IN THE HIGH COURT OF JUSTICE **CO/150/2021**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPEAL UNDER SECTION 105 OF THE EXTRADITION ACT 2003

THE UNITED STATES OF AMERICA

Appellant

-v-

JULIAN ASSANGE

Respondent

SKELETON ARGUMENT OF THE APPELLANT

Date of hearing: 27th October 2021
Time estimate: 2 days
Essential reading: *see separate sheet*

*Note that reference to the appeal bundles are in square brackets and are to [**Bundle letter /tab number ("T")/page number ("p")**]*

Contents

I. INTRODUCTION

1. This is an appeal from the decision of DJ Baraitser ("DJ"), of 4 January 2021, to discharge the Respondent under section 91 of the Extradition Act 2003 ("the relevant decision"). The 'relevant question' before her under that section was whether the "*mental condition of the person [The Respondent]is such that it would be unjust or oppressive to extradite him"*.

2. Leave has been granted on all grounds set out below. Grounds 1 and 2 raise issues of law whilst Grounds 3 and 4 (which concern the District Judge's assessment of evidence) raise issues of mixed law and fact (expressly provided for pursuant to section 105(4)(a)).

3. The Appellant submits that the appeal should be granted by this court under either or both the conditions set out in sections 106 (4) and 106 (5) of the 2003 Act. The former provision applies when the District Judge ought to have decided the relevant question differently, and the latter where there is a new issue or evidence not raised at the extradition hearing and that issue or evidence would have resulted in her deciding the relevant question differently.

4. Unusually, the District Judge did not receive oral closing submissions. At the close of the evidence the court ordered that only written closing submissions were to be made by both parties. Whilst no complaint is made of this procedure, the absence of oral submissions and discussions in court may help explain why the District Judge fell into error (i) in applying the correct test;(ii) in her approach to the evidence, and (iii) why she did not notify the Appellant of any provisional view she had taken about the Respondent's mental health or his conditions of detention.

5. The grounds put forward under section 106(4) may be summarised as follows:

    (1) The District Judge made errors of law in her application of the test under section 91 of the 2003 Act. Had she applied the test correctly she would not have discharged Mr Assange;

    (2) The District Judge, having decided that the threshold for discharge under section 91 was met, ought to have notified the requesting state of her provisional view, so as to afford it the opportunity of offering assurances to the Court;

    (3) The District Judge having concluded that the principal psychiatric expert called on behalf of the defence (Professor Kopelman) had misled her, on a material issue, ought to have ruled that his evidence was incapable of being relied upon (or that little weight should be attached to it) or that his lack of independence rendered his

evidence inadmissible. The District Judge failed to interrogate or adequately assess the reasons for Professor Kopelman misleading her (seemingly concluding that it was sufficient that he had misled her for '*human'* reasons) or to adequately assess how his willingness to mislead her impacted upon the overall reliability of his evidence (*a fortiori* when two, additional and wholly independent, experts were of a different opinion). Had she not admitted that evidence or attributed appropriate weight to it, the District Judge would not have discharged Mr Assange pursuant to section 91; and

(4) The District Judge erred in her overall assessment of the evidence going to the risk of suicide (and, in particular, in her predictive assessment of a future, long term risk which was based upon a number of contingencies which might or might not eventuate).

6. The ground put forward under section 106(5) is:

(1) The United States has provided the United Kingdom with a package of assurances which are responsive to the District Judge's specific findings in this case. In particular, the United States has provided assurances that Mr Assange will not be subject to "Special Administrative Measures" ("SAMs") or imprisoned at ADX Florence prison ("ADX") (unless he were to do something subsequent to the offering of these assurances that meets the tests for the imposition of SAMs or designation to ADX). The United States has also provided an assurance that the United States will consent to Mr Assange being transferred to Australia to serve any custodial sentence imposed on him.

II. SUBMISSIONS

A. Section 106(5) of the Act

1. *The Assurances*

7. It is convenient to deal with the assurances which have now been given by the United States of America. These assurances are offered despite the Appellant's primary position that the Judge erred in her assessment of the Respondent's mental health and that the European Court of Human Rights has already concluded (in a series of United Kingdom extradition cases) that the imposition of SAMs pre- trial in the United States does not even raise an admissible

issue under Article 3 of the Convention (including as regards detainees with mental ill health)[1] and rejected that detention in ADX (including the detention of those with mental illness) would render extradition incompatible with Article 3. [2]

8. It is submitted these assurances are dispositive of the appeal (although given the significance of the issues raised in this appeal as to the correct approach to be taken to mental health, the Appellant invites the Court to determine the Appellant's primary point that the District Judge was wrong in her approach to section 91). The assurances are:

    (1) The United States will not impose Special Administrative Measures (SAMs) on Mr. Assange, pre-trial or post-conviction. This undertaking is subject to the condition that the United States retains the power to impose SAMs on Mr. Assange in the event that, after entry of this assurance, he was to commit any future act that met the test for the imposition of a SAM pursuant to 28 C.F.R. § 501.2 or § 501.3.

    (2) Pursuant to the terms of the Council of Europe Convention on the Transfer of Sentenced Persons (COE Convention), to which both the United States and Australia are parties, if Mr. Assange is convicted in the United States, he will be eligible, following conviction, sentencing and the conclusion of any appeals, to apply for a prisoner transfer to Australia to serve his U.S. sentence. Should Mr. Assange submit such a transfer application, the United States hereby agrees to consent to the transfer. Transfer will then follow, at such time as Australia provides its consent to transfer under the COE Convention.

    (3) The United States undertakes that in the event of extradition, and Mr. Assange being held at any time in custody, it will ensure that Mr. Assange will receive any such clinical and psychological treatment as is recommended by a qualified treating clinician employed or retained by the prison where he is held in custody.

    (4) The United States undertakes that, pretrial, Mr. Assange will not be held at the United States Penitentiary-Administrative Maximum Facility (ADX) in Florence, Colorado. If he is convicted and sentenced to a term of imprisonment, Mr. Assange will not be held at the ADX save that the United States retains the power to designate Mr. Assange to ADX in the event that, after entry of this assurance, he was to commit any future act that then meant he met the test for such designation.

9. The giving of assurances is an 'issue'; it is not fresh evidence. Assurances can be given at any stage of the extradition proceedings including at the appellate stage. In *India v Chawla* [2018] EWHC 1050 (Admin) the Divisional Court noted:

[1] Ahmad v United Kingdom (Admissibility) (24027/07); Ahsan v United Kingdom (Admissibility) (11949/08); Mustafa (aka Abu Hamza) v United Kingdom (Admissibility) (36742/08)131 (2010) 51 E.H.R.R. SE6 at 131.
[2] Ahmad v United Kingdom (24027/07); Al-Fawwaz v United Kingdom (67354/09); Bary v United Kingdom (66911/09); Mustafa (aka Abu Hamza) v United Kingdom (36742/08); Ahsan v United Kingdom (11949/08) (2013) 56 E.H.R.R. 1.

> "[29] Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may show that the requested person will not be exposed to such a risk by providing an assurance that the individual will be held in particular conditions which are compliant with the rights guaranteed by article 3 of the ECHR. Such assurances form an important part of extradition law, see Shankaran v India [2014] EWHC 957 (Admin) at paragraph 59. The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in Othman v UK at paragraphs 188 and 189 and those principles have been applied to assurances in extradition cases in this jurisdiction, see Badre v Court of Florence, Italy [2014] EWHC 614 .30.
> [30] The Court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see Florea v Romania and USA v Giese [2015] EWHC 2733 (Admin) , and the Court may consider a later assurance even if an earlier undertaking was held to be defective, see Dzgoev v Russia [2017] EWHC 735 at paragraph 68 and 87.
> [31] It is established that an assurance is not evidence. This is because it is a diplomatic assurance provided by the requesting state about the future treatment of the requested person. In United States of America v Giese [2015] EWHC 3658 (Admin); [2016] 4 WLR 10 there was consideration of the powers of the Divisional Court to allow an appeal on the basis of a new assurance. It was held at paragraph 14 that an assurance was an "issue" and not "evidence" for the purpose of section 106(5) (a) of the Extradition Act 2003 . [Emphasis added]

2. *The risk of SAMs and ADX was determinative of the DJ's decision*

10. It is clear that the District Judge's decision on section 91 was predicated on the finding that there was a real risk that SAMs would be imposed on Mr Assange and that he would be imprisoned in ADX.

11. The relevant question was whether (quoting from the section): *" the ... mental condition of the person [Respondent] is such that it would be .... oppressive to extradite him."*. There was no issue of 'unjust' and the submission before the DJ and the approach of the DJ was limited to 'oppression'.

12. The ruling deals with the relevant question under "H. SECTION 91 – OPPRESSION DUE TO HEALTH" [A/T1/pp91-120], §§278 to 364. The District Judge. at §287 has a separate heading: ***Is there a real risk that Mr. Assange will be subject to special administrative measures****?* And after reciting and discussing the evidence of risk of imposing SAMs says at §§294 and 295:

> 294. No assurances have been given that Mr. Assange will not be subject to pre-trial SAMs. Mr. Kromberg acknowledged that their imposition is possible.
> 295. Taking these factors into account, I consider there to be a real risk that Mr. Assange will be subject to restrictive special administrative measures.

13. The District Judge set out an entire section "***Conditions in pre-trial SAMs***" at §§ 296- 300. The next subheading of the ruling is at §302 of the ruling and has the subheading: ***Is there a real risk that Mr. Assange will be housed at the ADX Florence?*** The finding of the District Judge is at §305 where she states:

> 305 …In my judgment there is a real risk that Mr. Assange will be designated to the ADX, Florence.

14. Consistently, throughout the ruling, the District Judge refers to the imposition of SAMs and imprisonment in the ADX; see §§316 "***Conditions in the ADX Florence for inmates subject to post-trial SAMs"*** she states:

> 316. Professor Kopelman considered that, if housed in conditions of segregation and solitary confinement, Mr. Assange's mental health would deteriorate substantially resulting in persistently severe clinical depression and the severe exacerbation of his anxiety disorder, PTSD and suicidal ideas.

15. In her application of the law to the facts the District Judge expressly states (emphasis added):

> 340. Thirdly, **if detained subject to the full restrictions of pre-trial SAMs**, Mr. Assange will be housed in conditions of significant isolation. Contact with his family will be limited to one monitored 15-minute phone call per month. Any time out of his cell will be was spent exercising in a small room or cage alone. He will be forbidden from communicating with other prisoners. If SAMs continues post-trial at the ADX Florence, then this level of isolation will be maintained.
> …
> 344. Mr. Assange faces the bleak prospect of severely restrictive detention conditions designed to remove physical contact and reduce social interaction and contact with the outside world to a bare minimum.

16. Most importantly, the District Judge summed up her opinion in the discussion section at §355 et seq (emphasis added):

> 355. I am satisfied that, **if he is subjected to the extreme conditions of SAMs**, Mr. Assange's mental health will deteriorate to the point where he will commit suicide with the "*single minded determination*" described by Dr. Deeley
> …
> 357. Secondly, though it is by no means certain that SAMs will be imposed on Mr. Assange, and, if it is, there are a range of measures the authorities can consider, nevertheless, for reasons already given, **it is my judgment that there is a real risk that he will be kept in the near isolated conditions imposed by the harshest SAMs regime, both pre-trial and post-trial**.
> 358. … By contrast, **a SAMs regime would severely restrict his contact with all other human beings, including other prisoners, staff and his family**. In detention subject to SAMs, he would have absolutely no communication with other prisoners, even through the walls of his cell, and time out of his cell would be spent alone.
> …
> 362. I accept that oppression as a bar to extradition requires a high threshold. I also accept that there is a strong public interest in giving effect to treaty obligations and that this is an important factor to have in mind. However, I am satisfied that, in these harsh

> conditions, Mr. Assange's mental health would deteriorate causing him to commit suicide with the "*single minded determination*" of his autism spectrum disorder.
> 363. I find that the mental condition of Mr. Assange is such that it would be oppressive to extradite him to the United States of America.

17. The only possible interpretation of the District Judge's finding of oppression, was that it was predicated upon the prior finding that there was a real risk that SAMs and imprisonment in the ADX would be imposed.

18. That finding has been superseded by the assurances and it follows that absent those findings the decision would have been different.

3. ***The assurances should be taken at face value and relied upon.***

19. In *Babar Ahmad, Haroon Rashid Aswat v The Government of the United States of America* [2006] EWHC 2927 (Admin), the Divisional Court dealt with submissions that assurances from the United States of America were not reliable. Laws L.J said:

> 74. In short we are asked, as I have already said, to hold that the United States would not honour the Diplomatic Notes given in each case, or at least that there is a substantial risk that they would not. How is this court to provide a conscientious response to such an argument? The starting point, I think, is the statement of Kennedy LJ in Serbeh v Governor of HM Prison Brixton (31 October 2002, CO/2853/2002) at paragraph 40: "[T]here is (still) a fundamental assumption that the requesting state is acting in good faith." The assumption, of course, may be displaced by evidence. We must consider whether it is displaced here.
> 75. I have already referred to Mr Keith's submission that the assurances in the Notes were given by a mature democracy. So much goes without saying. But the United States is also a State with which the United Kingdom has entered into five substantial treaties on extradition over a period of more than 150 years. Over this continued and uninterrupted history of extradition relations there is no instance of any assurance given by the United States, as the requesting State in an extradition case, having been dishonoured
> 76. I see no reason to doubt that the American authorities would likewise give effect to the views of this court as to the critical importance of the integrity of the Diplomatic Notes

20. The Respondent has filed evidence which purports to show that the assurances are not reliable. This evidence appears to be relied upon to make two principal points. The first is that despite the extent to which the Respondent's case at first instance was martialled towards demonstrating that he would be subject to SAMs or detained at ADX (that focus reflected in the District Judge's Judgment), it now appears to be suggested (surprisingly) that neither SAMs nor ADX would actually matter and that the Respondent would be detained, for the duration of his detention, in conditions of extreme isolation anyway. The second point the Respondent appears to attempt to establish, is that the United States has breached diplomatic

assurances previously given. The United States will provide an affidavit in response to this evidence. However, it is the Appellant's primary response that the evidence given is assertional, hearsay, untested and, or unreliable. It falls very far below the threshold required to demonstrate that a long term, reliable extradition partner to the United Kingdom would breach assurances given.

4. *Conclusions on Assurances*

21. Regardless of whether the District Judge misdirected herself on the correct test under section 91, the approach to the psychiatric evidence, or erred in the overall evaluation of the evidence and test, the result of the assurances is to prevent the operation of section 91 in this case.

22. The Respondent is now driven to submit that absent SAMs and ADX the conclusion on the relevant question remains the same. This is unsustainable. However, it is entirely open to this Court to re-evaluate afresh the relevant question, including taking into account the assurances, and to determine if it ought to be decided differently.

B. The failure of the District Judge to seek assurances

23. The District Judge ought to have notified the Appellant of her provisional view, so as to afford it the opportunity of offering assurances to the Court. It is clear she would have taken assurances into account from her Judgment at §294. However, this view was never communicated to the Appellant.

24. This ground is essentially a material irregularity and thereby enables this court to consider all matters afresh in the light of the assurances. It follows it does not individually add to the argument as to why the appeal should be allowed but requires this court to re-evaluate afresh the relevant question and determine if it ought to be decided differently.

25. That the DJ should have sought assurances is clear. In *India v Dhir* [2020] EWHC 200 (Admin) the Divisional Court said when prison conditions might cause extradition to be refused, the correct approach was for the District Judge to postpone final judgment until a reasonable time had elapsed in which undertakings could be sought:

> [35] Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may nevertheless show that the requested person will not be exposed to such a risk by providing an assurance that the individual will not be subjected to that treatment. Such assurances form an important part of extradition law, see Shankaran v India [2014] EWHC 957 (Admin) at paragraph

> 59, India v Chawla [2018] EWHC 1050 (Admin) at paragraphs 29 to 33 and Giese v USA (No.4) [2018] EWHC 1480 (Admin), [2018] 4 WLR 103 at paragraphs 37 to 39.
>
> [39] Where a real risk of inhuman and degrading treatment is established, it is not appropriate to discharge the requested person but to enable the requesting state "to satisfy the court that the risk can be discounted" by providing assurances, see Georgiev v Bulgaria [2018] EWHC 359 (Admin) at paragraph 8(ix). If such an assurance cannot be provided within a reasonable time it may then be necessary to order the discharge of the requested person, see Aranyosi and India v Chawla at paragraph 47.

26. It has been described as a '*duty'* of the extradition court to elicit information it needs from a requesting state, if there are relevant gaps in the evidence or if it has concerns; *Magyar v Budapest Environs Court, Hungary* [2021] EWHC 2402 (Admin) [§8]. It is a duty which the High Court also discharges; see, for example, the approach in *Chechev v Regional Prosecutor's Office Kardzhali (Bulgaria)*, [2020] EWHC 3115 (Admin).

27. In this case, the Appellant sought to answer every issue raised (despite the multiplicity of issues; the lack of merit in almost every point and without the Court asking for information). The Appellant provided seven affidavits and declarations dealing with the issues raised in the extradition proceedings. It filed dedicated evidence about the conditions that Mr Assange might be held in and about mental health treatment available (see the Declaration of Gordon Kromberg dated 3rd September 2020 [C/T1/p3] and Declaration of Alison Leukefeld dated 24th August 2020 [C/T2/p147]). It instructed two expert psychiatrists who did not agree with Professor Kopelman's prognosis. Unusually, this was not a case where the requesting state agreed that there was a real risk Mr Assange would be subject to SAMs or be detained in ADX (compare the position in UK vAhmad and others (cited above) where this was conceded by the United States). In short, every single issue relevant to section 91 was contested.

28. The issue of assurances has arisen only because of the Judge's conclusions on section 91. Had the Judge notified the requesting state that she was minded to find that the threshold in section 91 was met, because of the conditions that Mr Assange might be held in, the requesting state could have considered offering assurances as part of the hearing.

29. Whilst the principles set out above apply to cases where a Court is minded to discharge because extradition may violate Article 3 of the ECHR, there is no principled reason why precisely the same approach ought not be applied to section 91, particularly where the District Judge's findings under section 91 were contingent on her findings as to conditions of detention in the requesting state. Put another way, the duty on the Court to request

information or to convey any concerns it has about extradition is not divisible, contingent upon which bar to extradition is relied upon.

C. The correct approach to section 91 of the Act

30. Reliance upon mental ill- health, as precluding extradition under section 91, is increasingly common. While the authorities point in one direction, it is not always easy to discern the correct principles. As Collins J. said in *Regina (Griffin) v City of Westminster Magistrates' Court and another* [2012] 1 W.L.R. 270, at [41]:

> 46. I cannot help thinking that some of the problems in these cases [previous authorities on section 25 and 91 of the Act] have arisen from an unnecessary focus on articles 3 and 8 of the European Convention. Section 21 of the 2003 Act certainly requires the district judge and this court to decide whether the person's extradition would be compatible with his Convention rights. The Strasbourg jurisprudence has in removal cases, whether extradition or under immigration powers, been concerned with what might happen in the country to which removal would take place. Hence the real risk test has been applied since the court has to consider what the future might bring and what might happen to the individual if he is removed to another country.
> …
> 49. However, in cases such as this of suicide risk where delay is not in issue it s difficult to see how it could be said to be oppressive to extradite unless to do so would constitute a breach of human rights. My only caveat is that I would recognise that the seriousness of the offence in question could be relevant. It may be that the threshold could arguably be lowered if the offence was truly to be regarded as not at all serious …

31. It is submitted that the principal focus of the test under section 91 is the mental health of the person in the United Kingdom, at the time of extradition. While there may be some requirement to consider what might happen after extradition it cannot have been the intention of Parliament to both replicate the safeguard under section 87 and require the District Judge hear voluminous, lengthy and contested evidence about what might or might not happen at some indeterminate time in the future in the requesting state *and* then seek to predict what impact those eventualities might have upon the individual at an undetermined point in the future. Specifically, it is submitted that section 91 does not permit a long term, predictive assessment (dependent upon a number of contingencies) of what an individual's mental health might be like at some point in the unascertained future and then to determine that extradition is barred upon that prediction (as opposed to mental ill health at the time of the hearing).

32. It is submitted that not only is this the approach which the words of section 91 mandate, it is consistent with the practical impossibility of making reliable findings as to how possible, future events might impact upon an individual and the sorts of factors which might ameliorate

any mental health condition on a long-term basis. In a case like this (and presuming the individual to have a depressive disorder) the range of factors that might bear upon the mental state of the individual, at some point in the future, are almost endless.

33. The statutory language is consistent with the practical reality that it is difficult (if not impossible) to predict a longitudinal risk of suicide; per the expert evidence in this case from Professor Fazel (a world, leading authority on suicide within prison) that it is not possible to assess the risk of suicide on a long- term temporal basis (considered further below).

34. It follows if an extradition court does (as occurred here), contrary to the Appellant's submission, embark upon the exercise of predicting a future risk of suicide, dependent upon what might or might not happen at some indeterminate time, in the requesting state, it has to make clear findings about those factors. In a case like this, it would require findings as to when the risk might eventuate and why it would lead to suicide (pre- trial: Why would the prospects of acquittal not be sufficient meet the risk? Why would the healthcare available (in a prison which the Respondent's own expert described as having a "stellar" record [D/T10/p397]) not provide adequate protection? Why would ongoing contact with a defence team and preparation for trial not provide sufficient protection if the defendant was detained in a single cell. Post trial: What sentence would be imposed? What appeals might the Respondent have? What are his prospects of serving a sentence in his home country? What level of contact might he have with friends and family?) There are numerous variables at stake, which would counter a risk of suicide and which must also be addressed.

35. This was precisely the approach which Lord Reed found was required in *Howes v HM Advocate* [2009] HCJAC 94:

> [9] … In the circumstances, it appears to us that one cannot predict the appellant's future mental health, as Dr Pasupuleti was instructed to do, on the assumption that, if extradited, she faces the prospect of ''decades of incarceration'' and ''the permanent loss of her children'', without taking account also of the prospect that she might be acquitted, or might receive a non-custodial sentence or a short sentence of imprisonment, or might be considered favourably for transfer to Scotland under the Convention.

36. In the present case the defence submitted (and indeed have enlarged upon the point in its evidence submitted in response to the assurances), that the Respondent cannot be convicted having regard to his 1st Amendment rights and would embark upon a lengthy appeal process in the event he was unsuccessful at trial as regards various legal challenges; See the culmination of this at §11.57 of the Respondent's closing submissions "*This Court should conclude, on the compelling evidence it has heard, that the First Amendment will prevent this*

prosecution" [A/T4/p260]; see also the evidence of Professor Turley (the Respondent's appeal evidence at Tab 13 of the Respondent's evidence bundle]) at § §76 – 100 on the issues that would be raised at trial and upon appeal.

37. The question as to what length of sentence might be imposed on the Respondent was hotly contested at first instance. Other comparable cases have led to significantly lower sentences than those claimed by the defence witnesses (in United States v Sterling a sentence of 42 month (maximum exposure 130 years); in United States v Allbury 48 months (maximum exposure 20 years)). The lengthiest sentence ever imposed on a federal defendant for unauthorised disclosure to the media was the case of United States v Winner, and was 63 months [Appellant's submissions to the District Judge at §§ 296- 297, A/T5/p482].

38. In summary, if (contrary to the Appellant's submission) section 91 permits the prediction of the Respondent's future mental health, at some point in time, in the requesting state, there are a myriad of factors which bear upon this and which must be taken into account. The District Judge simply did not approach section 91 in this way. She did not make findings as to the various permutations which might affect the Respondent's future mental health. This was also despite that the opinion of defence witnesses, but particularly Professor Kopelman, as to the Respondent's future mental health, were premised upon contingencies like future conditions of detention and length of sentence (Professor Kopelman at [B/T5/p391] §9 said):

> "All the U.S. lawyers, cited above, believe that Mr Assange will be placed in conditions of near-total solitary confinement, potentially for a lifelong sentence, following extradition to the United States. Mr Assange himself is very aware of the conditions he would face, having studied them over the past 10 years. **If he were to be extradited in such circumstances, my prediction is that segregation, solitary confinement, and the prospect of a prolonged/lifelong sentence will result in a further plummeting of Mr Assange's mood state, resulting in persistently severe clinical depression as well as a severe exacerbation of his anxiety disorder, PTSD, and suicidal ideas**. This would constitute a form of 'psychological hardship'/oppression in the sense of severe psychological suffering and mental deterioration.

1. *Construction of section 91*

39. The wording of section 91 is in the present tense: *"the physical or mental condition of the person is such that it would be unjust or oppressive to extradite.."*. It is submitted that the focus of section 91 is on the mental health of the individual at the time the issue is raised and upon preventing the extradition of those with severe and enduring mental illnesses (which are sufficiently serious to make extradition oppressive). Its purpose is not to prevent the

extradition of individuals whose current health does not preclude extradition. The alternative crystal ball construction should not find favour.

40. It is submitted the correct approach is to:

    (1) assess the individual's health as at the time of the application under section 91. This chimes with the provision under section 91(3)(b) of the Act simply to adjourn to see if the persons health improves. No assessment of future deterioration of mental health contingent upon future uncertain events is required;

    (2) determine if the individual has a mental health condition which is of such severity that they would be unable to resist the impulse to take their own life. If the condition is not of this severity or nature, the section cannot be satisfied;

    (3) determine what mental health care and safeguards exist in the requesting state so as to meet the risk of suicide; if such safeguards exist the section will be satisfied (save perhaps in exceptional cases where no treatment or safeguards will meet the risk of suicide); and

    (4) determine overall if this very high risk is sufficiently great to result in a finding of oppression taking into account the seriousness of the alleged offence.

41. This approach distils the approach taken in a number of authorities (considered below). It permits of certainty and a reliable basis for any conclusion that an individual cannot be extradited on the basis of oppression because of mental health. Having a reliable basis upon which to determine the issue is fundamental. Serious mental health problems are endemic amongst prisoners in this jurisdiction. Such problems are only very rarely a basis for not subjecting an individual to trial. As a matter of domestic law, no individual judged fit to plead or stand trial would escape a custodial sentence on the basis that they might, in the future, become suicidal.

42. This approach is consistent with *Jansons v Latvia* [2009] EWHC 1845 (Admin) (upon which it appears all later authorities are predicated). The facts were that Jansons hanged himself with his bed sheets in his cell at Wormwood Scrubs Prison and only because of the actions of a nurse, did not complete his suicide. He suffered from memory impairment after the suicide attempt. He was unable to remember his girlfriend's name. He also gave a different account, that his parents were dead when in fact they were alive. The uncontroverted position

before the High Court was that the defendant would take his life upon extradition [Sir Anthony May §15]:

> "Whatever may be said internally about those two reports, the fact remains they constitute unchallenged evidence before this court and contain the unqualified statement that if the appellant is sent back to Latvia, his mental state will deteriorate and he will kill himself."

As is plain, that deterioration was simply predicated on his being returned to Latvia. It was not predicated on permutations of uncertain future events in Latvia or the prison conditions in Latvia. In *Jansons* it was accepted Latvia would so far as its able seek to prevent his suicide. The court said:

> 23. In the present case, whether the applicant's fear of ill treatment is objectively well founded is more or less obliterated by the fact that well founded or not, the evidence is that he will commit suicide if he is returned.
> …
> 27. Set against that [there are appropriate arrangements in place in the prison system in Latvia] is the uncontradicted evidence not only that his mental condition will be triggered to deteriorate if he is returned to Latvia but also and in unqualified terms that he will commit suicide if he is returned to Latvia.

43. Despite the history of a determined suicide attempt, the High Court nonetheless regarded in 'a very difficult case'. It concluded that it would be oppressive to order Jansons's return when there such a substantial risk that he would commit suicide: "*It is not as if this is an appellant who is threatening to commit suicide without any history of having tried to do so. Not only is he threatening that he will commit suicide and the doctor believes him but he has in fact, for the same reason, attempted to commit suicide in Wormwood Scrubs Prison and very nearly succeeded in doing so*." Also of note, is that in *Janson* the offences were the theft of two mobile phones worth £450. It follows the result in Janson would be achieved by the test put forward in §40 above.

44. The case of *Rot v Poland* [2010] EWHC 1820 (Admin) was a conviction case and therefore if returned it was certain that the Appellant would serve the remaining two years imprisonment. Mitting J. said:

> 4. "There were two documented incidents in HMP Wandsworth which occurred before the hearing. On 5th June 2009 Mr Rot was found suspended from a piece of clothing. He was breathing, the report says, on arrival. Whether that is upon his arrival elsewhere or on arrival of staff at the prison is not clear. The reason was that he was apparently frustrated by his inability to contact his family. On 27th June 2009 he tied a piece of string from a bedsheet round his neck and attempted to strangle himself. Again, the reason was because he had been denied a telephone call. Additionally, he was angry about his medication. There has been one similar incident since. On 15th April 2010 he was found "after he had attempted to hang himself on the landing bars". He was assisted to his cell whereupon he placed another ligature around his neck. He was then taken to a

> holding cell. The notes from HMP Wandsworth also contain information that he had stopped taking medicine and had stopped eating."

45. Mitting J went on to say the test was [§13]:

> "Until and unless the reasoning in Jansons is disproved, the risk of suicide must be accepted to be a relevant risk for the purpose of section 25 . The question must therefore be addressed and answered in such a case: would the mental condition of the person to be extradited make it oppressive to extradite him? Logically, the answer to that question in a suicide risk case must be no unless the mental condition of the person is such as to remove his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying, and therefore may make it oppressive to extradite him. Untidy though it may be, and while Jansons remains good authority, the question must be approached in a somewhat less logical manner. When, as in Jansons , there is uncontradicted evidence that an individual who has made a serious attempt to kill himself will kill himself if extradited, it may be right to hold that it would be oppressive to extradite him. Anything less will not do."

46. The final sentence has not met with approval in other cases. However, again, in *Rot*, the evidence was not predicated on future deterioration of mental health contingent upon future uncertain events. It follows the result in *Rot* would be achieved by the test put forward in §40 above.

47. In *Marius Wrobel v Poland* [2011] EWHC 374 (Admin) the unchallenged evidence of the psychiatrist was that:

> "I repeat my conclusion that if he is extradited his risk of impulsive but serious self-harm, including suicide, will be very high by virtue of the fact that his mental health, with a borderline personality disorder and unpredictable serious swings in his mood state, and a high likelihood of depression, be it short term or persistent, will render him unable to resist the impulse to commit suicide."

48. This was also a conviction case and therefore if returned it was certain he would serve the remaining two years and two months imprisonment. Again, the medical evidence was not predicated on future deterioration of mental health contingent upon future uncertain events. It follows the result in *Wrobel* would be achieved by the test put forward in §40 above.

49. In *Turner* [2012] EWHC 2426 (Admin) the medical facts were set out at §8 of the judgment. The medical evidence was not predicated on future deterioration of mental health contingent upon future uncertain events. Immediately prior to the hand down of the court's judgment the Appellant had attempted suicide. The Court also concluded that one of the criteria which had to be met was that mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide [at § 28(4)]. The court concluded in *Turner*:

> "I accept that Ms Turner's mental condition is undoubtedly delicate and difficult and that it has deteriorated over the past month. I accept that her mental condition may well deteriorate further if she is extradited. I also accept that there is a substantial danger that Ms Turner may attempt suicide again if she is extradited. However, ultimately, Ms

> Turner's current delicate mental state has as its cause the fact that she was involved in a fatal road accident in which she received little or no physical injury and that her extradition is sought to stand trial on charges which result from that accident. It seems to me, at least on the evidence of the present case, that it cannot be said that Ms Turner's current mental condition which flows from the consequences of the accident and the request for her extradition, even if that includes a substantial risk of further attempts at suicide by her, will give rise to the extradition being either unjust or oppressive by reason of that mental condition."

50. The result in *Turner* would be the same upon the application of the test at §40 above.

51. *Turner* was approved in *Polish Judicial Authority v Mariusz Wolkowicz* [2013] 1 W.L.R. 2402 (Sir John Thomas P. and Burnett J (as he then was) as succinct and useful summary of the test to be applied [§9]. *Wolkowicz* was one of a number of conjoined cases all of which considered risk of suicide and section 25 and 91 of the 2003 Act.

52. Sir John Thomas, giving the judgment of the court, emphasised at [§10]:

> "The key issue, as is apparent from propositions (3), (5) and (6), will in almost every case, be the measures that are in place to prevent any attempt at suicide by a requested person with a mental illness being successful.

53. As can thus be seen *Wolkowicz* highlights the limb of the test at §40(3) above as paramount.

54. In *Debiec v District Court of Piotrkow Trybunalski (Poland)* [2017] EWHC 2653 (Admin) the Appellant's return was sought as a convicted person in respect of two European Arrest Warrants and therefore if returned it was certain he would serve the specified term of imprisonment. It was found his current medical state now presented an extremely high suicide risk. It was said:

> 39. Miss Townshend argues that the medical evidence tips the balance and that in light of the Appellant's mental condition extradition would now be disproportionate. She points to the evidence that he would suffer serious and possibly irreversible deterioration in his health in the event he was to be returned to Poland. She also argues that the evidence crosses the threshold of oppression and thus that extradition is barred by s 25 .

55. Julian Knowles J. said:

> [43] …So far as suicide is concerned, I have well in mind the case law to the effect that only where the defendant would have no choice but to commit suicide if extradition were ordered can suicide raise a bar to extradition. I do not decide the case on the recent information about the Appellant's threat to commit suicide if extradition is ordered *per se* , but I do take into account Dr Conway's conclusion that only hospitalisation could guard against that risk, and the steps she says would be necessary if he were to be put on the plane. These, it seems to me, are an indicator of the severity of his illness and the need for his treatment to continue. Indeed, the question can be rhetorically posed: If someone is so ill as to need special respiratory protection and special emergency measures to be in place in order to be flown abroad, can they be well enough to fly at all?

56. The medical evidence was not predicated on future deterioration of mental health contingent upon future uncertain events. It again follows the result in *Debiec* would be achieved by the test put forward at §40 above.

57. In *Love v United States of America* [2018] EWHC 172 (Admin), although primarily a forum case, the medical evidence concluded that if extradited he would no longer be fit to plead [§32]. The District Judge found [§57] "*There will be a high risk he will commit suicide if extradited. This will be prior to removal, in transit and on arrival in the United States*." The court considered [§74] his Asperger syndrome, depression and eczema, and the consequent risk of serious deterioration in his mental and physical health, or suicide, or both. The court did consider the conditions in which he would be detained in the United States. However, the court made a consolidated finding that [§115] "*We come to the conclusion that Mr Love's extradition would be oppressive by reason of his physical and mental condition*.". The court found that measures to prevent suicide would have a seriously adverse effect on his very vulnerable and unstable mental and physical wellbeing. The court found that if his high risk of suicide were to be prevented that in itself would worsen his mental condition which would in turn worsen his physical condition [§119] and if not in segregation he would be a target for bullying and intimidation. It was the combination of circumstances that made his extradition oppressive. This combination of physical and mental issues, which is absent in the instant appeal, does not make the test set out in §40 particularly relevant.

58. In *Cash v France* [2018] EWHC 579 (Admin) the appellant was currently unfit to stand trial and was seriously mentally ill with paranoid schizophrenia. After the extradition court made the extradition order the Appellant's mental health deteriorated further and he was voluntarily admitted to a psychiatric hospital. Because of concerns about the risk of self-harm or suicide he was subsequently detained in hospital under s 2 of the Mental Health Act 1983. The court said [§5]:

> "There was at that stage a psychiatric report dated 10 May 2017 from a consultant forensic psychiatrist, Dr Tim McInerny, which had not been before the district judge. He concluded that the Appellant was presenting with a serious mental illness that was likely to be paranoid schizophrenia. His symptoms included auditory hallucinations, thought control experiences and paranoid delusions. He was also presenting with fluctuating mood, distress and agitation and persistent thoughts of self-harm and suicide. His illness had not at that date responded to medication, despite him having been trialed on two antipsychotic medications. Dr McInerney regarded the Appellant's particular illness as being difficult to treat. His overall conclusion was that the Appellant was currently psychotic and extremely mentally unwell. He was not fit to stand trial under the *Pritchard* criteria (*R v Pritchard (1836) 7 C&P 303*).

> 6. On 26 May 2017 the Appellant was found hanging from a patio door in the hospital and had to be cut down.
> …
> 16. It was for these reasons that I allowed the appeal at the conclusion of the hearing. I should make clear that in the event that the Appellant recovers – as I sincerely hope that he will – then it will be open to the Issuing Judicial Authority to re-commence extradition proceedings if it wishes to do so.

59. Again, the medical evidence was not predicated upon future deterioration of mental health contingent upon future uncertain events. It again follows the result in *Cash* would be achieved by the test put forward in paragraph §40 above.

60. This test is consistent with the position before the 2003 Act. Under the 1989 Act the overarching observation was made that it would be an exceptional course to determine that an individual could be extradited owing to his mental health. Even where there is evidence that an individual is not fit to plead, the general approach remains, per *Warren v SSHD and Crown Prosecution Service (acting for the United States of America)* [2003] EWHC 1171 (Admin), that it is not unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. Even if the inevitable result would be that he would be found unfit, there may nonetheless be countervailing circumstances that warrant return (for example where there was a process akin to that in the UK whereby a defendant who is unfit may be found to have committed the acts of the offence); Hale LJ as then at §42.

2. ***The approach under the Convention***

61. A further issue of principle arises upon this appeal as to the approach taken to section 91 in this case and the extent to which it diverges from the approach taken under the ECHR. As noted above, the issue in *Wrobel* was whether the test for discharge under section 91 had a *higher* threshold than under Article 3 - Bean J. concluded that it did not. The prosecution does not take issue with that conclusion but rather submits that the approach in this case was to apply a threshold considerably lower than that applied under the Convention. The issue of principle is whether it was intended that section 91 should operate as such a high barrier to extradition when the law applicable to fundamental human rights does not. It is submitted that there should not be such a degree of divergence given considerations of comity and the UK's treaty law obligations.

62. Under the Convention mental or physical illness will only, in very limited and compelling circumstances, give rise to an issue under the Convention. In *N v United Kingdom* (2008) 47 E.H.R.R. 39 the European Court concluded where life expectancy would be 'significantly

reduced' if an individual was to be removed from UK, this was not sufficient in itself to give rise to breach of Article 3 [§42]. Rather the critical focus was on the standard of care that would be afforded in the state to which the individual will be removed: see N at [42]: "*The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling …"* As is apparent the test presupposes that the conditions in the other state are inferior to those in the UK.

63. In *N*, the threshold was reached in respect of the Applicant because of the advanced state of his terminal illness [§51]; the consequences of the withdrawal of medication and care (and a lack of any corresponding care) and because of the exceptional circumstances and the compelling humanitarian considerations in his case [§54].

64. The European Court has identified that in addition to situations of imminent death, there may be "other very exceptional cases" where the humanitarian considerations weighing against removal are equally compelling; *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008 § 43. In *Paposhvili v Belgium [2017] Imm AR 867* the European Court clarified [at §183] that such "other very exceptional cases" should be understood to refer to "situations involving removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy". The Court pointed out "that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness" [at 183]. The approach in *Paposhvili* has also been applied in the context of long term schizophrenia (*Savran v Denmark* [2019] ECHR 651). It has also been given effect domestically (by the Supreme Court in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] 2 W.L.R. 1152).

65. Regardless of the nature of the illness, the focus is on the absence of care in the state to which removal is contemplated; see *Paposhvili* [§189] (emphasis added)

> "189. As regards the factors to be taken into consideration, the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the

applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 (see paragraph 183 above)."

66. In short, under the Convention, removal to another State will raise an issue under the Convention rights, only in the context of very serious illness and, where, fundamentally, there will be an absence of care in another state or an inability to access such care, which results in the sort of rapid, irreversible decline foreseen in *Paposhvili.*

67. It is submitted that this approach broadly corresponds to the approach taken by the High Court in cases like *Jansens, Turner* and *Wolkowicz.* Those cases indicate that the English Courts have consistently approached section 91 in a careful way which broadly comports with the approach taken under the Convention. The approach to section 91 taken in this case was significantly different, in that Mr Assange's current mental state was not such to preclude extradition; he has no history of serious and enduring mental illness; the Court did not conclude that the care generally available in the United States was insufficient or inappropriate for the treatment of any future mental ill health that Mr Assange might experience (to the contrary the evidence demonstrated that suicide prevention measures were good) and extradition is to a state which has a lower rate of suicide than in this jurisdiction.

D. The legal test applied by the District Judge

68. **First**: she wrongly compartmentalised the test into (1) was there a substantial risk of suicide [from §337, CAB/1/pages 109 et seq] (2) the capacity to resist the impulse to commit suicide [from §347, CAB/1/pages 112 et seq]; and (3) the risk that Mr Assange would succeed in committing suicide whatever steps are taken from [§350 onwards, A/T1/p115 et seq].

69. She then omitted to make the *overall* determination required: whether 'the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression'. See Judgment at §§362- 364 [A/T1/p120].

70. **Second**: the District Judge failed to apply the test set out in §40 by basing her decision upon the future deterioration of mental health contingent upon future uncertain events.

71. **Third**: Analysis of the arrangements in place in the requesting state (§40(3) above) was essential. There must, at least, be a finding as to why those steps would not meet the risk of suicide in a given case. For example, if an individual became acutely suicidal, does the foreign state have a suicide prevention protocol? Does it have the ability to transfer acutely

mentally ill patients for hospital treatment? Does it have a programme of treatment or support to prevent prisoners from becoming acutely ill in the first instance?

72. The District Judge did not take that approach. She acknowledged that the United States took measures to prevent suicide but based her decision on Mr Assange's *intellectual ability* to circumvent suicide preventative measures [ruling §359] and his "determination, planning and intelligence" [ruling §360, A/T1/p119].

73. This approach is wrong for a number of reasons and replete with risks that, without proper foundation, it impedes the UK's ability to extradite individuals whose condition does not preclude extradition. But, the overarching observation is made that very many domestic prisoners and many of those who resist extradition on grounds of mental health, could be said to have sufficient intelligence to circumvent suicide prevention measures. If the District Judge was going to adopt the approach she did, then it was incumbent on her to consider with greater intensity why the United States' system would be unable to cope with individuals who sought to disguise or hide or minimise feelings of being suicidal.

74. The District Judge's approach was also wrong because it focuses on the intellectual ability of an individual to "get around" suicide prevention measures as opposed to focusing on the severity of the individual's mental illness and the measures available in the requesting state to treat that mental illness and to manage the risk of suicide. Proceeding on the basis that an individual has the ability to circumvent suicide prevention measures becomes a trump card. It negates that a requesting state may have the resources, the treatment and suicide prevention measures (equivalent to those in the UK) to treat psychiatric illness and manage the risk of suicide. It also assumes that no treatment in the requesting state could reduce the risk of suicide before it becomes acute.

75. There is also a risk that the approach taken in this case by the District Judge erects a threshold that no requesting state can meet. Regardless of any resource available in the requesting state, extradition could be precluded where an individual can be said to have the intellectual ability to circumvent the State's preventative measures.

76. Moreover, it is clear from the District Judge's ruling that she approached this issue on the basis that although the defence evidence was that the protocols for the prevention of suicide within the Bureau of Prisons were good, it was not *impossible* for an individual to take their own life whilst in prison in the United States; See Judgment at §361 [A/T1/p120]. This approach was wrong. It is recognised that "…*preventative measures can never guarantee*

that an individual will not succeed in taking his own life. As Dyson LJ said in J v Secretary of State for the Home Department [2005] EWCA Civ 629 *, as quoted in* Jansons v Latvia [2009] EWHC 1845 (Admin) at [7] *'someone who is sufficiently determined to do so can usually commit suicide'. That is not the issue as Sir Anthony May said in Jansons at [7]. What matters is that at each stage all reasonable precautions would be taken to prevent a successful attempt at suicide." NM (Vietnam) v. Czech Republic* [2020] EWHC 409 (Admin) per Nicol J at §37(vi).

77. The Appellant submits that the approach which was taken in this case was to erect a barrier to extradition that no state could meet (and which the United Kingdom would not meet if this was a test which applied to it). Indeed, it was uncontroversial in these proceedings that the suicide rate in US prisons is substantially lower than it is in prisons in this jurisdiction. Professor Fazel's evidence on prevalence was that comparative data showed that suicide rates in prisons in England and Wales are substantially higher than in United States prisons [see B/T12/p514].

78. The District Judge's approach carries with it the risk of rewarding fugitives for their flight, and of creating an anomaly between the approach of the Courts in domestic criminal proceedings, and in extradition. In the domestic context, it would never be said that an individual accused of crimes of the severity of Mr Assange's could not be put on trial (despite being fit to be tried) because of his determination to commit suicide. Rather, provided reasonable care could be offered to the defendant, the trial would proceed regardless of the defendant's determination to circumvent any measures put in place. Nor would it prevent a court from remanding an individual in custody or imposing a custodial sentence.

79. Moreover, the *Turner* test requires the Court to find that the mental condition of the person is such that it removes his capacity to resist the impulse to commit suicide (§40(4), above). This test goes to the nature of the mental condition of the individual. The District Judge did not apply this test- she merely found [at §347, A/T1/page 114] that Mr Assange's suicidal impulses would come "from his psychiatric diagnoses rather than his own voluntary act". This was not sufficient to meet the *Turner* test. The emphasis in *Turner* is whether the individual's illness is such that he or she lacks the ability to make a rational choice about whether to take their own life or not.

80. Again, a number of important points arise. The Respondent does not currently have a mental health condition which precludes his extradition. He is fit to participate in legal proceedings.

He has not made the sort of serious attempt on his life or have the history of serious self-harm seen in other cases. He has never previously suffered from the sort of mental health condition that deprived him of the ability to make rational choices. He has no formal psychiatric history save for the single incident referred to in his early adulthood.

81. Even if considering the future deterioration of mental health contingent upon future uncertain events is the correct approach, this is a case which required robust analysis as to the nature of the mental illness Professor Kopelman predicted that Mr Assange might develop; why it would develop in such a way as to remove his capacity to resist suicide; why the requesting state would be unable to manage the risk of that illness developing; and why, if it did, the requesting state would not able to manage the risk of suicide. The Court must then then conduct the overall assessment as to whether it would be oppressive to order extradition. The District Judge did not take this approach.

82. Had the Judge applied the correct test, and considered all relevant and appropriate matters, she would not have ordered discharge. As was said in the Appellant's written closing submissions at §161:

> In short, Assange does not fall into the category of individual so mentally ill that he has no capacity to resist suicide. The defence suggests that he might he in the future; that is entirely speculative and premised upon a number of variables that may or may not ever eventuate.

E. Whether the evidence of Professor Kopelman could be relied upon.

83. In a case where a defendant has gone to extraordinary lengths to avoid extradition (not least, in this case, his being willing to live in an embassy for seven years in purportedly terrible conditions) and demonstrated himself to be a skilled operator in many arenas, it was vitally important that the expert psychiatric evidence he relied upon was reliable and truly met the requirements of independence.

84. Professor Kopelman was forced to admit, he had failed in his duty to the court to be impartial by deliberately omitting from his first report (of 17 December 2019) that the Respondent had established a family life with Ms Morris having had two children with her during the currency of his being in the embassy. The passage at transcript page 57 to 59 on the 22nd September 2020 [D/T4/pp186-8] shows this:

> A. This is about, this is about the revelation of my handwritten notes.
> MR LEWIS: Yes, it is ---

JUDGE BARAITSER: Professor, just listen to the question and try and answer it if you can.
MR LEWIS: Yes. Now, when you met with Stella Morris, did she tell you she was the current partner of Mr Assange and she was the mother of two of his children?
A. She did, yes. I did not put that in the first report because it was not known.
Q. And that is in fact if we need it, it is set out in your handwritten notes, bundle page 25 728. We do not need to turn that up.
A. Well, I am not going to dispute that.
Q. No, you said that. Now, why did you not put that in your report?
A. Because it was not known in the public domain and I discussed with the legal team and we decided that we did not need to mention it. We would mention that he had a partner who was strongly supportive to him and by the time of the second report she had gone public about that and that is why I included it in the second report.
Q. Do you agree that fact that she was his current partner and had two children by him is relevant to the risk of committing suicide?
Um, you mean that if you have a partner you may or you may not be more at risk?
Q. Yes.
A. Uh, yes.
…
Q. But you do not even mention the two children in your report do you?
A. I do mention but in another context. At that point I did not reveal that she was the mother of his two children.
Q. And you must admit, it must be terribly relevant because even if we go a page and a couple of pages back, page 19, in relation to Ms Dreyfus, and I am picking it up on the third paragraph from the bottom, he, that is Mr Assange, told Dr Dreyfus that what stopped him from suicide was the fight for his son's safety and wellbeing. He could not leave his son unprotected.

Q. I know that, Professor, but what I am saying is, it is an obvious relevant factor to put in your report that his partner and two children, is it not?
A. This was not in the public domain at that point and she was very concerned about privacy so we decided not to put it in. As soon as it became in the public domain I included it.
…
Q. But what I am saying is why did you not? You know your duty, your first duty is to the court and it does not matter whether it is embarrassing or confidential, is it not?
A. Yes, OK, but she was very concerned about privacy and I was trying to respect that.
…
Well, maybe I did not perform my duty to the court there but I was trying to be diplomatic and respect her privacy.
…
Q. Because she is naturally going to want to say helpful things to Mr Assange, is she not?
A. Yes.
Q. And the court should be aware of that when assessing the veracity of her account to you. Do you agree?
A. Yes,

85. Professor Kopelman's actions went beyond omitting relevant information from his first report and actively misrepresented the true position. For example:

(1) At pages 7- 8 of his report [B/T4/pp328-9], having referred to the respondent's former partners and his older children, Professor Kopelman said the Respondent

had subsequently commenced a close relationship with another woman, which was of continuing huge importance and support to him. He stated that this woman "has two children". The juxtaposition of information about the Respondent's children and these two other children, belonging to the woman referred to was to actively give the impression that these were not the Respondent's children.

(2) At page 16 [B/T4/p337] Professor Kopelman referred to the Respondent's mood in August 2019, and said that "an obligation to his children" was one of only two things which the Respondent said had stopped him from committing suicide. By October 2019, Professor Kopelman reported, the respondent "no longer thought that feelings for his children would prevent him from committing suicide." He was willing to state this without making clear that these children included his two very young children with Ms Morris.

(3) At page.22 [B/T4/p343] Professor Kopelman referred to his meeting with Ms Moris, whom he said had been employed by the respondent in February 2011. He recorded that Ms Moris had twice met the respondent's adult son. He made no reference at all to her current relationship with the respondent, or her children by him. He recorded her belief that the respondent would commit suicide if he were to lose the case. Again (having referred to the woman whom the Respondent was in a relationship with), this was to create the positive impression that Ms Morris was not in a relationship with Mr Assange.

86. None of this is in dispute. Professor Kopelman deliberately set out to misrepresent the position so, in his words, in his oral evidence on oath, to protect Ms Morris' privacy. He compounded his being misleading in his first report by failing to mention in his second report that he had always known of the existence of this family life. The Appellant only discovered that Professor Kopelman had known of the correct position when he wrote both reports when his notes were disclosed (pursuant to the Appellant seeking them), the afternoon before he was due to give evidence.

87. It follows:

(1) Professor Kopelman deliberately suppressed in his report a highly relevant factor to the question of likelihood to suicide. He stated in his evidence that he was willing to do so to protect Ms Morris' privacy.

(2) The Appellant only learned of the true position when the Respondent elected to deploy information about his family life, with Ms Morris, to support his bail application in March 2020. Far from there being any concerns about Ms Morris' or the children's privacy or *safety*, Ms Morris disclosed the relationship (and photographs of the children) to the media.

(3) If Professor Kopelman really considered there to be any issue as to the privacy of Ms Morris, there is no evidence whatsoever that he considered any alternative courses such as providing a confidential annexe to his report which out the true position.

88. Professor Kopelman was willing to sign a statement of truth that he had adhered to the following requirements in his report of 19 December 2019:

> "(i) I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.
> (vii) I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
> (viii) I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
> (ix) I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.
> (xi) I understand that:
> my report will form the evidence to be given under oath or affirmation; …"

89. He knowingly signed the statement of truth that he had met these requirements, when he had not done so.

90. Asides his willingness to mislead, Professor Kopelman's approach to diagnosis gave cause for concern. His attitude to being asked for an objective yardstick was extraordinary:

> Q. Professor, I want to sort out a yardstick for diagnosis. It is right, is it not, that you have used the World Health Organisation classification in Mental and Behavioural Disorders (ICD 10)?
> A. Could I make a comment here? I am not a great fan of what I call "those bloody books" (ICD and DSM), so I make a clinical diagnosis on the basis of my clinical experience and was in the research literature.[3]

91. Without the yardstick of the established body of works and guidelines it is difficult for the court to assess reliability and consistency of a psychiatrist's diagnosis. By dismissing the

[3] Transcript 22nd September 2020, D/T4/p142, lines 23 - 27

objective criteria by which psychiatrists judge mental illness and instead relying on his 'clinical experience'; Professor Kopelman made it more difficult to test his opinion. It was thus all the more important that his evidence was impartial and reliable.

92. The Appellant's concerns about the quality of Professor Kopelman's evidence (in addition to his being misleading) were set out in detail in the written submissions to the District Judge. As Professor Kopelman himself made clear in oral evidence the sort of psychiatric opinion he gave was contingent upon the self - reporting of symptoms by the Defendant: "*The nature of psychiatry is that one relies quite heavily on self-report. That is the nature of psychiatry. There is no MRI scanner that will show you a hallucination.*" [D/T4/p186, lines 5-6]. One of the key differences between this approach and that of the Appellant's experts, Dr Blackwood and Professor Fazel is that they considered that the long running, day to day notes made by staff and medical practitioners to be important in discerning the true picture about the Respondent's health. They were of the view that these notes did not support or were inconsistent with some of Professor Kopelman's findings. Again, the detail of these differences were set out at length in the Appellant's written pleading [at §400 *et seq*].

93. Professor Kopelman had been retired from practice for five years at time he gave evidence. Unlike Dr Blackwood and Professor Fazel, he is not (and was not) a forensic psychiatrist (rather his specialisation in practice was memory disorders). He did not have the sort of familiarity with the ICD criteria that might be expected of an expert psychiatrist.[4] Nor was he sufficiently familiar with the common language used in a forensic setting to recall what the common acronym for Assessment, Care in Custody and Teamwork "ACCT" stood for. This was despite it being referred to in his reports several times, and being used hundreds of times throughout the medical notes.[5]

94. In her Judgment, the District Judge did not descend into any of the detail or squarely confront the concerns expressed by Dr Blackwood (see §48 of his report as regards his reservations about Professor Kopelman's opinion on the Defendant at his "self – stated" worse) or those expressed by Professor Fazel (see his report at §5.3). In summary, they explained why they considered that the long running records were apparently at odds with Professor Kopelman's suggestion that Mr Assange had experienced an extreme level of depression with psychotic features. At §336, the District Judge rejected Dr Blackwood's evidence on the basis that his

[4] Transcript 22nd September 2020, D/T4/p143, from line 7
[5] Transcript 22nd September 2020, D/T4/p162, from line 33.

summary of the notes was less detailed than Professor Kopelman's but failed to address the Appellant's central point that looking at the notes as a whole, they conveyed a picture different to that conveyed by Professor Kopelman in terms of the extremities of the condition which he described.

F. The District Judge's approach to Professor Kopelman

95. The District Judge found as fact that she had been misled by Professor Kopelman. She concluded:

> [329] ..In his first report of 17 December 2019 Professor Kopelman described Ms. Morris as follows "Ms Morris is a UK resident of Swedish nationality. She took a degree in Law and Politics at the School of Oriental and African Studies in London, and then an MSc in Oxford. She was employed by Mr. Assange in February 2011, when he needed someone to research the Swedish case. She also works with a very prominent Spanish lawyer, dealing with asylum matters, and acts as a legal researcher and coordinator." **This is misleading as**, by this time Ms. Morris was Mr. Assange's partner and mother of two of his children. In the same report, he states: "Subsequently, Mr. Assange commenced a close relationship with another woman, which is of continuing huge importance and support to him. This woman has remained very supportive, which greatly helped his morale in the embassy. She has two children". **This is misleading** as it implies that Mr. Assange was not the father of the two children. Professor Kopelman was aware that Mr. Assange's children were a significant factor in the assessment of his risk of suicide, as Mr. Assange had told him in August 2019 "The only things stopping [me] from suicide were the "small chance of success" in his case, and an obligation to his children".
> 330. **In my judgment Professor Kopelman's decision to conceal their relationship was misleading and inappropriate in the context of his obligations to the court**, but an understandable human response to Ms. Morris's predicament

96. This was a slight and inadequate assessment of the position. It demonstrates:

    (1) That the District Judge failed to appreciate the significance of the fact that Professor Kopelman had been willing to mislead her on a material issue.

    (2) That she failed to explore what the so called 'predicament' was when it was clear that the Respondent and his partner were perfectly willing to utilise the existence of their children when it suited them.

    (3) She appeared to rely upon the fact that she had not read the report until after the defence had revealed the position (months later). But this was nothing to the point, what she needed to interrogate was why Professor Kopelman had been willing to mislead her in her first place.

97. To determine the point on the basis that Professor Kopelman was misleading for '*human'* reasons did not begin to answer the requesting state's concerns. It is not even clear what this

means. And, having found that Professor Kopelman misled on one material issue, the critical issue was how the Court could be sure that he had not been misleading, in other aspects of his evidence, for equally 'human' reasons. [6]

98. Once Professor Kopelman demonstrated that he preferred to protect the privacy of the Defendant and his family, above his duty to the Court to provide all information relevant to the key issue of the risk of suicide, he demonstrated that his evidence lacked a fundamental quality of expert evidence; *Kennedy v Cordia* [2016] 1 W.L.R. 597 [§51] [page 22] and the Law Commission of England and Wales, "*Expert Evidence in Criminal Proceedings in England and Wales"* (Law Com No 325) (2011)[7].

99. In *Kennedy v Cordia*, the Supreme Court specified that a lack of independence goes to admissibility rather than to weight §51. It is submitted that this is precisely because a lack of independence undermines the totality of the evidence. It raises an immediate issue as to how the Court is to trust the expert's opinion on any material issue. It is respectfully submitted that (per §81 above) no court should ever be in this position. If that position is reached, the evidence should not be admitted.

100. This is the position for any expert evidence but it is of critical importance when it comes to psychiatric evidence given the difficulties of verifying, by objective evidence, any conditions reported or diagnosed; see Ouseley J in *HE (DRC) v Secretary of State for the Home Department* [2004] UKIAT 321 (DRC: Credibility and Psychiatric Reports) at §18.

101. Whilst it is accepted that the usual principle which applies in appellate proceedings is that the Court will only rarely disturb a judge's finding of fact reached after hearing oral evidence from a witness whose credibility is in issue, this is not sacrosanct; *Kotsev v. Bulgaria* [2019] 1 W.L.R. 2353 [Knowles J at §27]. The position is also distinct from the assessment of witnesses of fact given that the expert's evidence will be contained in their report.

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[6] The Appellant has made an application to admit fresh evidence which may throw some light upon Professor Kopelman's motivations when giving evidence. This is a published interview with Professor Kopelman from BJPsych Bulletin, Volume 41, Issue 6 , December 2017 at pages 364 – 365. See witness statement of Kate Leonard and B/T13/p528.

[7] See B/T14/p530 Law Commission, "EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES" (§86 of the Perfected Grounds of Appeal: *Expert witnesses therefore owe a unique, elevated duty to the court, with a concomitant duty to ensure that they do not mislead the court, regardless of the impact this may have on the party for whom they have been called. There is, therefore, a further principled justification for special rules for experts and, in particular, for requiring that all experts, regardless of their client, disclose matters which may have a bearing on the reliability of their evidence.*

102. It is submitted that the District Judge should have decided that she could not rely upon Professor Kopelman's evidence at all or ought to have attributed far less weight to it. For the avoidance of doubt, it is not accepted that the evidence of Professor Rix is admissible on this issue.

G. The District Judge erred in her overall assessment of the evidence going to the risk of suicide and oppression

103. Finally, it is submitted that the District Judge erred in her overall approach to the evidence. Much of this ground follows on from the points made above, but in particular, the District Judge failed to (i) adequately address the evidence about what a "high risk" of suicide actually means; (ii) adequately address the difficulties of assessing that risk of a longitudinal basis and (iii) correctly identify the nature of the Respondent's psychiatric condition. Overall, she failed to accord adequate weight to the Appellant's expert evidence.

104. Professor Fazel is a world leading expert on suicide in prisons. His published work was referred to by all the other psychiatrists. He explained that a 'high risk' of suicide means an elevated risk from the normal population. Not a high probability it would occur. He said:

> Yes. I think it is important to clarify this. So, usually when psychiatrists talk about high risk they mean it is more than the general population of similar age and gender. So, it means it is elevated. And then it is important also to contextualise what that means because if the comparison group has a very, very low risk then high risk has to be seen in that light. So, for instance, for prisoners in England and Wales, about one in a thousand prisoners will die from suicide in any one year. So, when you talk about high risk or an elevated risk of suicide in prisoners that has to be borne in mind. It is still, we are talking about you know, an increase maybe from one, to two, three, or four usually ---
> Q. A thousand?
> A. --- for out of a thousand, yes, so it is less than one per cent risk in any given year. And I think that has not been clarified previously and I think that is important to understand the context of suicide risk. The other thing about suicide risk, and I think this is also very important to state upfront, is that it, something that changes, so it is not something you can say today I can anticipate someone's suicide risk in six months, you have to understand that suicide risk is a dynamic.[8]

105. He confirmed that it is very difficult to anticipate with any certainty what someone's suicide risk will be in a month or more particular if their situation has changed.[9]

106. As set out above, the current test applied under section 91, required that the District Judge be satisfied that the nature of the Respondent's condition was such that he would not be able to

[8] Transcript 23rd September 2020, D/T6/p275, lines 8 – 14
[9] Transcript 23rd September 2020, D/T6/p275 line 23

resist suicide. This was not the test which was applied by the Judge at §347. The question is not whether the individual's intent to commit suicide comes from a psychiatric condition but whether the individual is sufficiently ill that the individual has no ability to resist suicide. This part of the *Turner* test is clearly intended to ensure that only those with sufficiently severe and enduring mental illnesses will avoid extradition under section 91.

107. The Appellant's experts agreed that the Respondent did not reach this threshold; see Dr Blackwood at B/T11/p477 [§6]; Professor Fazel at B/T12/p513 at §5.9. Dr Deeley (called on behalf of the Respondent) described, to opposite effect of this limb of the *Turner* test, that rather, suicide would represent an assertion of agency in a situation in which the Respondent regarded himself as disempowered (described by the District Judge at §319 of her Judgment).

108. Whilst the District Judge may accurately have repeated aspects of what each expert said, this is not a substitute for proper reasoning as to why aspects of the Appellant's evidence were not relied upon. It is submitted that the District Judge ought to have taken a much more critical approach to the Respondent's evidence and that she ought ultimately to have determined that it did not demonstrate that the threshold for discharge under section 91 was met.

III. CONCLUSION

109. For all of the reasons set out above it is respectfully submitted that this Court should allow the appeal on the grounds that:

    (1) The District Judge was wrong, in law, in her approach to section 91.

    (2) The District Judge erred in concluding that the Respondent's mental health condition met the threshold for discharge under section 91.

    (3) Further and alternatively, that the assurances offered by the Appellant address the conditions of future detention which the District Judge relied upon in making her decision under section 91.

110. The Court is invited to remit this matter to the District Judge and direct the Court to proceed as it would have been required to do if it had decided the relevant question differently at the extradition hearing (per section 106(6)). In this case the direction should be that the case should be sent to the Secretary of State.

JAMES LEWIS QC

CLAIR DOBBIN QC

JOEL SMITH **13 OCTOBER 2021**