants would have had their complaints resolved one way or another. Mr Assange would have had the accusations resolved one way or another. The interview on his own terms does not comply with the court's order that he be extradited to Sweden.

The fourth point

53. Mr Summers relies on what he says is the punishment that Mr Assange has undergone. There is evidence of the medical effect of him spending four and a half years in a small room. He has respiratory infections. Mr Summers says he has no sunlight. He cannot leave the flat to have dental treatment or have an MRI scan on his frozen shoulder. He is a resilient character but is suffering from significant depression. For the first five years he was avoiding the extradition process but for the last six months his incarceration is referable to his fears concerning exposure to the actions of the United States if detained on this court's arrest warrant. Even were he to be committed to the Crown Court, Mr Summers argues, the maximum sentence for failing to surrender would be 12 months' imprisonment. He has served this sentence, forfeited his own money and the money of his sureties. There is no residual public interest in further punishment for failure to attend. It is disproportionate. The issue is whether he has been punished enough for what he has done, whether it can be said that it is proportionate and in the public interest to initiate the process.

54. I have read the medical reports. Mr Assange is fortunately in relatively good physical health. He has a serious tooth problem and is in need of dental treatment and needs an MRI scan on a shoulder which has been described as frozen. I accept he has depression and suffers respiratory infections. Mr Sommers contends he has been

punished enough. I do not accept there is no sunlight; there are a number of photographs of him on a balcony connected to the premises he inhabits. Mr Assange's health problems could be much worse.

The fifth point

55. Finally, Mr Summers points out that the law has changed since the Supreme Court decision and Mr Assange would now not be returned to Sweden because of section 12A of the Extradition Act 2003. This section does not allow the return of an individual if there are reasonable grounds to believe that the requesting State has made no decision to charge or try and the individual's absence from the requesting State is not the sole reason for that failure. Having looked at the prosecutor's record of her decision dated 19th May 2017, Mr Summers is arguably wrong. In the last paragraph of the decision Ms Ny states: "…In view of this, and that to continue with legal proceedings would require JA's personal appearance in court, there is no longer any reason to continue with the investigation." On the face of it, the reason for stopping the investigation is Mr Assange's absence from the court proceedings in Sweden and on that basis extradition may not be barred were the Swedish request still in place.

CONCLUSION

56. In December 2010 for seven days, Mr Assange was held in Wandsworth Prison whilst the bail package he suggested was being put in place. Whilst he was held in prison he had three separate appearances in court, two at the then City of Westminster Magistrates' Court and one at the High Court. He was then granted bail subject to the conditions he had suggested. He was subject to a curfew, had to live in a country house and had to attend the local police station daily. Without the conditional bail given to him he would have been held in custody and extradited at the end of the appeal process granted to him. Those restrictions on his freedom were according to law and proportionate. They cannot be criticised.

57. Mr Summers says Mr Assange fears being rendered to the United States by Sweden. There is no evidence that that was going to happen. He would not have been rendered by this country to the United States nor by Sweden. On occasions Mr Assange says he fears being extradited to the United States. On an extradition request from the United States in this jurisdiction he would be able to argue extraneous considerations, fair trial and conditions of detention in the United States prison system. The courts would consider, with the assistance of Mr Assange's lawyers and expert witnesses, whether he should be extradited. There would then be the appeal process which would consider whether the first court got it wrong, whatever the decision either way.

58. I have found above that Mr Assange's failure to surrender has impeded the course of justice and has led finally to the case being dropped as it cannot be continued unless he returned to Sweden. I find Mr Assange's failure is a determined attempt to avoid the order of the court, an order which was considered by the Supreme Court in this jurisdiction.

59. When considering the public interest I have regard to the consequences of his failure to appear, one of which is the drain on resources that policing Mr Assange's choice has caused. I have regard too to the losses incurred by his sureties. I must look at the impact on public confidence in the criminal justice system if Mr Assange is allowed to avoid a warrant for his arrest by staying out of reach of the police for years in conditions which are nothing like a prison. The failure to surrender was deliberate and occurred after the defendant had been able to challenge the original order all the way to the Supreme Court.

60. The impression I have, and this may well be dispelled if and when Mr Assange finally appears in court, is that he is a man who wants to impose his terms on the course of justice, whether the course of justice is in this jurisdiction or in Sweden. He appears to consider himself above the normal rules of law and wants justice only if it goes in his favour. As long as the court process is going his way, he is willing to be bailed conditionally but as soon as the Supreme Court rules against him, he no longer wants to participate on the court's terms but on his terms.

61. I have had to consider whether it is proportionate not to withdraw the warrant for his arrest. On the one hand he is a man who has failed to attend court and has thwarted the course of justice but on the other he has been unable to leave a small flat for a number of years and is suffering physically and mentally as a result.

62. Having weighed up the factors for and against and considered Mr Summers' arguments I find arrest is a proportionate response even though Mr Assange has restricted his own freedom for a number of years. Defendants on bail up and down the country, and requested persons facing extradition, come to court to face the consequences of their own choices. He should have the courage to do so too.

63. It is certainly not against the public interest to proceed. Whether section 6 proceedings are initiated will depend on Mr Assange's circumstances (such as health) at the time he is produced to the court. If section 6 proceedings are launched, Mr Assange can then plead guilty or put forward a reasonable cause for his non-attendance and the court will then adjudicate. If found guilty the court will have the sentencing options available to it including that of committal to the Crown Court if the court finds its sentencing options to be too limited.

Senior District Judge (Chief Magistrate) Emma Arbuthnot
13th February 2018