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

IN THE MATTER OF AN APPEAL UNDER S.105 OF THE EXTRADITION ACT 2003

THE UNITED STATES OF AMERICA

Appellant

-v-

JULIAN ASSANGE

Respondent

RESPONDENT'S SKELETON ARGUMENT

Abbreviations:

A – E: Bundles A – E;
REB: Respondent's further evidence bundle;
PG: Appellant's Perfected Grounds of Appeal;
SA: Appellant's Skeleton Argument.

1. INTRODUCTORY SUMMARY

1.1. The USA appeals a carefully considered and fully reasoned judgment by the District Judge ('DJ') under s.91 that Mr Assange's mental condition is such that it would be oppressive to extradite him. That decision was reached after a series of hearings commencing in April 2019, culminating in a 4 week evidentiary hearing in September 2020, which was then followed by an extensive exchange of written submissions before the giving of judgment in January 2021.[1] The prosecution wrongly claim at §4 of their skeleton argument that the judge '*unusually…ordered that only written closing submissions were to be made'.* In fact, the judge offered both parties a day to make oral submissions in the week following the close of the evidence. It was only at the request of both parties and at their joint urging that the judge acquiesced in the suggestion that closing submissions should be in writing only. So the prosecution's claim is misleading.

1.2. At the extradition hearing the Judge received oral and written evidence as to Mr Assange's mental state from four psychiatrists, as well as a US physician Dr Crosby

[1]. The Court will be aware that the US's criminal complaint which gave rise to these proceedings itself dated back to December 2017, in respect of events taking place in 2010.

and a psychological expert, Emma Woodhouse [**§§318-319].** In her judgment, the DJ gave detailed reasons for preferring the evidence of the defence psychiatrists Professor Kopelman and Dr Deeley to that of the prosecution's two psychiatrists **[A, tab 1, pp108-111, §§329-336]**. She found Professor Kopelman's opinion to be '*impartial and dispassionate'* despite the attacks made on him by the prosecution and their attempts to discredit him in cross-examination **[§331]**. She referred to the fact that he was an experienced and distinguished neuropsychiatrist[2]; that he had exclusive knowledge of Mr Assange's mental state in the period of May to December 2019, when his mental state was at its worst; that he had taken great care to provide an informed account of Mr Assange's background and psychiatric history; and given close attention to the prison medical notes – which he had summarised in detail in an annexe to his December report **[§332]**. She also accepted Dr Deeley's evidence that Mr Assange suffers from Autistic Spectrum Disorder ('ASD'), against the background of Dr Deeley's unique specialism in ASD and maintenance of his position under '*robust cross-examination'* **[§333]**. By contrast, she found Dr Blackwood's contact with Mr Assange to have been more limited, and his knowledge of the prison medical records significantly less detailed **[§§335-336]**. In addition, his assessment did not accord with that of the second prosecution psychiatrist, Professor Fazel, in significant respects.

1.3. The prosecution have sought to minimise the severity of Mr Assange's mental disorder and suicide risk. But the Judge relied on the undisputed diagnosis of a long standing and recurrent depressive disorder ranging from moderate to severe in degree **[§§313, 319, 325]**; the family history of depression and suicide; and his own 3 previous episodes of depression and past admission to hospital for slashing his wrist **[§315]**. She further relied on the fact that Mr Assange was continuously on medication – both antidepressant medication and the antipsychotic Quetiapine **[§§314, 345]**. She referred in detail to the medical notes and what they showed **[§§331, 345]**. She traced the history of his continuing placement on ACCT for suicide risk; his transfer for months to the medical wing because of suicide risk **[§§336, 345];** the adverse consequences of his relative isolation there **[§§314, 316]** his confession of suicidal thoughts and frequent resort to the Samaritans line **[§§313, 345]**; and the evidence of suicidal planning on his part **[§345]**. This review was an entirely sound basis on which to proceed, given further her own ability to make an assessment of Mr Assange. She herself found after detailed consideration of the medical records that:- '*the overall impression is of a depressed and sometimes despairing man, who is genuinely fearful about his future'* **[§345]**. This insightful and balanced reading of the medical notes was obviously informed further by her own opportunity to observe him over a long period of time.[3]

1.4. Against the background of those findings, the Judge then addressed the successive tests laid down in the case of ***Turner v USA*** [2012] EWHC 2426 (Admin) **[E, tab 15]**. She first accepted the evidence of Professor Kopelman that Mr Assange *'suffers from a recurrent depressive disorder which was severe in December 2019 and*

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2 As the DJ recorded, Professor Kopelman is an *'emeritus professor of neuropsychiatry at Kings College London and, until 31 March 2015, a consultant neuropsychiatrist at St Thomas's Hospital'* **[Judgment §312]**.

3 The significance of a judge's observations of a requested person throughout a long hearing was recognised in the case of ***USA v McDaid*** [2020] EWHC 1527 (Admin) at §50.

sometimes accompanied by psychotic features, often with ruminative suicidal ideas' **[§332]**. She further found that he suffered from '*autism spectrum disorder'* on the basis of the evidence of Dr Deeley who is '*an experienced developmental psychiatrist and the only expert to give evidence with a specialism in autistic spectrum conditions'* **[§333]**. She then set out, at **§§337-346,** her seven reasons for finding that the risk of suicide was '*substantial'* or '*very high',* within the test laid down at **§28(3)** of ***Turner***.

1.5. Next the Judge addressed the test laid down in **§28(4)** of ***Turner*** as to whether, if he was extradited, his mental disorder would lead to an inability to control his impulse to commit suicide. She accepted the evidence of Professor Kopelman that the '*imminence of extradition or extradition itself would trigger a suicide attempt but it was Mr Assange's mental disorder that would lead to an inability to control his wish to commit suicide'* **[§§348-349]**. She further accepted the evidence of Dr Deeley to like effect that if he was extradited his mental disorder would give rise to a state of mind that would lead Mr Assange to conclude that he would kill himself rather than face these conditions **[§§339, 348-349]**.

1.6. Finally, the Judge addressed the question of whether the risk that he would commit suicide '*whatever steps were taken'* was so great as to make extradition oppressive, as required by **§§28(3)** and **28(5)** of ***Turner***. She dealt with this question at **[Judgment §§350(ff)]**, and concluded that she was satisfied that he would commit suicide whatever steps were taken **[§§361-362]**. In addressing this question she considered carefully the procedures for treatment and prevention available in the US, as required by ***Turner*** at **§28(6)**. She analysed the treatment and measures available on the basis of the evidence of Dr Leukefeld, the BOP Expert **[§§350-361]**. But she concluded that these measures would be insufficient to prevent him from committing suicide because of a combination of his mental disorder and a resultant determination to take his own life **[§§359-360]**. It was this that justified her **conclusion** that by reason of his mental disorder and high suicide risk **it was oppressive to extradite him** because he would be driven by his disorder to find a way to commit suicide whatever preventative steps were taken.

1.7. These findings arose primarily from the nature of Mr Assange's mental disorder and his fears of extradition given the wholly exceptional nature of his case. There is nothing to suggest that these factors have changed in the least bit since the extradition hearing. It is true that the Judge, in reaching her conclusions, took account of the risk that he would be detained in conditions of isolation under Special Administrative Measures ('SAMs') and also in ADX **[§§355-357]**; but she also relied on the inevitable fact that he would be detained in isolation whatever the regime and deprived of many of the protective factors currently available in the UK at HMP Belmarsh **[§358]**. On the evidence she was fully entitled to rely on both factors.

1.8. The newly proffered and conditional assurances do not in fact remove the real risk of detention on SAMs or on ADX. They certainly do not remove the very real risk of detention in administrative segregation, which was fully established at the hearing and is further confirmed by the new evidence now available and summarised in part 5. They do not remove the virtual certainty of detention in the Alexandria Detention Centre, where, on May 18 2021, a mentally ill person committed suicide due to the wrongful discontinuance of his medication **[REB pp463-464].** And, even if the Court were to admit the assurances, there is no reliable basis to conclude that the Judge's

overall conclusion as to oppression, strongly conditioned by her findings on the medical evidence itself as it was, would have been any different.

1.9. Against that background we turn to analyse the specific grounds of appeal advanced by the prosecution.

The Grounds of Appeal

1.10. To the extent that the US in their **Ground 1** now seek to identify an error of law in the application of the legal test under s.91, it is in fact clear that the judge scrupulously applied the test for oppression in cases of mental disorder, laid down in a series of cases, including ***Turner*** (supra), ***Wolkowicz v Poland*** [2013] 1 WLR 2402 **[E, tab 12]** and ***Love v USA*** [2018] 1 WLR 2889 **[E, tab 6].** She applied each of the tests laid down in ***Turner*** for oppression by reason of mental disorder and suicide risk; and she found that those tests were met. Mr Assange's full response to this point is set out in detail in the Notice of Objection **[A, tab 8, p664, at part 2]** and in part 2 below.

1.11. Next the US seeks in **Grounds 3 and 4** to re-litigate the issue of Professor Kopelman's reliability and the respective weight to be attached to the defence psychiatric experts Professor Kopelman and Dr Deeley on the one hand and the prosecution experts Dr Blackwood and Professor Fazel, on the other. Their approach runs contrary to the well-established principle that the appellate court should respect the competence of the DJ to determine for herself the issues of the reliability and weight of the expert witnesses she herself heard. This point is analysed further at 4.2 below.

1.12. The prosecution wrongly criticise the DJ for relying on the evidence of Professor Kopelman despite finding that he had included a misleading statement in his initial report of 17th December 2019, 9 months before the hearing. But the DJ took full account of the criticism that could be made of Professor Kopelman's initial non-disclosure of the nature of the Mr Assange's relationship with Stella Moris and the fact they had two young children. She reasonably found that this was "*an understandable human response to Ms Moris' predicament"* – and that response obviously took account of Professor Kopelman's well-founded concerns for her safety and the judge's own knowledge of the evidence of risk (see **§3.12** below). The new evidence of Professor Keith Rix further supports the approach of the DJ. It highlights the genuine ethical dilemma that Professor Kopelman faced as an expert medical witness with a duty to protect the confidentiality of the sources he interviewed and concludes that he acted '*professionally*'; '*responsibly'* and that he '*exercised appropriate and reasonable caution'* in not disclosing the full position in his first report **[REB, tab 3, pp85-6, §§9.3 - 9.5]**. And, the Judge's overall conclusion that Professor Kopelman's opinion was '*impartial and dispassionate'* took account of all relevant factors and should not be reverse [see further part 3 below].

1.13. As to **ground 4** and the criticism that the Judge should have preferred the evidence of the prosecution experts to that of Professor Kopelman and Dr Deeley, the weight of their respective evidence was squarely a matter for the judge who heard the evidence. No error of law has been identified in her approach. She gave eminently powerful reasons for preferring the evidence of Professor Kopelman and Dr Deeley at **[§§329-336]**.

1.14. To the extent that the US seeks in **grounds 2 and 5** to rely on assurances provided after the evidentiary hearing, at the appellate stage, the Respondent submits as follows:- First, these qualified and conditional assurances are produced too late to be properly tested. Secondly, they do not undermine the principal findings of the DJ on the Respondent's mental condition and risk of suicide. Thirdly, they do not remove the risk of detention under SAMs, or in conditions of administrative isolation even if SAMS are not imposed. Nor do they remove the risk of long-term isolating detention in the USA, before any question of repatriation could even arise. Fourthly, testing their trustworthiness would is a matter only the DJ is capable of performing against other evidence she has heard. This is fully dealt with at Part 5.

1.15. These submissions accordingly deal firstly with **Grounds 1, 3** and **4** relating to the ***Turner*** test and the reliability of the evidence of Professor Kopelman and Dr Deeley to support the Judge's conclusions. Then they address **Grounds 2** and **5** and the question of the assurances.

2. GROUND 1: ALLEGED MISAPPLICATION OF THE LEGAL TEST

2.1. The prosecution firstly submit that the learned DJ failed to apply the test laid down in the successive cases of ***Turner*** and ***Wolkowicz*** as to risk of suicide due to mental disorder. The first complaint is that the effect of the DJ's *'approach was to dilute'* the ***Turner*** test **[A, tab 7, p650, §64(iv)]**. But, in fact, the judge scrupulously applied the successive tests laid down in ***Turner,*** as set out more fully in the Notice of Objection **[A, tab 8]**.

2.2. At §§44 and 64 of the Perfected Grounds, the prosecution criticise the learned judge for failing to '*make the overall assessment required by s.91 as to whether extradition would be oppressive'* **[A, tab 7, p650, §64(vi)]** and for compartmentalising the three tests of substantial or high risk; capacity to resist the impulse and risk that he would succeed in committing suicide whatever steps were taking**.** The prosecution's criticism is misconceived. As required by ***Turner***, the Judge correctly addressed in turn the questions of substantial or high risk of suicide (as required by **§28(2)** of ***Turner***) at **Judgment §§337-346**; the capacity to resist the impulse to suicide at **Judgment §§347-349** (the fourth test at **§28(4)** of ***Turner***); and the '*risk that he will succeed in committing suicide whatever steps are taken'* (as required by §§28(3) and 28(5) of ***Turner***) at **Judgment §§350-361**. But, in doing so, she did also make an overall assessment as set out below.

2.3. The decision in ***Turner*** at **§28(3)** lays down that the **overall question** of whether extradition will be oppressive necessarily depends on whether there is '*a sufficiently great risk the [Respondent] will succeed in committing suicide whatever steps are taken'* to make extradition oppressive. And this is precisely the question the judge did address at **Judgment §§350-363** before she reached her overall finding of oppression as required by Section 91. In order to do so she necessarily addressed the further question laid down at **§28(6)** of ***Turner*** as to whether there are '*appropriate arrangements in place in the prison system to which extradition is sought so that those authorities can cope properly with the persons' mental condition and the risk of suicide'.* If the requested person will commit suicide whatever steps are taken, then it is obvious that the appropriate arrangements in place in the requesting state will not be adequate. Accordingly, the Judge analysed the evidence of Dr Leukefeld, the

psychologist employed as the administrator of the psychology services of the BOP as to the treatment available and the systems in place to prevent suicide **[§§354-359]**. But, after that review, she concluded that:- '*I am satisfied that the procedures described by Dr Leukefeld will not prevent Mr Assange from finding a way to commit suicide'* [last sentence of **§361**]. Therefore she complied with each and every one of the **Turner** requirements.

2.4. In their Perfected Grounds, the prosecution complain that the DJ had '*diluted the **Turner** test'.* This criticism has already been fully answered on Mr Assange's behalf in the Notice of Objection **[A, tab 8, p664]** to show that the DJ had faithfully applied each step of the test laid down in ***Turner***. But now, in their Skeleton Argument, the prosecution have sought instead to reformulate the s.91 suicide risk test **[A, tab 12, p774, §40]**. To this end:

(i) At **§40(1)** they stress the importance of considering the individual's health <u>at the time of the application</u>. This is over-simplistic. It totally overlooks the necessity of considering what effect the fact of extradition itself, if it occurs in the future, will have on the mental health of the requested person. This was the essence of the exercise carried out by the High Court in the comparable case of ***Love*** (supra). So, inevitably s.91 requires a prediction as to what the future consequences of an actual order for extradition will be on the health and suicide risk of the requested person. So this criticism fails.

(ii) Next at **§40(2)** the prosecution refer to the question of whether the requested person's mental condition is of such severity that he would be unable to resist the impulse to take his own life. This test, derived from ***Turner,*** was scrupulously applied by the DJ **[§§347-349]**. So there is no proper criticism on this count.

(iii) The prosecution then say at **§40(3)** that '*the Court must determine what mental health care and safeguards exist so as to meet the risk of suicide'* and suggest that '*if such safeguards exist the section will [not] be satisfied (save perhaps in exceptional circumstances where no treatment or safeguards will meet the risk of suicide)'*. This totally re-writes the test laid down in ***Turner*** by downgrading the essential point that the Court must ask itself whether the suicide risk is so great that the requested person will commit suicide '<u>*whatever steps are taken'*</u> . That test was enunciated in ***Turner*** at §28(3) and repeated at §28(5), and has been consistently applied by this Court, most recently in ***Farookh v Germany*** [2020] EWHC 3143 (Admin), as approved by Chamberlain J in ***Fletcher v India*** [2021] EWHC 610 (Admin), two cases which are not even confronted by the prosecution. The correct test is whether 'th*e risk that the person will succeed in committing suicide, whatever steps are taken'* is *'sufficiently great to result in a finding of oppression*' **[*Turner,* §28(5)]**. The prosecution have totally failed to confront the fact that a Judge who concludes that the requested person will commit suicide 'whatever steps are taken' has necessarily concluded that the mental health care and safeguards in the requesting state are inadequate to meet the risk of suicide in the individual case**.** This is a fundamental defect in the prosecution's analysis and their attempt to re-write the test in ***Turner***, ***Farookh*** and ***Fletcher***.

(iv) The prosecution then state that the judge '*must 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'* **[§40(4)]**. But this ignores and rewrites the exact formulation in ***Turner, Farookh***, and ***Fletcher***. Those judgments formulate the overall question quite differently, as '*whether on the evidence, whatever steps are taken … the risk of the requested person succeeding in committing suicide by reason of a mental condition removing the capacity to resist the impulse to commit suicide is sufficiently great to result in a finding of oppression*'.[4] That was the test that the Judge in this case correctly applied since she concluded, at **[Judgment §§350-362]**, that there was a great risk of suicide whatever steps are taken, and this led directly to her conclusion at **§363** that extradition would be oppressive.

2.5. For these reasons the prosecution's subsequent criticisms of the judge's approach **[A, tab 12, pp751-754, §§68-82]** are wholly unfounded:-

(i) The prosecution wrongly claim that the judge failed to make an overall determination of oppression by reason of mental disorder **[A, tab 7, p645, §45 and tab 12, p751, §§68-69].** But in fact the judge did necessarily ask herself whether the risk that Julian Assange would commit suicide whatever steps were taken was sufficiently great to make his extradition oppressive. She addressed this issue from **§§350 onwards**, focused on it especially at **§§356** and **§§359-360** and then based her conclusion at **Judgment §§362-363** substantially on her findings that his mental condition was such that he would commit suicide whatever steps were taken – both because of the nature of his mental disorder and because of the harsh conditions of detention he faced in the States and the lack of support mechanisms there **[§§350-362]**.

(ii) The prosecution wrongly criticise the judge for '*basing her decision upon the **future** deterioration of mental health'* **[A, tab 12, p751, §70].** But in fact this is necessarily part of the analysis in every case, since extradition occurs in the future. In this case, the DJ rightly focused mainly on the effect of imminent extradition itself on Mr Assange's suicide risk. This is clear from her judgment at **§§348-349**, in which she accepted Professor Kopelman's evidence that '*the imminence of extradition, or extradition itself, would trigger a suicide attempt'* which he would be unable to resist, due to his '*mental disorder';* and she further accepted Dr Deeley's evidence as to the likelihood that the fact of extradition itself would exacerbate his mental disorder, so as to create '*a high risk of attempted suicide'*. Those findings were enough to satisfy the ***Turner*** test.

(iii) It is true that the judge did additionally take account of Mr Assange's likely future mental deterioration consequent upon detention in the harsh conditions of isolation in the US, at **§§340-342**, at **§§355** and **§§362.** But, in doing so, she took the exact same approach as the High Court applied in ***Love.*** In that case too**,** the risk of future deterioration after extradition to the US because of the conditions of detention was an essential part of the ratio **[*Love,* §§118-121]**.

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4. ***Farookh*** (supra) at §7, approved in ***Fletcher*** (supra) at §39.

Indeed the High Court in ***Love*** dealt in those paragraphs was the effect of detention in conditions of isolation on remand in considerable detail; and rightly so, given the broad value judgment mandated by the words of s.91.

(iv) The prosecution next wrongly criticise the judge on the basis that her '*ruling ought to have been focused on an examination of the measures which would have been in place in the United States to prevent Mr Assange from attempting suicide'* **[A, tab 7, p645, §46 and tab 12, p751, §71]**. But in fact the DJ performed precisely this exercise at **§§350-361**, and expressly concluded that 'the procedures described by Dr Leukefeld (the BOP official whose statement was before the court) would not prevent Mr Assange from finding a way to commit suicide' **[§361]**.

(v) The prosecution assert that the consequence of the DJ's approach is that a prisoner with intellectual ability to circumvent suicide prevention measures will escape extradition **[A, tab 7, p646, §§47-50 and tab 12, p252, §§74-75].** The same could be said of the reasoning of the High Court in **Love** at **§§118.** But, in fact it is clear that the defence psychiatric experts the DJ relied upon here had concluded that it would be Mr Assange's mental disorder and not merely his intellectual ability that would drive him to find a way to circumvent suicide prevention measures. That was the whole burden of the evidence of both Professor Kopelman and Dr Deeley, summarised by the DJ at **§§347-349** as the basis for her finding that he would be unable to resist the impulse to suicide. Thus she found that the cause of both the urge to commit suicide and the determined circumvention of suicide prevention measures would be Mr Assange's mental disorder itself. That was what Dr Deeley said about the effects of Mr Assange's ASD in his evidence[5] and what Professor Kopelman said about the effects of Mr Assange's depression, if he were to be extradited. Moreover the same drive and ability to circumvent suicide prevention measures was the basis of the High Court decision in ***Love*** that to extradite him would be oppressive: see §§115 and 118 – 119 **[E, tab 6, pp95-96]**. So this criticism is unfounded, and amounts to a direct attack on the approach of the High Court in ***Love*** itself.

(vi) The prosecution finally state that the test applied by the DJ '*erects a threshold that no requesting state can meet'* **[A, tab 12**, **p752, §§75-77]**. But this was a very special case decided by an experienced specialist judge - see ***Wolkowicz*** **[E, tab 12, p178, §14]**. And the DJ made very specific findings about Mr Assange himself, his unique combination of two specific mental illnesses and the particular nature of the imminent risk if extradition was ordered, and of his own prospects if detained in isolation in the US. In doing so, she acted no differently than the High Court in ***Love***, with whose case the Judge drew a direct parallel at **§360.** It is simply ridiculous to suggest, as the prosecution do, that the case of ***Love*** can be distinguished because the determining factor in

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[5]. See **D, tab 5 p237, lines 23-7**: '*the acute worsening of his mood state in keeping with his depression I think would render unbearable the prospect of extradition and that would interact with and be compounded by his excessive rumination and rigidity of thought…I think the reality of the situation is that people who are determined to kill themselves do kill themselves…and that is evidence in the report of Kupers…'*

that case was that, though he suffered from depression and Asperger's, like Mr Assange, he also suffered from the physical condition of eczema (which occupied just half a sentence of the ***Love*** Judgment at §119 in the context of the full seven paragraphs that set out the Court's reasoning on oppression at §§115 - 122). And if the High Court were entitled to adopt the approach they did in ***Love***, so too was the DJ in this case. It is perfectly reasonable to find it oppressive to extradite a mentally disordered person because his extradition is likely to result in his death.

2.6. The Judge's approach and the test she applied was in fact entirely in line with the approach adopted by Fordham J in ***Farookh*** (supra) at §7, as approved in ***Fletcher*** (supra) at §39. The **compendious test** they derive from ***Turner*** and later cases is '*whether on the evidence, whatever steps are taken – and even if the court is satisfied that appropriate arrangements in place in the prison system in the country to which extradition is sought, so that those authorities will discharge their responsibilities to prevent the requested person from committing suicide – the risk of the requested person succeeding in committing suicide by reason of a mental condition removing the capacity to resist the impulse to commit suicide is sufficiently great to result in a finding of oppression.'* And that is precisely the question that the judge asked herself. Applying that test she found at **§§361 – 363** that the risk of suicide, whatever steps were taken, was great enough to make extradition oppressive. There is no other reasonable interpretation of her judgment, since she was scrupulously tracking the steps laid down in ***Turner.*** In any event there is good authority that appellate courts should respect the findings of '*expert tribunals …unless it is quite clear that they have misdirected themselves in law'*: see Baroness Hale in ***AH (Sudan) v SSHD*** [2008] 1 AC 678, §30.

Further errors in prosecution approach

2.7. That disposes of the prosecution's key grounds of appeal against the approach rightly adopted by the judge on the basis of the decisions in ***Turner*** and ***Love*** – and entirely consistent with the approach of the courts in the later cases of ***Farookh*** and ***Fletcher***. It is highly significant that their review of the case law omits these two most recent cases which directly approve ***Turner*** and which derive a compendious test from ***Turner*** and the succeeding cases.

2.8. As to the prosecution's suggestion at the permission hearing that it is **necessary to establish unfitness to plead** in order to succeed under s.91, this wholly confuses the test of injustice with that of oppression. Where oppression is concerned, as in ***Love*** and in the original case of ***Jansons v Latvia*** [2009] EWHC 1845 (Admin) **[E, tab 19]**, it is not necessary to establish unfitness to plead. It is the high risk of suicide by reason of mental disorder in the event of extradition that justifies the finding of oppression. This recognises the special consequence of removal to a foreign jurisdiction – which was the very fact that led Parliament to introduce an additional protection on grounds of physical or mental health.

2.9. The prosecution further attempt to compare this case to other cases and draw **factual distinctions** as to the relative severity of the conditions. But that exercise offends against the injunction in ***South Africa v Dewani*** [2013] 1 WLR 82 that '*the words in s.91 and s.25 set out the relevant test and little help is gained by* ***reference to the facts***

of other cases' [§73]. As the Court also observed in ***Dewani,*** even the characterisation of the test as imposing a high threshold is not helpful because *'this inevitably risks taking the eye of the parties and the court off the statutory test'* [§73]. What is important are the principles laid down in ***Turner*** and condensed in ***Farookh*** and ***Fletcher,*** as governing suicide cases.

2.10. Elsewhere, the prosecution attempt to collapse s.91 into a simple Article 3 analysis, suggesting that s.91 adds nothing to the scheme of s.87, and that s.91 should therefore be governed solely by Article 3 case law **[SA, §§61-67]**. Of course, Parliament is presumed not to have legislated unnecessarily. Put otherwise, s.91 is to be presumed to add to the protections already built into s.87 (see, for the example, the House of Lords' principled refusal to collapse s.82 into a bare Article 6 ECHR analysis in ***Gomes & Goodyer v Trinidad*** [2009] 1 WLR 1038 at §36). But there are a number of other obvious objections to this approach in the Article 3 / s.91 context. The Article 3 cases referred to by the US are immigration cases and deal with the question of what burden should be placed on the expelling state to provide medical care to non-citizens. The ECtHR in ***Aswat v UK*** (2014) 58 EHRR 1 expressly recognised that a different set of issues is in play when the person concerned is subject to a request for extradition. The Court distinguished the case of Mr Aswat from the immigration case of ***Bensaid v UK*** on the basis that Mr Aswat was '*facing not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends'* [§57]. In the immigration cases cited by the prosecution, the sole basis of objection to removal was the lack of medical care in the destination state rather than the effects of a coercive removal for detention and trial in a foreign state. No useful parallel can be drawn between Article 3 and s.91 cases based on inapplicable immigration case law.

2.11. Finally, the Prosecution repeatedly suggest that the risk of imminent suicide would not protect a defendant from prosecution in a domestic case. That is debatable. But in any event, in the 2003 Act, Parliament has clearly and advisedly given the judiciary an important power to protect the mentally disordered from extradition where their mental disorder is such that extradition to a foreign state is *'oppressive'*. That arose from particular concerns unique to the extradition context. Therefore extradition judges are entitled, and indeed obliged, to apply the test laid down by Parliament in any genuine case of mental disorder which gives rise to an unacceptably high risk that suicide will occur, whatever preventative steps are taken. Here that test was properly and conscientiously applied in accordance with established principles.

3. **GROUND 3**

3.1. Ground 3 is the suggestion that Professor Kopelman's evidence was rendered inadmissible by the misleading statements in his initial report of December 17, 2019. In the alternative, the prosecution submit that no weight should have been given to his evidence.

3.2. The US says that the DJ expressly found Professor Kopelman had misled the court. In fact she made no such finding. As a matter of plain historical fact, she herself was not misled. On the contrary, the DJ expressly declared that '*the Court had become aware*

of the true position, in April 2020, before it had read the medical evidence or heard evidence on this issue' **[§330]**.[6]

3.3. This is important. The highest the prosecution can fairly put their case is that Professor Kopelman was willing, in his initial report of December 2019 **[B, tab 6, pp407-8]** to make statements which the judge found to be '*misleading'* **[§329]**. She found them to be misleading because they omitted to disclose or '*concealed'* the relationship between Mr Assange and Stella Moris. But she in no way questioned Professor Kopelman's fuller explanation in his third report of November 2020 **[B, tab 6, pp407-8]**, backed up by the statement of Gareth Peirce of 1 December 2020 **[C, tab 12, pp344-6]**. In his report, evidence was that this non-disclosure was a temporary expedient to protect the safety and privacy of Ms Moris; that he finalised this initial report after discussion with a very experienced solicitor (confirmed by Gareth Peirce herself in her statement); that he anticipated seeking further legal guidance (from counsel) before giving evidence; and that '*it was never at any point my intention to withhold relevant information from the court*' [sic] **[pp253].** In fact, by that time the full picture was before the Court because Stella Moris herself later disclosed the full nature of the relationship in advance of the bail application on March 25 2020. By that time she had changed her address, having already changed her name at an earlier stage to protect her privacy. Moreover, the disclosure of her relationship at the bail hearing on March 25 was the result of very anxious consideration. It was accompanied by an attempt, backed up by the prosecution, to preserve her confidentiality by way of an anonymity order. It was only after the rejection of her request for anonymity on April 7 2020, and in the light of knowledge that the relationship was likely to be disclosed on the internet that Stella Moris made public disclosure of the relationship to a newspaper on April 11. The full chronology relevant to this issue is set out in Chronology A – which amplifies a chronology already provided at the renewal hearing in August..

3.4. In those circumstances, the prosecution's attack on Professor Kopelman's omissions totally fails to recognise the unique and special reasons that led to Professor Kopelman's understandable caution about the identification of Stella Moris as Julian Assange's partner. They arose from real concerns about a risk to Stella Moris' safety and privacy, and that of her children **[see B, tab 6, pp407-8].** That risk was evidenced by the anonymous Spanish witnesses who were employed by UC Global and whose evidence is referred to at paragraph 181 of the DJ's judgment. These witnesses had come forward before Professor Kopelman's first report was completed and testified to the extreme measures of surveillance employed against Mr Assange in the Ecuadorian Embassy, the targeting of Stella Moris and the children; and the discussions they participated in about kidnapping or poisoning him. Professor Kopleman refers to Julian Assange's concerns about this surveillance in his first report at **B, tab 4, pp330-1.** This is now the subject of criminal proceedings conducted by a judge in Spain, where the witnesses have been placed under witness protection. So the situation was truly a threatening and menacing one. Since then, recent disclosures about CIA plans from the same period in time to seriously harm Julian Assange have

[6]. This is the third time that the Respondent has had to correct this false claim that the judge found that she had been misled – see Notice of Objection **[A, tab 8, p664, §4.3]**, and submissions made at oral renewal hearing. Yet the Appellant continues to make this inaccurate assertion.

only served to emphasise and justify the reality of Professor Kopelman's concerns. UC Global was said to be operating in conjunction with the CIA and is the subject of criminal proceedings presently conducted by a judge in Spain.

The inadmissibility point now raised in Ground 3

3.5. Against that background, we will deal firstly with the supposed inadmissibility point. This is a point on which the single Judge refused leave, and the full court expressed scepticism when granting leave – on the basis that the criticism of Professor Kopelman would go more to weight than admissibility.

3.6. In their Closing Submissions to the DJ, the US originally submitted that the non-disclosure went only to the weight of Professor Kopelman's evidence, not its admissibility **[A, tab 5, pp514-515, §§404-406]**. Thus they submitted at §404 that '*the evidence of Professor Kopelman should be given very little or no weight*'. Swift J rightly relied on the fact that this was a new point when refusing permission.

3.7. The prosecution now rely on the case of ***Kennedy v Cordia*** [2016] 1 WLR 597 in support of their new admissibility point. But the principle to be derived from the relevant passage at §51 of ***Kennedy*** is that a Court '*may'* exclude an expert report if it concludes that it '*on its face does not comply with the recognised duty of a skilled witness to be independent and impartial'* **[E, tab 10, p147]**. Taken literally, this principle, even if it were applicable, would only apply to Professor Kopelman's first expert report and not to his second report and his oral evidence. But it is obviously necessary to address the question of whether the omissions in his first report were such as to justify characterising his expert evidence as a whole as no longer qualifying to be the evidence of an *'independent and impartial'* expert witness.

3.8. In this regard, the DJ herself did correctly pose the question of whether, despite what she found to be the '*misleading'* statements in the initial report about Stella Moris, she could nonetheless regard the overall evidence as '*objective and impartial'*. She confronted this issue at **§329** and again at **§331**. She expressly held at **§331** that she '*found Professor Kopelman's opinion to be impartial and dispassionate; I was given no reason to doubt his motives or the reliability of his evidence*'. Therefore, though she had found that Professor Kopelman's non-disclosure in his initial report on one matter was '*misleading and inappropriate'*, she expressly went on to find that his evidence as a whole was independent and impartial – in the manner required at ***Kennedy*** §51.

3.9. In reaching her overall conclusion, the DJ had regard to all the circumstances, some of which she expressly summarised at **[Judgment §330]**. They were as follows:

(i) First, that the report of 17 December 2019 was a preliminary report submitted long before the actual hearing, in the sense that it anticipated a number of further investigations before any final conclusion was reached and before any evidence would be heard. And in fact, no evidence was given for a further 9 months.

(ii) Secondly, there was the explanation given by Professor Kopelman – which the DJ accepted – namely that he acted out of concern to protect the privacy of

Julian Assange's partner and young family and her safety. The judge expressly accepted at **§330** that '*Professor Kopelman's decision… arose from* ***an understandable human response*** *to Ms Moris' predicament*'. Professor Kopelman had explained the nature of that predicament in his third, later report of 25 November 2020 as arising out of '*Ms Moris' strongly expressed concerns for her and her family's safety*' **[B, tab 6, p407]**. These concerns were very real given that there was evidence before the DJ both of surveillance of Julian Assange and Stella Moris; the targeting of their children; and of specific plans to poison or assassinate him **[Judgment §181].**

(iii) Thirdly, shortly before service of his report, Professor Kopelman raised with Mr Assange's solicitor, Gareth Peirce, a concern at the consequences of naming Ms Moris - of risk to her and her children. Asked whether service of the report could be achieved without detriment to its conclusions if her identification was temporarily deferred, he responded affirmatively. Ms Peirce indicated that in the circumstances, she believed that until fuller legal advice could be given, such identification could be temporarily postponed **[C, tab 12, p345]**.

(iv) Fourthly, the initial caution in disclosing the full family position was therefore confirmed as a result of discussion between Professor Kopelman and Ms Peirce, and genuine concerns about harassment or harm – which recent developments have shown to be fully justified, as set out in part 5 below.

(v) Fifthly, there is the important point that the judge was never in fact misled because she had never even read the initial December report until after Stella Moris had openly disclosed her relationship with him at the bail hearing in March, 5 months before the full extradition hearing. The judge expressly recorded the fact that she was not misled at **§330**. And Professor Kopelman openly referred to the relationship in his August 2020 report and his oral evidence.

(vi) Finally, there was in truth never any prospect of Professor Kopelman giving evidence to the Court without disclosing the full position. In discussions with Gareth Peirce he was advised that they would seek the advice on this issue on his return from Australia at the end of January 2020. But, in fact the evidential hearing was successively postponed and the need to take advice on this issue was overtaken by events. So, before the relationship was disclosed at the bail hearing in March, there was no consideration of the psychiatric evidence, and Professor Kopelman's intention was to seek counsel's advice before proceeding further. After the relationship was disclosed to the court on March 25, the Court knew the full picture and Professor Kopelman openly referred to the fact when he came to write his report in August 2020. By the time he came to give evidence in September 2020, the initial omission to disclose the relationship in his first report nine months earlier was a matter of history.

3.10. Against that background, the DJ had full regard to the issue of non-disclosure in Professor Kopelman's initial report of December 2019. But she reasonably and justifiably concluded on all the evidence that Professor Kopelman's expert evidence was independent and impartial. She was fully entitled to make that overall finding on

all the evidence – as Swift J himself found in refusing permission to appeal on Ground 3. Her finding that Professor Kopelman's decision was an '*understandable human response'* should not be subjected to an unduly critical analysis, given that '*[s]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made on him by the primary evidence*': ***Lowe v SSHD*** [2021] EWCA Civ 62 at §31, citing Lord Hoffmann in ***Biogen Inc v Medeva*** plc [1997] RPC 1. And, it has to be understood in the context of a doctor's duty to protect the safety of those who make confidential revelations to him.

3.11. Moreover, even assuming that the DJ was correct to find some fault on Professor Kopelman's part in the initial non-disclosure, it cannot be the case that any departure, at any stage of the proceedings, from the strict duty of full disclosure, renders the whole of an expert's evidence inadmissible from then on irrespective of the explanation or context. Nor does it justify the alternative conclusion that his evidence should have been given **less weight** – given that the judge had regard to the totality of his evidence, and she accepted his explanation for the initial non-disclosure. Further it is submitted that the full explanation given does absolve Professor Kopelman of any significant fault[7]. This respectful submission is firmly supported by the analysis carried out by the UK's acknowledged expert on the ethical duties of psychiatric experts, Professor Keith Rix in his report dated 24 September 2021 **[REB, tab 3 pp16ff, particularly pp85-86]**.

The issue of Ms Moris' safety and that of her children

3.12. The judge made a finding that Professor Kopelman's initial non-disclosure of the relationship between Stella Moris and Julian Assange, and of the fact that they had two young children, was **'*an understandable human response* to Ms Morris's predicament'** **[Judgment §330]**. The judge accepted, and the prosecution did not challenge, Professor Kopelman's claim in his report of 25 November 2020 that he had acted as he did because of '*Ms Moris' strongly expressed concerns for her and her family's safety*' **[B, tab 6, p407]**. There was evidence before the Judge of a threat to the life of Julian Assange, including a plot to kidnap and poison him, which she expressly refers to earlier in her judgment **[Judgment §181]**. The evidence extended to attempts to take DNA samples from the nappy of one of his children. The concerns raised by this evidence have been increased by the recent revelations from a number of CIA operatives that there was indeed a plan to kidnap or assassinate Julian Assange whilst he was in the Ecuadorian Embassy: see **[REB, tab 17, p461, §15 and e.g. p537]**. This is more fully analysed in part 5 below. The judge, who had heard and seen all the relevant evidence, had every reason to find Professor Kopelman's reticence in his initial report to be '***an understandable human response****'*.

3.13. **Professor Keith Rix** in his report of 27 September 2021 provides his considered view, as a psychiatric expert on ethical issues, that Professor Kopelman acted '*professionally*'; '*responsibly'* and that he '*exercised appropriate and reasonable caution'* in not disclosing the full position in his first report' **[REB, tab 3, pp85 – 86,**

[7]. Professor Kopelman accepted in his third report of 5 November 2020 that, with the benefit of hindsight, it would have been better if he had 'indicated that there was a matter on which he could not elaborate until further advice had been given'.

§§9.3 – 9.5]. The court is respectfully invited to have regard to this. Professor Rix highlights the very real ethical issues created for a psychiatrist in the position of Professor Kopelman by the need to maintain the confidentiality of a family member with very young children whose privacy and safety might be put at risk by inappropriate and premature disclosure of a relationship with a very high-profile individual, who had become the declared target of the agencies of a powerful foreign state[8]. The Court is invited to proceed with considerable caution in the light of Professor Keith Rix's expert evidence, before criticising Professor Kopelman for his initial non-disclosure of the full position, or reversing the DJ's overall conclusion – which was informed by her deep knowledge of the full background. The specific provisions of Rule 19(4)(c) – about the disclosure of all material facts upon which an opinion is based – may well have to be read subject to conflicting ethical duties and overriding human rights considerations, particularly in circumstances where what is at issue is a postponement of the disclosure of a particular material fact in order to safeguard an informant. And the general and overriding duty of the professional expert laid down in Rule 19(2) is to provide an opinion which is objective and unbiased. The judge expressly referred to the general rule in 19(2) and found that Professor Kopelman's report did comply with this general and overriding duty, on the totality of the evidence. That was despite her more specific finding that in one respect he failed in his initial report to comply with the specific duty to make full disclosure.

3.14. For all these reasons, it is submitted that the DJ's instinctive judgment was sound and that her overall reasoning that Professor Kopelman's temporary non-disclosure of the full position, on legal advice and subject to review at a later stage, did not invalidate his overall independence and impartiality.

The new evidence of the 'BJ Psych Bulletin' article

3.15. The prosecution have sought to adduce evidence of a 'BJ Psych Bulletin' article. This is dealt with more fully in the Notice of Objection to which the court is referred **[A, tab 8, p687-689, §§4.7 – 4.11]**. Though it is now relegated to a footnote to §97 of the Appellant's skeleton argument, the application has not been expressly abandoned so we will briefly address it.

3.16. First, the prosecution clearly intended from the start to attack Professor Kopelman's credibility at the extradition hearing, and they proceeded to so as noted, see commentary at paragraph 22.24 of respondent's closing submissions [**A, tab 4, pp384-5**]. So any research into his history should have been conducted well before the hearing. Therefore this is evidence that could have been obtained with reasonable diligence before the hearing and it should be excluded by application of the test laid down in ***Hungary v Fenyvesi*** [2009] EWHC 231 (Admin) at **§32**.

3.17. Secondly, the article does not in any way support the prosecution's interpretation that Professor Kopelman was in some improper way advocating '*playing the system to get justice for people'*. In context, it is absolutely clear that he is commending the work of

[8] Mr Assange had specifically told Professor Kopelman about the aggressive surveillance in the Embassy and the numerous death threats advocating his assassination, see pp9-10 of Professor Kopelman's report of 17 December 2019 **[B, tab 4, pp330-331].**

Gareth Peirce who '*plays within the system'* to '*get justice*' for *'the falsely convicted and for Guantanamo detainees'* **[B, tab 13, p529]**.

3.18. Thirdly, if the court were to admit the article, then in justice to Professor Kopelman, consideration would also have to be given to the explanation he provides in his statement dated 29 September 2021 of the innocent nature of the unofficial remarks he made during the informal interview in 2014 **[REB, tab 5]**. As Professor Kopelman makes clear, what he was commending was working to achieve changes *'within the system'* – to right serious injustices, which he details more fully in this statement. This explanation is further supported by the letter of Doctor Norman Poole who himself conducted the interview back in 2014 **[REB, tab 4]**. As he describes: *'during the conversation and when writing the interview, I took Professor Kopelman to mean that Gareth Peirce works within the system and that he took inspiration from her rigorous approach'* **[REB, tab 4, p105]**.

4. GROUND 4:

4.1. Under Ground 4 the US firstly submitted in their Perfected Grounds that '*the judge erred in accepting Professor Kopelman's evidence and rejecting that of the Prosecution experts'* in relation to the risk of suicide **[A, tab 7, pp660-661, §§99-104]**. They now submit that the DJ failed to give sufficient weight to the Appellant's expert evidence **[A, tab 12, p761, §103]**.

4.2. But the DJ heard the evidence and was the primary decision maker. Therefore, on fundamental principles, her assessment of the evidence that she heard should be accorded full respect. The fact sensitive findings of an expert tribunal should be respected [see ***Kotsev v Bulgaria*** [2019] 1 WLR 2353, **E tab 5, p49, §26** and ***Wolkowicz,* tab 12, p178, §14**]. This long-held principle was confirmed to extend to the consideration of expert evidence by Lord Justice Brandon in ***Joyce v Yeomans*** [1981] 1 WLR 549,[9] and its applicability to expert evidence has been recognised in a number of cases.

4.3. As to the criticism that the judge failed to address the evidence about what a high risk of suicide actually means, the DJ clearly accepted the evidence of the defence experts which was to the effect that the Respondent would commit suicide. She accepted Professor Kopelman's evidence that the risk was *'very high'* **[§§338 and 344]**. Moreover at **§356** she accepted Professor Kopelman's view that he was '*as confident as a psychiatrist can ever be that Mr Assange will find a way to commit suicide'* **[§356]**. She did specifically take into account Professor Fazel's statistical analysis and his caution about '*probabilistic estimates of suicide risk'*, which she recorded at **§343**. But in respect of this she found that, though helpful, '*statistics and epidemiology take you only so far'* **[§344]**. There is no sound basis on which to reject her seven detailed reasons for finding that the risk was very high or substantial – which took full account of the expert evidence and the medical records, and carefully explained why she

[9]. *'In my judgment, even when dealing with expert witnesses, a trial judge has an advantage over an appellate court in assessing the value, the reliability and the impressiveness of the evidence given by experts called on either side. There are various aspects of such evidence in respect of which the trial judge can get the "feeling" of a case in a way in which an appellate court, reading the transcript, cannot.'*

preferred the conclusions of Professor Kopelman and Dr Deeley to those of Dr Blackwood and, to the extent that he differed from the defence expert, Professor Fazel.

4.4. The prosecution suggest that it was unreasonable not to accept Professor Fazel's contrary views and his reference to the difficulties of predicting suicide more than 6 months ahead. But a prediction of what will happen if extradition ordered is called for by the decided case law; and the extradition courts do regularly make such predictive assessments on the basis of the evidence before them. The DJ was fully entitled to deal with the case on the basis of the predictions made in respect of the special facts of the individual case before her. And she accepted Professor Kopelman's evidence that the risk of suicide was very high [Judgment **§**338] and that he was ***'as certain as a psychiatrist can ever be that Mr Assange will find a way to commit suicide'*** **§356]**. She further accepted Dr Deeley's evidence that *'his risk of an attempted suicide would be high'* **[Judgment §319** and **§348**]. That was against the background of his oral evidence that it was ***'more likely than not'*** that Julian Assange would *'**attempt to take his own life'*** **[D, tab 5, pp260, lines 19-20]**. Given that specific evidence, Professor Fazel's concerns about the difficulties of making a scientific prediction that a suicide will take place were no reason for the Court not to conduct the exercise required by the authorities in Mr Assange's case. And the risk that the DJ identified was in any event an **imminent risk**, given the expert evidence she accepted as to what would happen upon extradition.

4.5. Finally, the prosecution rely on certain passages in Dr Deeley's written report to suggest that Dr Deeley's view was that Mr Assange would make a rational decision to kill himself, as *'an assertion of agency'* **[A, tab 12, p762, §107]**. But that misunderstands the totality of Dr Deeley's evidence. The DJ correctly reported at **§348** how Dr Deeley considered that extradition would worsen Mr Assange's symptoms of depression and anxiety '*as his Asperger's Syndrome diagnosis would render him less able to manage them'*. This would lead to him *'ruminating about his predicament'* to the point where '*his risk of attempted suicide would be high'.* This is a clear indication that she accepted Dr Deeley's oral evidence that the risk of suicide **would be the result of Julian Assange's mental disorder** and not the result of a rational choice. The judge made the same point at **[Judgment §339]** where she recorded that Dr Deeley specifically related the risk of suicide to his Autism Spectrum Disorder. Moreover, Dr Deeley had given oral evidence quite clearly along these lines **[D, tab 5, pp236-237]**. He had linked the increased risk of suicide to Julian Assange's Asperger's Syndrome and the fact that this would '*render the prospect of extradition unbearable'* **[D, tab 5, pp237, line 19** and **p269, lines 14-26]**. Thus Dr Deeley's evidence was that, if extradited, Julian Assange's disorder would produce in him an emotional state '***which he feels unable to tolerate'*** ; and that the high risk of suicide would be the direct result **[D, tab 5, p269, lines 24-25]**. To like effect was Dr Deeley's evidence that *'the acute worsening of his mood state in keeping with his depression I think would render the prospect **unbearable** of extradition and that would interact with and be compounded by his excessive rumination and rigidity of thought'* **[D, tab 5, p237, lines 18-20]**. This was tantamount to a finding that he would

be unable to tolerate his position, and therefore unable to resist the drive or impulse to commit suicide.[10]

4.6. So in fact, on careful analysis, the judge correctly found support in Dr Deeley's evidence for an inability on Julian Assange's part to control the emotions that would lead to suicide; and for the fact that this inability would arise from Mr Assange's mental disorders. There is therefore no substance in the Prosecution's suggestion that Dr Deeley's evidence was to the effect that Mr Assange's prospective suicide risk would involve a rational decision to take his own life rather than a suicidal act arising from his underlying mental disorder.

4.7. Moreover, Dr Deeley pointed out that there was a far higher risk of suicide and suicidal ideation in the case of someone suffering from Asperger's Syndrome. He confirmed the relevance of research conducted by Professor Baron-Cohen that '*people with the Asperger's diagnosis are nine times more likely to have suicidal ideation'* **[D, tab 5, p270, lines 17-20]** as cited by Professor Kopelman in his second report **[B, tab 5, pp392-393]**.

4.8. For all these reasons, **Ground 4** should also be rejected.

5. ASSURANCES (GROUNDS 2 AND 5)

The Prosecution's position in Ground 2

5.1. The prosecution submit in Ground 2 (now issue 'B') that, rather than discharge based upon her evidential findings, the DJ was under a legal obligation instead to adjourn and seek assurances from the US as to the various external factors she had found would impact the Respondent's mental health post-extradition.

5.2. First, the legal obligation the prosecution seek to erect does not exist:

(i) The authorities relied upon for the existence of the '*duty'* all concern Article 3 ECHR; and apply where the Court reaches a *prima facie* view that the prospective (prison) conditions in the requesting state would violate Article 3. In those circumstances, ***Aranyosi*** §§95-98, 104 and article 15(2) FD impose an EU law obligation to seek ameliorative assurances before discharging. That is, of course, not what happened here. The DJ made no finding (even on a *prima facie* basis) that SAMs or ADX violate Article 3 (or are in any way problematic or objectionable in their own right). Instead, she (rightly) concluded that the evidence showed that conditions of isolation were a likely outcome for Mr Assange, and concluded (rightly) that, if such regimes are applied to his particular mental health difficulties, his extradition would be (for that and other reasons) oppressive under s.91.

[10]. If judicial concern about the Turner test exists at all, it is that it is too *high*, not too low. In ***Modi v India***, leave has been granted to seek clarification of the whether the test propounded at §26(4) of ***Turner*** is better formulated as whether the underlying mental disorder would be the operative cause of the suicide rather than it being the result of a rational decision. But nonetheless, the more exacting test was clearly met in this case.

(ii) As the Appellant acknowledges, no authority exists under s.91 (or even s.25) which imposes any comparable obligation to seek assurances. The reason is obvious. Not only are the protections of s.91 and Article 3 ECHR substantively distinct (see above **§2.10**), they are likewise procedurally different. In an Article 3 challenge, such as prison conditions, a *prima facie* violation will arise from a general assessment of country-wide prisons. Fairness then dictates the requesting state be permitted the opportunity to adduce prison-specific evidence or assurances; the issue of not being a live one prior to the point. Hence the ***Aranyosi*** obligation. A s.91 enquiry will, by definition and by contrast, have been (and was here) an intensely and all-encompassing fact-sensitive exercise, during which the requesting state will have ample opportunity to provide factual evidence and assurances, if it wishes to do so. See, e.g. the s.91 assurances provided by the USA to the DJ in ***Miao v USA*** [2020] EWHC 2178 (Admin). Unlike an Article 3 enquiry, if a s.91 enquiry reaches the point of discharge without assurances being forthcoming, it will be because the requesting state has itself chosen not to provide assurances. No legal obligation to '*invite'* assurances can or does exist in such circumstances.

(iii) Thus, for example, ***Love*** (supra), where the Divisional Court's findings on prison conditions played a significant part in its conclusion that it would be oppressive under s.91 to extradite by reason of suicide risk, contains no suggestion of (and is inconsistent with) any such obligation to invite assurances before discharge.

5.3. Secondly, even if, *arguendo,* the ***Aranyosi*** obligation does extend to s.25, and then does also further extend to Part 2[11]:

(i) The ***Aranyosi*** obligation is, at most, one which requires the judge to '*enable the requesting state 'to satisfy the court that the risk can be discounted' by providing assurances'* and to be afforded a '*reasonable time'* to do so (***Aranyosi*** at §104; ***Georgiev v Bulgaria*** [2018] EWHC 359 (Admin) at §§8(ix) and (x); ***Chawla (No. 1)*** [2018] EWHC 1050 (Admin) [**E, tab 8**] at §47). The s.91 process here self-evidently '*enabled'* the USA to provide any assurances it wished, and an entirely '*reasonable time'* in which to do it.

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[11]. This Court has never heard argument on whether the ***Aranyosi*** EU law obligation applies to Part 2. The issue was conceded by counsel in ***Chawla (No. 1)***, on the basis that there existed a treaty power to request and receive further information (article 11(6) of the Indian extradition treaty) said to be equivalent to article 15 of the Framework Decision (see §33). The same concession was repeated in ***Dhir*** (§38). A *power* is not the same as an *obligation*. Article 15(2) FD contains an obligation, binding in EU law, on the UK as executing judicial authority ('*the executing judicial authority...shall request*'). That is why Article 3 cases under Part 1 speak in terms of '*duty'* **[SA, §26]**. Whereas Part 2 treaties (including that with India and article 10 of the UK/USA treaty in play here) are (deliberately) worded differently and bestow no more than a power. In short, the Article 15 FD '*duty'* does not run in Part 2, and the DJ's obligations are not the same. The most that can properly be said in a Part 2 (and this) case is that the judge has *power* to adjourn to seek assurances. Whether or not to exercise that power will depend (even more than does the scope of the duty in a Part 1 case) on what opportunities have already been afforded to the requesting state to do just that.

(ii) See to like effect ***Iancu v Romania*** [2021] EWHC 1107 (Admin) at §§15-24. Even in a Part 1 Article 3 case, ***Ayanyosi*** does not require a DJ to afford a requesting state opportunities it has already had and eschewed. On the contrary, as ***Iancu*** emphasised at §23, the Crim PR overriding objective, and the consistent case law of this Court, both show that **(a)** '*principal responsibility for the provision of information required by the EAW lies on the state requesting extradition. That responsibility is not transferred to the English court considering extradition'* (***Alexander v France*** [2018] QB 408 at §77 per Irwin LJ), and **(b)***'[t]he requesting state must be expected to get its tackle in order'* (***M v Italy*** [2018] EWHC 1808 (Admin) at §74 per Gross LJ). At best, the DJ would have had a '*case management discretion'* to allow the US a further opportunity to do what it could and should have done previously (***Iancu*** at §24).

(iii) Throughout the 1½ years of these proceedings below, **(a)** the defence evidence squarely raised the impact of either SAMs or ADX (among other regimes of isolation)[12] as one of the factors contributing to the risk of suicide, and **(b)** the US chose to challenge the substance of that evidence, rather than remove the risk with assurances (and so chose notwithstanding that the defence witnesses repeatedly commented on the notable absence of assurances or guarantees). The risk that the DJ would accept the defence expert evidence, rather than the US prosecutor's, on the reality of the isolation regimes, as she did, was obvious. But the USA chose nonetheless (and did so for the tactical reason of retaining the possibility of imposing SAMs / ADX or other forms of isolation on Mr Assange) to litigate this case in that way, rather than remove the risk with assurances.

(iv) The suggestion now advanced by the USA (that it can deliberately run a s.91 case keeping ADX and SAMs open to it, but if the judge disagrees, it must then be given an opportunity to re-group and change its case) is inconsistent with this Court's case law. ***India v Dhir*** [2020] EWHC 200 [**E, tab 2**] confirms that there is an onus on the requesting state to indicate its willingness to provide any assurance at the extradition hearing, and the Court is under no obligation, even in Article 3 cases, to adjourn thereafter for assurances to be given. ***Dhir*** concerned an attempt to provide assurances (that life without parole would not be imposed), for the first time, having run a different argument previously (that a life sentence was reducible), after the conclusion of the extradition hearing but immediately before judgment (§§20-27), which the DJ refused to consider. That refusal was upheld by this Court (§§34-47). ('*If the Government had considered it could provide an assurance it should have sought directions providing a timetable for the service of an assurance, and served an assurance in accordance with that timetable'* per Dingemans LJ at §43). That was the case even applying ***Aranyosi***.

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[12]. As discussed below, SAMs and ADX were merely two of many regimes of isolation in the US potentially applicable to Mr Assange; each far more severe than the '*relative isolation of Belmarsh Healthcare'* commented on by the DJ at **[Judgment §314 and 316]**. To assist the Court, the Respondent will provide in advance of the hearing an overview document summarising the evidence before the DJ regarding the various regimes of isolation.

(v) See also ***Iancu*** (supra) at §§23-32 to like effect ('*the judicial authority had had three months to provide the further information sought and had failed to do so or to provide any explanation for their failure*').

(vi) *A fortiori* the attempted introduction of assurances here, for the first time, *after* the judgment below. See, e.g. ***India v Ashley*** [2014] EWHC 3505 (Admin) per Hickinbotton J at §§32-33: '*the Appellant Government was given more than a fair opportunity...It steadfastly refused to do so'.*

Ground 5 – too late

5.4. As stated above, the fact that so-called assurances are offered, for the first time, on appeal (i.e. at an even later stage than in ***Dhir***), ought to lead to an even more rigorous application of the principles in ***Dhir*****.** Unsurprisingly, that is exactly what the case law of this Court concerning '*fresh'* issues demands.

5.5. Assurances might not be '*evidence'* within the meaning of s.106(5) (per ***Geise (No. 2) v USA*** [2016] 4 WLR 10 at §14), but they are nonetheless subject to the restrictions in s.106(5) by virtue of being a '*fresh issue'* (***ibid*** at §§11-15; ***Chawla (No 1)*** at §31), i.e the issue whether the court should accept the assurances offered as removing the risk of oppression.

5.6. In short, the principles in ***Fenyvesi*** (supra) apply here. It is '*incumbent on litigants in first instance courts or tribunals in which evidence is adduced to advance their whole case at first instance and to adduce all the evidence on which they want or need to rely...An appeal court is not generally there to enable a litigant who has lost in the lower court to advance their case upon new and enlarged evidence which they failed to adduce in the lower court. Litigation should normally be conducted and adjudicated on once only. It is generally neither fair nor just that the expense and worry of litigation should be prolonged into an appeal because a party failed to adduce all the evidence they needed at first instance...'* (per Sir Anthony May P at §3).

5.7. Based on that established '*policy which lies behind authorities and statutes which regulate the admission on an appeal of evidence which one or other of the parties did not adduce at first instance*' (***ibid***, §2), the USA is now first required to demonstrate that the fresh issue (i.e. the assurances) is one '*was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence*' have raised (§32). This is the law that applies to fresh '*issues'* just as it applies to fresh '*evidence'*: see, e.g. ***Satkunas v Lithuania*** [2015] EWHC 3962 (Admin) per Mitting J at §§21-22.

5.8. No ***Fenyvesi*** explanation is offered by the USA, or exists. The issue of assurances could (and should) have been raised during the (extremely prolonged) extradition hearing. To repeat, it is of note, for example, that:

(i) The significance of SAMs and ADX (and other forms of islation) had been flagged up in the earliest reports of Eric Lewis in October 2019, and developed in detail in subsequent evidence (from Joel Sickler, Maureen Baird and Lindsay Lewis in particular). The Respondent's witnesses repeatedly observed

that the conspicuous absence of assurances or '*undertakings'* or '*guarantees'* was both noteworthy and important.

(ii) The USA was plainly anxious to ensure that SAMs and ADX be kept available to it to be imposed on Mr Assange in due course **[Kromberg first declaration at §§95-96, 102-103]**, and therefore chose not to adduce undertakings or assurances. Instead the USA elected to attempt, through evidence adduced from the prosecutor, to minimise the reality of the regimes which those subject to SAMs and ADX endure, and the effects it has on their mental health.

(iii) Neither is it feasible to suggest that the USA was unaware of its own ability to offer assurances, or overlooked that power. Besides the Respondent's witnesses commenting on their notable absence, Dr Blackwood on behalf of the USA had expressly asked Mr Assange about his attitude to potential '*guarantees'* in interview **[Blackwood, B, tab 11, p476, §38**]. Dr Blackwood's appended notes[13] reveal that in March 2020 he questioned Mr Assange about '*...US guarantees cannot be trusted on ?? prison guarantees...SAMs...Administrative Seg → Yes? May apply that...Does not even trust death penalty guarantee – has been respected historically*'. Plainly, some briefing of the USA's witnesses on the possibility of assurances had taken place, followed by a deliberate tactical decision not to obtain them.

5.9. ***Fenyvesi***, and the public policy it gives effect to, exists for good reason. Withholding the assurances from the DJ (for perceived tactical advantage) meant that there was no opportunity to hear or test evidence in relation to these so-called assurances. Nor was the DJ afforded any opportunity to take account of them in reaching her overall assessments. The Respondent was, of course, in custody throughout the entire proceedings below, and parachuting this issue into these proceedings, at this remove of time, is fundamentally unfair. That is why it is prohibited by ***Fenyvesi***.

5.10. There is an important principle at stake here, namely:

> '*...the obligation to consider carefully the obligation of appellants and their legal representatives to consider what grounds should be advanced before the District [Judge], and what evidence must be deployed in that hearing. The Fenyvesi test for admission of fresh evidence will be actively applied by the Courts...That is not to be understood as an encouragement to take worthless points or adduce flimsy evidence in the extradition hearing, as a misconceived precautionary measure. It is the responsibility of appellants and their representatives to advance the proper points and evidence available to them, and no more. Where there is an application to justify fresh evidence before the High Court, the Court will expect a witness statement explaining why the evidence was not available before. An explanation fed through counsel, to the effect that 'we did not think of it' or 'we did not consider it necessary then but we have changed our minds now' must and will get short shrift...*' (***Varga v Romania*** [2019] EWHC 890 (Admin), per Irwin LJ at §51, emphasis added).

[13]. Disclosed to the Respondent only after his evidence concluded.

5.11. It is a striking feature of the Appellant's skeleton argument that it does not even mention ***Fenyvesi***, much less seek to engage with or satisfy its requirements.

Ground 5 – not decisive

5.12. In any event, the assurances address only two of the seven bases for the DJ's finding of a substantial risk of suicide **[Judgment §§337-346]**. Neither do the assurances offer any answer to many of the DJ's bases for finding oppression pursuant to that risk; such as the Respondent's *ability* and determination to suicide **[Judgment §§356, 359-361]**, the loss of family contact **[Judgment §358]**, the loss of support mechanisms such as the Samaritans phone line **[Judgment §358]**, and the very fact of imprisonment in a foreign country. In short, the assurances are also not capable of meeting the second ***Fenyvesi*** criteria, namely to be '*decisive'* (***Fenyvesi*** §35).

Ground 5 – not effective in any event

5.13. Neither are the so-called assurances even adequate to address the limited issues they direct themselves at. If the US is permitted (despite the submissions above) to introduce the fresh '*issue'* of assurances, then both fairness and authority[14] dictate that the respondent will be permitted to offer evidence in response. That is to say, the evidence that the Respondent would have adduced before the DJ had the '*issue'* of assurances been raised when it should have been. Admissibility of such evidence is not constrained by s.106(5) or the ***Fenyvesi*** criteria, it is admissible instead on straightforward '*interests of justice'* grounds: per ***FK v Germany*** [2017] EWHC 2160 (Admin) at §40.[15]

5.14. The SAMs assurance (designed to ameliorate the DJ's concerns regarding the effect of isolation):

(i) Does not prevent the imposition of SAMs at all. It expressly reserves to the USA 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*'. That is not an assurance, it is a mere re-statement of the law, a statement of the obvious. '*It is like promising that there will be no diagnosis for cancer before a patient is screened for cancer – then reserving the right to make such a diagnosis after the screening'* **[Turley §34, REB tab 13, §177].** Moreover, the '*test*' includes any '*act'* (including any words or speech uttered at any time from January 2021 by Mr Assange, however benign) which the CIA and Attorney General subjectively believes in their total discretion to render it '*reasonably necessary to prevent disclosure of classified information...that would pose a threat to the national security*'. That is absurdly vague **[Baird, REB tab 10, §§7-13, 34-36] [Lindsay Lewis, REB tab 11, §6] [Turley, REB tab 13, §14, 31-53, 175, 178] [Weiss, REB tab 18, §§6-7]**. Especially where the reasons for imposing need never be disclosed **[Baird, REB tab 10, §10] [Lindsay Lewis, REB tab 11, §6] [Turley, REB tab 13, §§34-53] [Weiss, REB tab 18, §5]**. None of

[14]. See, e.g ***FK*** at §38.
[15]. ***FK*** applies to Part 2: see ***Prendi v Albania*** [2021] EWHC 2625 (Admin) at §59.

this remotely satisfies the ***Othman*** criteria for clarity and external verifiability. As Ms Baird said in evidence below '*He is being charged for an espionage crime and it is believed that he continues to have involvement or he is familiar with people that have involvement with disclosing such classified information, so that would pose him as a risk to national security in the United States and that would cause concern for officials*'.[16] The unpoliceable likelihood of the CIA and A-G subjectively assessing, post-extradition, that Mr Assange '*qualifies'* for SAMs based on anything he might say or not say (to anybody at any time in any context)[17] is obvious (indeed overwhelming).[18] See also **[Eric Lewis, REB tab 9, §9]**. In short, all of the reasons recognised by the DJ for the real risk of imposition of SAMs on Mr Assange in the future **[Judgment §§291-295]** still apply under this '*assurance'* with undiluted force. And a SAMs determination, once made, is in practice unreviewable **[Eric Lewis, REB tab 9, §9] [Baird, REB tab 10, §§11-12] [Lindsay Lewis, REB tab 11, §§7-8] [Turley, REB tab 13, §40] [Weiss, REB tab 18, §7]**.

(ii) On a more general level, once it is acknowledged (as it must be by the offering of SAMs assurances) that the imposition of SAMs would work s.91 oppression, their imposition nonetheless for reason of a defendant's '*acts'* is surely impermissible. If (as the USA's plea to ***Aranyosi*** implies) there are Article 3 analogies to be pressed here, it would be entirely unlawful to subject someone to cruel or inhuman treatment (SAMs) by reason of their *own* conduct. Article 3 is absolute and can never be justified by a defendant's own conduct: ***Dorobantu*** [2020] 1 WLR 2485, CJEU (Grand Chamber) at §60, 62, 82. No authority, or principled reason, exists for limiting the s.91 prohibition on oppression only to those defendants who behave. Oppression is oppression whether a defendant '*deserves'* it or not.

(iii) The assurance does not prevent Mr Assange's detention in conditions of solitary confinement by measures other than SAMs, and by *'whatever label'* **[Baird, REB tab 10, §§14-15].** The assurances attempt to address one notorious prison regime and one notorious prison, and say nothing about any of the other severely isolating prison regimes or other notorious prisons in the USA about which the DJ heard copious evidence:

(a) Pre-trial: in <u>administrative segregation</u> ('AdSeg') at ADC, the '*highly discretionary*' criteria for which include merely facing a '*serious charge',* and which bears *'strong similarities with respect to isolation and sensory deprivation'* to SAMs and, once imposed, contain no reasonable likelihood of challenge. AdSeg at ADC involves detention in a windowless cell 22

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16. Recall, for example, that WikiLeaks retains the unredacted '*vault 7'* that details activities and capabilities of the CIA to perform electronic surveillance and cyber warfare (which WikiLeaks began publishing in redacted form in 2017).

17. The only way for him to not fall foul is for him to not talk to anyone, which is so close to SAMs as to make no difference.

18. Note for example that Joshua Schulte, prosecuted for leaking classified CIA materials (vault 7) to WikiLeaks, is detained under SAMs on the basis that the CIA and A-G consider it '*reasonably necessary to prevent disclosure of classified information...that would pose a threat to the national security'*

hours per day, in which the prisoner takes all meals, deprived of any meaningful human contact or sensory stimulation, with no access to a computer or the internet **[Eric Lewis, REB tab 9, §§11-17] [Baird, REB tab 10, §§13-14, 33] [Lindsay Lewis, REB tab 11, §§9-10, 12-13] [Turley, REB tab 13, §§18-30, 175, 178]**. It was under AdSeg at ADC that Chelsea Manning attempted suicide in March 2020 **[Judgment §361]**;

(b) Post-conviction: under substantially similar conditions of isolation at whichever unknown high security prison (if not ADX) Mr Assange is allocated, on a Special Housing Unit ('SHU') **[Baird, REB tab 10, §§20-21, 26]**. Or a High Security Unit ('HSU') **[Baird, REB tab 10, §§22-24] [Boyle, REB tab 12, §§5-7].** Or a Special Management Unit ('SMU') **[Eric Lewis, REB tab 9, §32]**. And/or in a Communication Management Unit ('CMU') (which may be imposed because of safety and security concerns arising from his communications '*during the commission of their crime'*) **[Eric Lewis, REB tab 9, §§18-20**].[19] Or in medical segregation **[Eric Lewis, REB tab 9, §23]**. Or else in isolation in protective custody **[Lindsay Lewis, REB tab 11, §11-13]**. Or even without any formal designation at all **[Lindsay Lewis, REB tab 11, §9, 13-15]**. '*There doesn't need to be a label attached to this type of restriction, other than to state that it is some form of administrative detention'* **[Baird, REB tab 10,§§14-15, 26-27]**;

(c) All of these regimes, especially in combination, constitute long-term and extreme isolation **[Eric Lewis, REB tab 9, §20]**, and engage the same the '*well known risks which solitary confinement poses to the mental health of those subjected to it for prolonged periods'* recently acknowledged by the Supreme Court in ***R (King) v SSHD*** [2016] AC 384 at §§34-40, in precisely the same way as SAMs do.

(d) Numerous previous extraditees have experienced extreme solitary confinement, without access to association or daylight, exercising alone in an underground cage etc., regardless of SAMs **[Peirce, REB tab 6, §§8-9** re: Babar Ahmad, **§15** re: Talha Ahsan, **§§22-23** re: Abdul Bary, **§50, 58-59** re: Haroon Aswat**] [Deprez, REB tab 7, §§17-19** re: Trabelsi**] [Boyle, REB tab 12, §§5-7** re: Al-Moayad**]**. The reality of SAMs for those anyway the subject of AdSeg or HSU isolating conditions is that they merely add to the restrictions on mail, phone calls and visits **[ibid]**.

5.15. The ADX assurance (likewise designed to ameliorate the DJ's concerns regarding the effect of isolation):

(i) Bizarrely promises not to detain at ADX '*pre-trial'* – something which could never happen (ADX is a post-conviction establishment) **[Weiss, REB tab 18,**

[19]. Daniel Hale, whistleblower convicted under the Espionage Act in Eastern District of Virginia, for example, is now being held in a CMU (at USP Marion, not ADX): (https://twitter.com/thedronalisa/status/1449021928698753024).

§18], has never been suggested by defence witnesses, and features nowhere in the DJ's ruling.

(ii) Does not in fact prevent post-conviction detention at ADX:

(a) The assurance concerns only federal ADX Florence. It would not prevent admission to the '*comparable'* federal prison at Thomson, Illinois **[Eric Lewis, REB tab 9, §§29-31]**, or indeed to any state-level Supermax prison.

(b) Once again, the assurance expressly reserves the power to detain Mr Assange even at ADX Florence '*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*'. Asides the impermissibility (detailed above) of inflicting s.91 oppression on defendants because they misbehave, there is no '*test'* for ADX designation; it is entirely at the (unreviewable) subjective discretion of the Bureau of Prisons. '*Any future act'* means just that, and ADX is '*only one mishap away for Mr Assange'* **[Baird, REB tab 10, §§16-19, 25, 34-36] [Turley, REB tab 13, §15, 179] [Weiss, REB tab 18, §19].** That '*act'* may have already occurred **[Lindsay Lewis, REB tab 11, §§23-25]**. There is simply no definition (or control) over what '*act'* might subjectively be deemed capable of triggering designation **[Weiss, REB tab 18, §20]**.

(iii) The assurance does not, in any event, prevent Mr Assange's detention in conditions of solitary confinement at any other high security prison other than ADX, as stated above §5.14(iii). '*Harsh regimes of isolation and extreme sensory deprivation...remain very much available elsewhere in the federal prison system*' **[Eric Lewis, REB tab 9, §31] [Baird, REB tab 10, §§20-24, 26-27] [Turley, REB tab 13, §16, 179] [Weiss, REB tab 18, §§21-22]**.

5.16. Contrary to the erroneous suggestion at **[e.g. SA §20]**, the Respondent's evidence below had explained in detail the myriad ways in which conditions of extreme and debilitating isolation could be imposed in US prisons, irrespective of SAMs or ADX.[20] That included:

(i) Pre-trial at ADC: Mr Assange will '*certainly'* and immediately be under AdSeg. The DJ was aware from the evidence she heard that AdSeg is '*essentially the same regime'* as, and a '*close variant of'*, SAMs. '*The impact upon Mr Assange would be likely to be similar; either regime is generally recognised as a form of solitary confinement*'.

(ii) Post-conviction: if not ADX, Mr Assange is at '*high risk'* of being housed in a HSU in any high security prison, or else in isolation in protective custody, or in a CMU, or in medical segregation.

[20]. It obviously would have been the subject of even evidential deeper focus, with further and more detailed evidence still, had the USA ruled out SAMs / ADX with assurances, below.

5.17. None of the evidence concerning Mr Assange's likely eligibility for any of these regimes was rejected by the DJ (or even seriously challenged by the USA). The DJ naturally focussed on SAMs and ADX as the most egregious and notorious manifestations of isolation, but, obviously, what she was concerned about was extreme isolation, not nomenclature:

(i) Even before she considered pre-trial SAMs (which can comprise '*administrative detention*' and/or limiting other contact) **[Judgment §287]**, the DJ had already acknowledged Mr Assange's vulnerability to the '*administrative detention'* aspect, in pre-trial detention at ADC in either AdSeg or protective custody **[Judgment §§197, 286].**

(ii) Post-conviction, the DJ was aware that '*administrative detention'* (even under SAMs) could be imposed elsewhere than ADX Florence **[Judgment §§303-304]**.

(iii) The DJ's findings naturally centred on the '*significant isolation'* wrought by exposure to the '*full'* and '*extreme'* restrictions of SAMs **[Judgment §§340, 355]**. *Non sequitur* that the DJ would have formed any different views based on the isolation inherent in AdSeg, or HSU / CMU detention. On the contrary, the DJ had previously recorded that *'conditions in the ADSEG unit and SAMs were put to [Dr Blackwood] and he agreed that, if they applied, they would impact Mr. Assange's mood'* **[Judgment §323]** and went on to record (presumably because it was significant) that **'***Mr. Assange had told [Dr Blackwood] of the profound degree of psychological suffering he expected to experience in administrative segregation*' **[Judgment §348]**.[21]

(iv) Ultimately it was 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'* that would impact Mr Assange's mental health **[Judgment §344]**. Not their label. As the DJ put it, *'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'* **[Judgment §357].**

5.18. ***Love*** did not face SAMs or ADX. Neither was it the prospect of SAMs or ADX that led John McAfee (technologist and outspoken supporter of Mr Assange) to commit suicide rather than face extradition from Europe to a US prison **[Prince, REB tab 17, §12]**. Chelsea Manning was not facing SAMs or ADX when she attempted suicide at ADC.

5.19. Neither, for the avoidance of doubt, are the other two assurances now belatedly[22] offered remotely capable of materially ameliorating those (non-SAMs, non-ADX) risks in any way which connects to the DJ's reasoning.

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[21]. This is the '*partial isolation'*, and Dr Blackwood's failure to take proper account of it, referred to at **[Judgment §341]**.

[22]. Nothing in them was unavailable to the USA below. The USA and Australia have been parties to the CoE Prisoner Transfer Convention, for example, since 2003.

5.20. The medical care assurance (presumably designed to ameliorate the DJ's obvious concerns regarding lack of appropriate psychiatric / psychological treatment):

(i) Is seemingly, once again, limited on its face by its wording: '*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*'. Clinicians provide psychiatric treatment. Psychologists provide psychological treatment. The assurance does not guarantee receipt of psychological treatment recommended by a qualified psychologist.

(ii) Is not, in any event, a remotely meaningful assurance of tailored psychiatric / psychological treatment, of the sort for example that was adduced by the USA and examined by this Court in ***Miao*** (supra). The DJ was plainly unimpressed and concerned by the US's existing evidence **[Judgment §358]**. Yet this assurance says no more than what US law mandates for every detainee in every US prison **[Weiss, REB tab 18, §14]**. It is no meaningful attempt to address **[Judgment §358]** at all.

(iii) The significance of the absence of any meaningful detail is highlighted by the evidence before this Court, that:

(a) Only '*medically necessary'* care as defined by the BoP Program Statement, and as approved by the prison, is capable of being '*recommended'* **[Lindsay Lewis, REB tab 11, §§20-22]**;

(b) In accordance with the evidence below **[Judgment §353]**,[23] the US prison authorities remain unable to deliver adequate treatment even if it is recommended, with security considerations taking priority over therapeutic considerations in cases of this nature **[Eric Lewis, REB tab 9, §§23-28] [Baird, REB tab 10, §§31-32] [Lindsay Lewis, REB tab 11, §18-19] [Weiss, REB tab 18, §15-16]**; and

(c) Extremely disturbing emerging evidence concerning the inadequacy of pre-trial psychiatric / psychological assessment at ADC in particular **[Prince, REB tab 17, §§4-11]**. The evidence concerning the circumstances of the recent suicide at ADC is of first importance to any assessment of this particular assurance because, not only does it show that the suicide prevention measures at ADC are insufficient in general (specifically, a staff clinician at ADC simply decided that a long-term mentally ill patient was not mentally ill, and discontinued psychiatric medication and treatment), it was followed by prison officials deliberately ignoring a court order (specifically, following the discontinuance, the US court ordered transfer to a medical treatment centre, which order was

[23]. The USA at **[SA §§34, 67]** appears oblivious to the DJ's findings. It is simply not accurate to suggest that the DJ '*did not conclude that the care generally available in the United States was insufficient'*. What the DJ found was that '*the practical reality at the ADX Florence [is that] psychological services are offered primarily through self-help packets and videos, where slots for individual therapy are limited, and where group therapy for prisoners subject to SAMs takes place from individual cages and with prisoners shackled'* **[Judgment §358].**

disobeyed by the BoP, and Christopher Lapp then suicided).[24] Put bluntly, if prison officials at ADC are ignoring the US court's orders, there is no reason to believe that they will respect assurances.

(iv) The evidence before this Court concerning previous extraditees subject to much more detailed '*treatment'* assurances than this, is also salutary. The DJ heard detailed evidence about the fate of Abu Hamza (promised transfer to an appropriate medical facility, sent instead to ADX following a BoP medical appraisal) **[Lindsay Lewis, REB tab 11, §§24-25]**. The DJ also had evidence concerning Haroon Aswat **[Sickler, C, tab 7, §§71-72]**. Aswat's extradition to the USA from Broadmoor hospital was (after the intervention of the ECtHR) the subject of assurances of psychiatric placement and treatment. The understanding and expectation of UK (and Strasbourg) courts regarding what should happen to Aswat (and what the assurances promised) was entirely obvious. As with Abu Hamza however, as soon as Aswat arrived on US soil, the opposite happened. The BoP evaluation simply disagreed that Aswat required hospitalisation **[Peirce, REB tab 6, §§33-63]**.[25] In short, there is more than the usual need for clarity and certainty in US cases.

5.21. The prisoner transfer assurance (an issue not mentioned by the DJ but presumably intended by the US to ameliorate the length of time Mr Assange may be subjected to extreme isolation in a US prison) is meaningless. On the evidence, Mr Assange will most likely be dead before it can have any purchase, if it ever could. It:

(i) Amounts to no more than a promise of prosecutorial '*consent'* to the application **[Weiss, REB tab 18, §§11-12]**. It assures nothing about the ultimate *decision* on approval of transfer, to be made by the Department of Justice, at their complete and unfettered discretion **[Peirce, REB tab 6, §§57-63] [Jiminez exhibit 2, REB tab 19, p608, 613] [Weiss, REB tab 18, §10, 13]**. The subtle (but deliberate and crucial) distinction was discovered, to their extreme cost, by the Spanish authorities in ***Mendoza*** **[Jiminez, REB tab 8, §§5-17** and **tab 19, exhibits 1-2]**. The Spanish Court made Mendoza's extradition conditional on prisoner transfer back to Spain to serve any sentence. In response, the US provided the same assurance offered here to the Spanish Court. Upon surrender, the prosecution did, as promised, consent to the application. It was then however refused by the DoJ. When the Spanish court complained of the '*clear breach'* of the assurance, the USA retorted that '*the US did not make and therefore could not and did not renege on a promise guaranteeing that MENDOZA would comply with the sentence imposed in Spain...The promise that was made at the time...is that MENDOZA could apply to the Protection Treaty of the Council of Europe to serve any sentence imposed on him in Spain...he may apply again...*' **[Jiminez exhibit 2, REB tab 19, p606-609]**. So far as the US is concerned, the fine wording of the

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24. '*I wasn't asking. It was an order,'* Judge Ellis said. '*I don't care what your lawyers tell you about what's allowed*.' (https://protect-eu.mimecast.com/s/vbrrCL96GfRgVRLfgfLcf).

25. Part, it seems, of a developing wider problem **[Eric Lewis, REB tab 9, §26] [Prince, REB tab 17, §§7-11]**.

assurance is what matters, not what the extraditing court thinks it means,[26] or wants to achieve. In short, the devil is in the detail.

(ii) Even if the DoJ does approve the transfer, no transfer can take place until after the conclusion of all processes, including appellate, in the USA. That, on the evidence before this Court (and the evidence before the DJ) will likely be a decade or more, during which Mr Assange will remain detained in extreme isolation in a US prison **[Boyle, REB tab 12, §§15-27] [Hodgson, REB tab 14, §17]**. The assurance is accordingly '*ethereal'* **[Turley, REB tab 13, §§17, 74-105, 164, 166-168, 170, 175, 180]**.

(iii) Even then, transfer likely won't occur. Transfer is also conditional upon Australia's consent. No indication has been made by Australia. Nor could it given that consent is a political decision, to be made by whichever government is in power in 10 years' (or more) time. In fact, there are obvious and compelling reasons to believe that Australia may never consent:

(a) Political decisions such as this require the concurrence of multiple political decision makers, any one of whom may decline, and are influenced by prevailing public opinion **[Hodgson, REB tab 14, §§7-9, 14-16, 25]**.

(b) Australia will not permit the transfer of a disproportionate sentence **[Hodgson, REB tab 14, §12, 18, 25]**. The evidence before the DJ, and now before this Court, is that sentence on conviction of even some of the counts in the new Second Superseding Indictment will likely result in an *de facto* life sentence without parole **[Eric Lewis, REB tab 9, §§7-8]**. That is, after all, what the Sentencing Guidelines will call for **[Berman, REB tab 15] [Bennet, REB tab 16]**.[27] Recall that Chelsea Manning, said to be below Mr Assange in terms of responsibility, received 35 years' imprisonment (and was not paroled) for her part in what is now only a fraction of the indictment Mr Assange faces, with its sentence exposure of 175 years **[Eric Lewis, REB tab 9, §7]**. The absence of any sentence-limiting assurance (such as was provided in ***Francis v USA*** [2019] EWHC 2033 (Admin) at §9) is '*significant'* **[Eric Lewis, REB tab 9, §§7-8]**. Australia would not accept responsibility for execution of such a sentence **[Hodgson, REB tab 14, §§19-20]**.[28]

(c) Australia will also not accept the transfer of a sentence imposed for conduct it does not recognise as criminal **[Hodgson, REB tab 14, §12]**. This Court is not seized of the evidence or arguments on dual criminality in this case, but the theory of criminality alleged in this prosecution here is,

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[26]. The Spanish Court understood that the assurance had been given by the US Court **[Jiminez exhibit 2, REB tab 19, p602]**. The US never disabused Spain of that misunderstanding.

[27]. The US position by contrast was, according to Mr Kromberg who declined to give evidence live and be cross-examined, that sentencing is '*difficult to estimate*' **[Kromberg first declaration, §188] [Kromberg fourth declaration, §28]**.

[28]. Neither, for the avoidance of doubt, is Australia unusual in this stance, the ability to alter or review any sentence post-transfer being so limited: see e.g. ***Willcox v SSHD*** [2009] EWHC 1483 (Admin) at §§56-74.

to put it neutrally, a controversial one, both from the perspective of Article 10 ECHR and (according to reputable US experts who gave evidence below) from a First Amendment perspective. The scope for Australia declining to execute a sentence (of whatever length) imposed for the exercise of standard, every-day, journalistic practices, is obvious. Or on grounds of extra-territoriality. Or political offences.

(d) Australia charges defendants for the costs of transfer. In a case accompanied by a long sentence, those costs will likely be prohibitive **[Hodgson, REB tab 14, §9]**.

(iv) Even if the DoJ and Australia both do eventually consent - and Mr Kromberg does not then frustrate the process by summonsing Mr Assange to testify before a Grand Jury or Congress with a view to further indefinite detention for contempt **[Boyle, REB tab 12, §27]**, as he has done in the past **[Turley, REB tab 13, §§17, 106-164, 171-174, 176, 181]** – or seek specialty permission to prosecute another matter - transfer will still then likely take years to affect **[Lindsay Lewis, REB tab 11, §§16-17] [Hodgson, REB tab 14, §6, 26]**. That will be so even if there is no requirement, as is usual, for a portion of the sentence to be served prior to any transfer **[Hodgson, REB tab 14, §6]**. Or any interest from Australian police or intelligence which would likewise delay the process **[Hodgson, REB tab 14, §11-13, 23]**.

5.22. In short, none of the assurances now belatedly offered, even if admitted, would actually address the DJ's concerns about the liklihood and effect of imposition of extreme isolation (or the very prospect of it) on Mr Assange's fragile mental health. All are caveated, vague, or simply ineffective. None offer any concession or 'assurance' against the application of existing US practice. They are all, on analysis, existing practice re-couched as 'assurances'.

5.23. What is also manifestly plain from examples such as ***Mendoza***, and others (Hamza, Aswat), is that the USA **(a)** drafts assurances such as these very carefully, and **(b)** leaves it to the requested state to discern the potential limits of that wording for itself. Putting the matter as neutrally as possible, experience has shown that conditional assurances often provide no sure guide as to what will actually happen after extradition to the USA. And, certainly, the USA does not regard unilateral conditions on extradition, short of an assurance, as having any force (see ***Mendoza***).[29] This Court, therefore, faces the task of construing the words of these assurances as it would a statute to protect Mr Assange against any possible '*misunderstanding'* on its own part. That protective role is mandated by, *inter alia*, the fact that, like in Spain, the UK courts have no power to unwind an extradition, or to even enforce compliance with wording, much less the spirit, of an assurance, once surrender occurs (***Seprey-Hozo v Romania*** [2016] 4 WLR 181 at §§20-21).

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[29]. According to the DoJ when refusing Mendoza's transfer, '*The Bilateral Extradition Treaty between Spain and the US does not contain any provision that allows the other party to condition the granting of an extradition'* **[Jiminez, REB tab 8, §15** and **tab 19, exhibits 1-2]**. Even the Spanish Government's threat to halt future extraditions failed to sway the DoJ **[Jiminez exhibit 2, REB tab 19, p609-610].**

Ground 5 – good faith

5.24. The insertion of caveats in or conditions on, and the vagueness of, the assurances is especially concerning in this particular case. This Court is not sighted on the troubled history of this prosecution or the detailed written and oral evidence that the DJ heard in relation to it, including:

(i) The nature of Mr Assange's disclosures the subject of this prosecution. Multiple witnesses confirmed below that Mr Assange '*exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians*' on the part of the US Government, and the CIA in particular: '*not only unlawful but morally, utterly reprehensible...a monumental criminal offence...we are talking about criminal offences of torture, you know, kidnapping, renditions, holding people without the rule of law, and, sad to say, murder'* **[Respondent's closing submissions below, A, tab 4, p148, §§13.1 – 13.27] [Judgment §122]**. And uncovered concerted US Governmental efforts to subvert judicial investigation of those crimes, including in Italy, Spain and Poland **[Respondent's closing submissions below, A, tab 4, p148, §§13.8 – 13.10]**. As the DJ concluded, '*like Mr. Shayler, Mr. Assange was disclosing information about the past conduct of the US government and its agencies in order to seek their reform...he expressed a wish to expose criminal conduct of the sort revealed by the Manning disclosures'* **[Judgment §147]**. He stands as a witness against the USA (specifically the CIA) in the criminal cases underway in relation to this egregious wrongdoing in Spain, in Germany, and before the ICC. The CIA have declared Mr Assange and WikiLeaks a '*non-state hostile intelligence agency*' and vowed to '*take [him] down'*.

(ii) The DJ heard copious evidence relevant to the USA's general trustworthiness in its relations with other states, including for example its unlawful spying on UN allies – all of which Mr Assange revealed **[Respondent's closing submissions below, A, tab 4, p148, §4.6]**.

(iii) His status as the CIA's most prominent critic has already caused Mr Assange personally to be the target of extra-judicial retributive actions by the CIA and US Government, including:

(a) Secret US Governmental efforts to gain access to Mr Assange's legally privileged communications (which acts are currently under active judicial investigation in Spain, in light of the USA's use of a Spanish company to coordinate the intrusions). Including by intruding in a foreign state's embassy and by breaking into lawyers' offices **[Respondent's closing submissions below, A, tab 4, p148, §§4.24 – 4.30 & 8.1(vi)] [Judgment §§181-188]**.

(b) Advanced CIA planning to extract him - extra-judicially - from that embassy, *including by kidnap (i.e. rendition) or by poisoning him* **[Respondent's closing submissions below, A, tab 4, p148, §§4.24 – 4.26 & 8.1(vi)] [Judgment §181, 293]**. The CIA even plotted to take DNA samples from his baby's nappy. Spanish police discovered a gun with its serial numbers filed off in the possession of the Spanish operative being

used by the USA. Witnesses in that matter are currently under judicial protection in Spain (and were afforded anonymity before the DJ).

(iv) Since the DJ's decision, yet further reliable and disturbing evidence has emerged from over thirty former US intelligence and national security officials, of incredible US government-level plots to *murder* Mr Assange **[Prince, REB tab 17, §15 and exhibit 11, p537]**.[30]

5.25. In short, there is a large and cogent body of extraordinary and unprecedented evidence, not before the Court on this appeal, that the CIA has declared Mr Assange as a '*hostile'* '*enemy'* of the USA, one which poses '*very real threats to our country'*, and seeks to '*revenge'* him with significant harm (beyond the fact of his prosecution). The personal '*mission'* which led to Babar Ahmad being subjected to debilitating isolating conditions **[Peirce, REB tab 6, §10]** pales into insignificance with this case. That[31] is the context against which a Court must now assess the good faith of, and likelihood of adherence to, the assurances. It is, for example, of obvious note that one agency with power to recommend SAMs to the Attorney General (on the basis of some unspecified '*act'* they perceive Mr Assange to have committed) is the CIA – the very same agency whose criminal acts Mr Assange has sought to expose, and who are under active investigation in Spain for, *inter alia*, plotting to kill him **[Weiss, REB tab 18, §8]**. These issues are stark. And not capable of being grappled with properly by this Court without knowledge of the alarming evidence adduced below.

5.26. In the event that the Court is, despite all the submissions above, minded to admit the assurances and view them as comprehensive, then consideration will next need to be given to which tribunal ought to assess their *trustworthiness* against the extraordinary background of this case. It is respectfully submitted that the only judge currently able to undertake that task properly is the DJ who heard days of oral evidence on the topics (and who may, notwithstanding her elevation, re-constitute herself as a DJ under s.66[32] of the Courts Act 2003).

5.27. The Court is respectfully invited to dismiss this appeal.

Edward Fitzgerald QC
Mark Summers QC
Florence Iveson

20 October 2021

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30. Ex CIA director and Secretary of State Mike Pompeo has acknowledged that '*there's pieces of it that are true* (https://news.yahoo.com/pompeo-sources-for-yahoo-news-wiki-leaks-report-should-all-be-prosecuted-234907037.html). A US Congressional Investigation is underway (https://au.news.yahoo.com/adam-schiff-asks-intelligence-agencies-for-information-about-ci-as-targeting-of-wiki-leaks-210324848.html).

31. And, of course, the reality of the '*clear breach'* and '*manifest violation'* of assurances (as the Spanish Court sees it) in ***Mendoza***: the relevance of which to proceedings in the UK was recently confirmed by the Supreme Court in ***Zabolotnyi v Hungary*** [2021] UKSC 14.

32. Extradition is a criminal cause or matter: ***VB v Westminster Magistrates' Court*** [2015] AC 1195 per Lord Mance at §19.