IN THE HIGH COURT OF JUSTICE **CO/150/2021**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

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

THE UNITED STATES OF AMERICA

Appellant

-v-

JULIAN ASSANGE

Respondent

PERFECTED GROUNDS OF APPEAL

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I. INTRODUCTION

1. This appeal is brought against the decision of District Judge Baraitser, of 4 January 2021, to discharge Julian Assange in respect of the request made for his extradition by the United States of America [CAB/ 3/page 134].

2. The appeal is brought pursuant to sections 105 and 106 of the 2003 Act which provide in so far as is relevant (set out here for ease):

> *105 Appeal against discharge at extradition hearing*
> *(1) If at the extradition hearing the judge orders a person's discharge, an appeal to the High Court may be brought on behalf of the category 2 territory against the relevant decision.*
>
> *....*
>
> *(3) The relevant decision is the decision which resulted in the order for the person's discharge.*
> *(4) An appeal under this section—*
> *(a) may be brought on a question of law or fact, but*
> *(b) lies only with the leave of the High Court.*
>
> *(5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the order for the person's discharge is made.*
>
> *106 Court's powers on appeal under section 105*
>
> *(1) On an appeal under section 105 the High Court may—*
> *(a) allow the appeal;*
> *(b) direct the judge to decide the relevant question again;*
> *(c) dismiss the appeal.*
> *(2) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.*
> *(3) The court may allow the appeal only if the conditions in subsection (4) or the conditions in subsection (5) are satisfied.*
> *(4) The conditions are that—*
> *(a) the judge ought to have decided the relevant question differently;*
> *(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.*
> *(5) The conditions are that—*
> *(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;*
> *(b) the issue or evidence would have resulted in the judge deciding the relevant question differently;*
> *(c) if he had decided the question in that way, he would not have been required to order the person's discharge.*
> *(6) If the court allows the appeal it must—*
> *(a) quash the order discharging the person;*
> *(b) remit the case to the judge;*
> *(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.*
> *(7) If the court makes a direction under subsection (1)(b) and the judge decides the relevant question differently he must proceed as he would have been required to do if he had decided that question differently at the extradition hearing.*
> *(8) If the court makes a direction under subsection (1)(b) and the judge does not decide the relevant question differently the appeal must be taken to have been dismissed by a decision of the High Court.*

(9) If the court–
(a) allows the appeal, or
(b) makes a direction under subsection (1)(b),
it must remand the person in custody or on bail.
(10) If the court remands the person in custody it may later grant bail.

3. In order for leave to be granted it must be shown that the appeal is "reasonably arguable" [see Criminal Procedure Rules 2020 ("CPR") rule 50.17(4)(b)].

4. In this case, notice of application for leave to appeal was given by the Respondent in time and prior to 18 January 2021 (the fourteenth day falling on a Sunday, per Mucelli v. Albania [2009] UKHL 2 at §84). By order, the time for the service of perfected grounds of appeal was extended to 12 February 2021. This was to facilitate the change of administration in the United States which took place on 20 January 2021.

5. The District Judge discharged Mr Assange from the extradition proceedings on a single ground: that under section 91 of the Extradition Act 2003, it would be oppressive to extradite him on account of his mental condition. The United States seeks to appeal this Judgment on five grounds:

    a. The first is that the Judge made errors of law in her application of the test under section 91 of the 2003 Act. Had she applied the test correctly she would not have discharged Mr Assange.

    b. The second is that the Judge, having decided that the threshold for discharge under section 91 was met, ought to have notified the requesting state of her provisional view, so as to afford it the opportunity of offering assurances to the Court.

    c. The third is that the District Judge, having concluded that the principal psychiatric expert called on behalf of the defence (Professor Kopelman) had misled her, on a material issue, ought to have ruled that his evidence was inadmissible. Alternatively, if it could be said that his lack of independence went to weight rather than admissibility, the District ought to have attributed no, or far less, weight to his opinion as to the severity of Mr Assange's mental condition than she did (*a fortiori* when two, additional and wholly independent, experts were of a different opinion). Had she not admitted that evidence or attributed appropriate weight to it, the District Judge would not have discharged Mr Assange pursuant to section 91.

    d. The fourth ground is that the District Judge erred in her overall assessment of the evidence going to the risk of suicide.

    e. The fifth ground is the United States has provided the United Kingdom with a package of assurances which are responsive to the District Judge's specific findings in this case. In particular, the United States has provided assurances that Mr Assange will not be subject to SAMs or imprisoned at

ADX (unless he were to do something subsequent to the offering of these assurances that meets the tests for the imposition of SAMs or designation to ADX). The United States has also provided an assurance that the United States will consent to Mr Assange being transferred to Australia to serve any custodial sentence imposed on him.

Assurances

6. The United States maintains that the District Judge was in error in determining that it would be oppressive to extradite Mr Assange pursuant to section 91. The United States has nonetheless provided four assurances to the United Kingdom. These are responsive to, and have been drafted so as to meet, the specific findings of the District Judge relevant to section 91. These are comprehensive; go beyond meeting the issues identified by the District Judge and are provided given the unique circumstances of this case.

7. Permission to appeal is thus separately sought pursuant to section 106(5)(a). The assurances constitute an issue that was not raised at the extradition hearing and which would have resulted in the judge deciding the relevant question differently. Assurances do not constitute fresh evidence and, may be offered at the appellate stage [see below at §77].

8. These assurances are as follows:

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

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

(3) The United States undertakes that in the event of extradition, and Mr. Assange being held at any time in custody, it will ensure that Mr. Assange will receive any

such clinical and psychological treatment as is recommended by a qualified treating clinician employed or retained by the prison where he is held in custody.

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

Issues of principle

9. It is recognised that these assurances, if accepted, may well render the other grounds of appeal academic. That will be a matter for the Court upon any substantive appeal. The prosecution will, if permission is granted on all grounds, nonetheless invite the High Court to consider the correctness of the District Judge's findings in respect of section 91 (irrespective of the assurances). This appeal raises important points of principle as to the correct approach to section 91 and, in particular, where it concerns predictive assessments about an individual's mental health, at a point in the future, post extradition, post -conviction and contingent upon conditions the individual may or may not be held in.

10. Those points of principle are all the more important here given that the defence evidence was that the prison that Mr Assange would be held in pre- trial had a "stellar" record on suicide prevention [Judgment at §353, CAB/1/page 115] and that that the protocols for the prevention of suicide within the Bureau of Prisons (which would apply post- trial) were good [Judgment at §361 CAB/1/page 118]. Moreover, Professor Fazel's evidence on the comparative prevalence of suicide (which was uncontested before the District Judge) was that suicide rates in prisons in England and Wales are substantially higher than in United States prisons [see CAB/12/page 638]. This raises broader, principled issues, as to comity:

    a. Whether the District Judge's approach in this case was to erect a hurdle to extradition that no state could meet and which the United Kingdom could not meet in equivalent circumstances.

    b. Whether it was intended that section 91 should operate as such a high barrier to extradition when the law applicable to fundamental human rights does not. The threshold to be met before removal to a foreign state will breach Article 3 Convention rights is significantly higher that the approach applied by the District Judge to section 91. For the reasons set out in this application, it is submitted that there should not be such divergence and that this is contrary to the stringent approach applied in other cases to section 91.

11. The appeal also raises a distinct point of principle about the approach which should be taken to expert evidence when a Judge has concluded that the expert has misled the Court. The issue that arises is whether expert evidence is ever admissible in these circumstances or whether the expert's conduct deprives such evidence of its expert character (or, if it is admissible, whether any weight can be attributed to it).

Procedural history (United States request for extradition)

12. Mr Assange first appeared before the Westminster Court pursuant to a provisional request for his extradition by the United States on 2 May 2019. The full extradition request was served on 13 June 2019. Mr Assange was a serving prisoner on that date. He had been convicted on 11 April 2019 of an offence under s.6(1) of the Bail Act 1976. He was committed to the Crown Court for sentence. On 1 May 2019 he was sentenced to a term of fifty weeks imprisonment. He was released from custody, on that sentence, on 22 September 2019.

13. The adjourned Extradition Hearing commenced on 24 February 2020 (at the Woolwich Crown Court). This hearing dealt with a number of preliminary matters including whether Mr Assange's extradition was precluded by operation of the 2003 Extradition Treaty between the UK and the USA (with exchange of notes) on grounds that he was accused of a 'political offence'. The matter was further adjourned for legal argument on all of the other points taken on behalf of Mr Assange.

14. A further extradition request was issued by the United States on 20 July 2020. The second request was made because a second superseding indictment had been returned against Mr Assange, in the United States, on 24 June 2020. This second request did not fundamentally alter the prosecution case against Mr Assange, in the United States, but rather added some additional conduct to the existing allegations. Mr Assange was arrested pursuant to the second extradition request on 7 September 2020 (he was already in custody having been arrested pursuant to the earlier request).

15. The second part of the extradition hearing was adjourned for reasons largely connected to the Covid pandemic and ultimately commenced on 7 September 2021. It concluded on 1 October 2021. Mr Assange sought to resist his extradition on ten separate grounds. This included that his extradition was politically motivated (and that he was sought as part of a 'war' on journalists by President Trump) and that his extradition constituted an abuse of process.

16. Judgment was given on 4 January 2021.

Events between 2012 and 2019

17. Prior to Mr Assange's extradition being sought pursuant to the United States request, his extradition was sought by the Swedish Prosecution Authority. The offences of which he was accused in Sweden and in respect of which his surrender was sought included "sexual molestation" and, in one case, rape.[1]

18. The Supreme Court dismissed Mr Assange's appeal on 14 June 2012. On 19 June 2012 he entered the Ecuadorean Embassy and was to remain there for the next seven years.

19. Mr Assange did not leave the Embassy voluntarily but only when Ecuador revoked the diplomatic status it had conferred upon him and allowed officers of the Metropolitan Police Service to enter the Embassy to arrest him. In sentencing Mr Assange for this offence, Her Honour Judge Taylor found that by this Mr Assange deliberately put himself out of reach, whilst remaining in the UK; had exploited his privileged position to flout the law and had advertised internationally his disdain for the law of the United Kingdom. The Swedish proceedings were discontinued because he remained in the Embassy. It cost £16 million of taxpayers' money to ensure that when Mr Assange did leave the embassy, he was brought to justice. [2]

20. Mr Assange entered the embassy and remained there for seven years for the avowed purpose of avoiding extradition to the United States; Gordon Kromberg, Second Supplemental Declaration at §§8-12 setting out statements by Assange's lawyers and by Mr Assange as to his seeking asylum in Ecuador because he believed there was a sealed case against him in the United States) [CAB/3/pages 361-3].

21. As this demonstrates, Mr Assange was prepared to go to extraordinary lengths so as to avoid his extradition to the United States. Mr. Assange has stated that, whilst he was in the Embassy, he made efforts to assist Edward Snowden's flight from prosecution following the issue of an arrest warrant by the United States District Court for the Eastern District of Virginia, for his arrest, on charges involving the theft of information from the United States government [see Gordon Kromberg's Affidavit in Support of Request for Extradition on the Second Superseding Indictment, CAB/3/pages 157-159]. Mr Assange was also able to continue presenting a talk show which he hosted for Russia Today (the Russian state-funded,

[1] Assange v Assange v The Swedish Prosecution Authority [2012] 2 A.C. 471 Lord Phillips at 1.

[2] Sentencing remarks of HHJ Taylor, 1 May 2019.

international English-language news channel, broadcast via satellite). He also fathered two children by his partner whilst in the Embassy.

The evidence of Professor Kopelman: introduction

22. The principal expert psychiatric witness instructed by Mr Assange was Professor Kopelman. Professor Kopelman is a retired neuro-psychiatrist. He concealed, in his initial expert report on Mr Assange's mental health [CAB/4/page 449], that Mr Assange had established a family whilst he was in the embassy. This information only came to the attention of the prosecution when Mr Assange and his partner elected to deploy that information to support an application for his bail.

23. There was no suggestion during the extradition proceedings that Mr Assange was mentally unfit to take part in them and there was no evidence that he would be mentally unfit to take part in any criminal proceedings in the event of his being tried in the United States. Indeed, Mr Assange plainly followed the proceedings closely and frequent breaks were permitted in the extradition proceedings when Mr Assange indicated that he took issue with submissions made on his behalf, or on behalf of the United States of America, and that he wished to instruct his lawyers further.

24. Mr Assange's mental health did not prevent his being detained in HMP Belmarsh during the extradition proceedings. His mental health did not require that be detained in the medical facility within HMP Belmarsh. His mental health did not require any form of "in-patient" care. It did not necessitate any particularly onerous or complex treatment within prison. The evidence at the hearing was that Mr Assange saw a prison psychologist, used anti-depressant medication and used the Samaritans Helpline (see Judgment at §314 and the protective factors referred to in the District Judge's Judgment at §358).

25. The evidence was also that Mr Assange lived most of his adult life (save for a single episode in his early twenties for which he was hospitalised for a week) without a formal psychiatric history. He did not have any diagnosis of autism (or of being on the autistic spectrum) until the extradition proceedings.

26. Notwithstanding this, the District Judge discharged Mr Assange from the extradition proceedings on the sole ground that his mental condition is such that it would be oppressive to extradite him (pursuant to section 91 of the Extradition Act 2003).

27. Critically, this conclusion rested upon the District Judge making a predictive assessment as to what Mr Assange's mental health condition would be post extradition, post-conviction, and contingent upon a predictive assessment as to what conditions he would be detained in the event of his being convicted.

28. In summary, the District Judge found that Mr Assange's mental condition would deteriorate upon his being extradited; that he was at risk of being subject to Special Administrative Measures (SAMs), and at risk of being held in the supermax prison, ADX Florence, and therefore at high risk of being suicidal; and that it would be possible for him to commit suicide regardless of the steps the requesting state would take to prevent this outcome.

29. As is apparent from the District Judge's ruling there were key differences between the opinions of Professor Kopelman on the one hand and the opinions of Professor Fazel and Dr Blackwood (called by the prosecution) on the other as to the nature and severity of Mr Assange's mental health condition. In summary, Professor Kopelman diagnosed Mr. Assange with a recurrent depressive disorder, which was severe in December 2019, and was sometimes accompanied by psychotic features (hallucinations) and with ruminative suicidal ideas. Professor Kopelman also diagnosed Mr Assange with a post-traumatic stress disorder (PTSD) (apparently arising out of an incident Mr. Assange had when he was 10 years old); generalised anxiety disorder with symptoms that overlap with features of the depression and PTSD; and traits of autism spectrum disorder; see Professor Kopelman's first report [CAB / 4/page 449].

30. Dr. Blackwood (a forensic psychiatrist) did not agree with Professor Kopelman. He considered that Professor Kopelman's diagnosis of severe depressive episode with psychotic features in December 2019 was at odds with Mr. Assange's social functioning as shown in the underlying observations which had been made of him by clinical staff at HMP Belmarsh [recorded in the Judgment at §322, CAB/1/page 104]. Dr Blackwood found no evidence of marked somatic syndrome or psychotic symptomatology [Judgment at §313, CAB/1/page 100]. He did not consider that a diagnosis of PTSD was warranted. He did not consider that Mr. Assange met the diagnostic threshold for an autism spectrum disorder [§321, CAB/1/page 103]. Dr Blackwood considered that Mr. Assange had proved himself to be a very resilient and resourceful person [§321, CAB/1/page 103].

31. Professor Fazel (also a forensic psychiatrist and with a specialisation in prison suicide) did not agree with Professor Kopelman's opinion either. He diagnosed Mr Assange with depression of moderate severity and considered the pattern of depression to be predominately moderate in nature. He did not characterise Mr. Assange's depression as psychotic either [Judgment §325, CAB/1/page 105]. Professor Fazel also gave evidence as to nature of risk of suicide in this context and the assessment of future risk

of suicide. He did not consider Mr. Assange's risk factors to be strongly predictive of suicide – they are factors which are prevalent in male prisoners, and suicide nonetheless remains a very rare outcome (even aggregating different factors) [§327, CAB/1/page 106].

32. The District Judge's decision was thus contingent upon her having accepted the evidence of Professor Kopelman. She accepted his evidence, without question, despite having found that he had misled the court and acted inappropriately by concealing that Mr Assange had fathered two children with his partner during the period that he lived in the Ecuadorian embassy. This went beyond mere omission – the District Judge found that Professor Kopelman has written parts of his report so as to misrepresent the position [CAB/1/pages 106-7]. The key paragraphs are recited here for ease (emphasis added):

> "329. First, I did not accept that Professor Kopelman failed in his duty to the court when he did not disclose Ms. Morris's relationship with Mr. Assange. Criminal Procedure Rule 19.2 provides that an expert must help the court to achieve the overriding objective (to deal with cases justly) by giving an objective unbiased opinion on matters within his or her area of expertise. In his first report of 17 December 2019 Professor Kopelman described Ms. Morris as follows "Ms Morris is a UK resident of Swedish nationality. She took a degree in Law and Politics at the School of Oriental and African Studies in London, and then an MSc in Oxford. She was employed by Mr. Assange in February 2011, when he needed someone to research the Swedish case. She also works with a very prominent Spanish lawyer, dealing with asylum matters, and acts as a legal researcher and coordinator." This is misleading as, by this time Ms. Morris was Mr. Assange's partner and mother of two of his children. In the same report, he states: "Subsequently, Mr. Assange commenced a close relationship with another woman, which is of continuing huge importance and support to him. This woman has remained very supportive, which greatly helped his morale in the embassy. She has two children". This is misleading as it implies that Mr. Assange was not the father of the two children. Professor Kopelman was aware that Mr. Assange's children were a significant factor in the assessment of his risk of suicide, as Mr. Assange had told him in August 2019 "The only things stopping [me] from suicide were the "small chance of success" in his case, and an obligation to his children".
>
> 330. In my judgment Professor Kopelman's decision to conceal their relationship was misleading and inappropriate in the context of his obligations to the court, but an understandable human response to Ms. Morris's predicament. He explained that her relationship with Mr. Assange was not yet in the public domain and that she was very concerned about her privacy. After their relationship became public, he had disclosed it in his August 2020 report.

In fact, 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."

33. This appeal is brought on five separate grounds. These grounds are independent of each other. The legal grounds are not dependent upon the evidential grounds.

II. LEGAL GROUNDS

Ground 1: The court did not correctly apply the test set out in section 91 of the 2003 Act in determining that it would be oppressive to extradite Mr Assange on grounds of his mental condition.

34. By virtue of section 91 of the Extradition Act 2003, the physical or mental health of the requested person may act as a bar to extradition, if it is such as to render extradition oppressive or unjust. Section 91 provides, so far as is relevant:

> *(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.*
> *(2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.*
> *(3) The judge must—*
> *(a) order the person's discharge, or*
> *(b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied.*

35. Section 91 provides a separate protection to that conferred by Convention rights and is to be regarded as the lex specialis as regards ill health within the statutory scheme. However, as developed below, the threshold which must be met by the individual is a high one: Surico v Public Prosecutor of the Public Prosecuting Office of Bari, Italy [2018] EWHC 401 (Admin) at 35. Oppression is different from hardship and imports a high threshold; Olga C v. The Prosecutor General's Office of the Republic of Latvia [2016] EWHC 2211 (Admin) , Burnett LJ as then §30.

36. A survey of the development of section 91 demonstrates the extent to which the threshold for discharge is stringent and has rarely been met. In Jansons v Latvia [2009] EWHC 1845 (Admin) the threshold was found to be reached, for the first time by the High Court, in the case of an appellant who made a serious attempt to kill himself (almost succeeding and requiring admission to intensive care [§§13 and 14]) prior to extradition. He had a long history of self-harm [§ 15]. May LJ (PQBD) described it as "*..not only a most unusual case but in one respect I think exceptional*". The psychiatric evidence before the Court about the Appellant's mental state (which was

unchallenged) was that (emphasis added) "his mental state will deteriorate and he will kill himself". It was not expressed merely as a risk

37. In Rot v Poland [2010] EWHC 1820 (Admin), the High Court applying Jansons, concluded that where there was uncontradicted evidence that an individual, who has made a serious attempt to kill himself would kill himself, if extradited, it might be right to hold that it would be oppressive to extradite him. "But anything less would not do". [Mitting J at §13].

38. In Marius Wrobel v Poland [2011] EWHC 374 (Admin) (Bean J as then) whilst agreeing with the mainstay of the Rot Judgment did not agree that in order for the threshold to be met the Court had to be certain that the individual would take his own life [§13]. Rather, Bean J concluded that the threshold was reached when the unchallenged evidence before the Court was that, if the Appellant was extradited, his risk of impulsive but serious self-harm, including suicide, would be very high by virtue of the fact that his mental health, with a borderline personality disorder and unpredictable serious swings in his mood state, and a high likelihood of depression, be it short term or persistent, would render him unable to resist the impulse to commit suicide [§6]. The Court also singled out for mention a part of the uncontested expert report which referred to the Appellant's self- harming history [at §4].

39. As part of his reasoning in Wrobel, Bean J also concluded that Parliament could not have intended that the test for oppression under section 25/91 was a *more* stringent test than that provided for in Article 3. It is submitted that the Judgment in this case demonstrates the application of a test with a considerably lower threshold to be met than under Article 3. There is a real issue as to whether there should be such a divergence in approach as between section 91 and the protection conferred by the Convention. This is developed below.

40. In Turner v Government of the USA [2012] EWHC 2426 (Admin) (Aikens LJ §28) reviewed the above authorities and set out the test which applied as to whether an individual should be discharged from extradition proceedings on grounds of mental health under section 91 (set out here for ease):

    (1) the court has to form an overall judgment on the facts of the particular case: United States v Tollman [2008] 3 All ER 150 at [§50] per Moses LJ.

    (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him: Howes v HM's Advocate [2009] SCL 341 and the cases there cited by Lord Reed in a judgment of the Inner House.

    (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if

the extradition order were to be made. There has to be a "substantial risk that [the appellant] will commit suicide". The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression: see Jansons v Latvia [2009] EWHC 1845 at [§24] and [§29].

(4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition: Rot v District Court of Lubin, Poland [2010] EWHC 1820 at [13] per Mitting J.

(5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression: ibid .

(6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide: ibid at [§26].

(7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind: Norris v Government of the USA (No 2) [2010] 2 AC 487 .

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

42. Sir John Thomas, giving the judgment of the court, emphasised at [§10] (emphasis added):

"The key issue, as is apparent from propositions (3), (5) and (6), will in almost every case, be the measures that are in place to prevent any attempt at suicide by a requested person with a mental illness being successful. As Mr Watson correctly submitted on behalf the respondent judicial authorities, it is helpful to examine the measures in relation to three stages:

(1) First, the position whilst the requested person is being held in custody in the United Kingdom is clear. As Jackson LJ observed in Mazurkiewicz at paragraph 45, a person does not escape a sentence of imprisonment in the UK simply by pointing to the high risk of suicide. The court relies on the Executive branch of the state to implement measures to care for the prisoner under the arrangements explained in R v Quazi [2010] EWCA Crim 2759, [2011] Crim LR 159 .

(2)Second, when the requested person is being transferred to the requesting state, arrangements are made by the Serious Organised Crime Agency (SOCA) with the authorities of the requesting state to ensure that during the transfer proper arrangements are in place to prevent suicide in appropriate cases. As Collins J

helpfully mentioned in Griffin at paragraph 52, steps should ordinarily be taken in such cases to ensure that no attempt is made at suicide and proper preventative measures are in place. Medical records should be sent with the requested person and delivered to those who will have custody during transfer and in subsequent detention.

(3) Third, when the requested person is received by the requesting state in the custodial institution in which he is to be held, it will ordinarily be presumed that the receiving state within the European Union will discharge its responsibilities to prevent the requested person committing suicide, in the absence of strong evidence to the contrary: see the authorities set out at paragraphs 3-7 of Krolick and others v Several Judicial Authorities of Poland [2012] EWHC 2357 and paragraphs 10-11 of Rot . In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from requesting states within the European Union. It will therefore ordinarily be sufficient to rely on the presumption. It is therefore only in a very rare case that a requested person will be likely to establish that measures to prevent a substantial risk of suicide will not be effective."

43. The correct test to be applied to section 91 remains that set out in Turner and approved in Wolkowicz . There has been no modification of it. Kruk v Judicial Authority of Poland [2020] EWHC 620 (Admin) [32].

44. The District Judge did not apply the Turner test correctly in this case. **First**: she wrongly compartmentalised the test into separate findings: (1) was there a substantial risk of suicide [from §337, CAB/1/pages 109 et seq] (2) the capacity to resist the impulse to commit suicide [from §347, CAB/1/pages 112 et seq]; and (3) the risk that Mr Assange would succeed in committing suicide whatever steps are taken from [§350, CAB/1/pages 113 et seq]

45. However, she then omitted to make the *overall* determination required: whether 'the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression'. See Judgment at §§362- 364 [CAB/1/page 118].

46. **Second**: the focus of the District Judge's ruling ought to have been an examination of the measures which would be in place in the United States to prevent Mr Assange from attempting suicide. Analysis of the arrangements in place in the requesting state are the final aspect of the Turner/Wolkowicz analysis. Any decision, that an individual would, at some point in the future, take his own life regardless of the steps taken in a foreign state, requires robust analysis as to those steps and systems. There must be a finding as to why those steps would not meet the risk of suicide in a given case. For

example, if an individual became acutely suicidal, does the foreign state have a suicide prevention protocol? Does it have the ability to transfer acutely mentally ill patients for hospital treatment? Does it have a programme of treatment or support to prevent prisoners from becoming acutely ill in the first instance?

47. The District Judge did not take that approach. She acknowledged that the United States took measures to prevent suicide but based her decision on Mr Assange's *intellectual ability* to circumvent suicide preventative measures [§359] and his "determination, planning and intelligence" [§360, CAB/1/page 117].

48. This approach is wrong for a number of reasons. But it is noted that it that could be said of many domestic prisoners and many of those who resist extradition on grounds of mental health, that they have sufficient intelligence to circumvent suicide prevention measures. If the Court was going to adopt the approach it did, it ought to have considered with greater intensity why the United States' system would be unable to cope with individuals who sought to disguise or hide or minimise feelings of being suicidal.

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

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

51. Moreover, it is clear from the District's Judge's ruling that she approached this issue on the basis that although the defence evidence was that the protocols for the prevention of suicide within the Bureau of Prisons were good, it was not *impossible* for an individual to take their own life whilst in prison in the United States; See Judgment at §361 [CAB/1/page 118]. This approach was wrong. It is recognised that "*..preventative measures can never guarantee that an individual will not succeed in taking his own life. As Dyson LJ said in J v Secretary of State for the Home Department* [2005] EWCA Civ 629 *, as quoted in* Jansons v Latvia [2009] EWHC

1845 (Admin) at [7] *'someone who is sufficiently determined to do so can usually commit suicide'. That is not the issue as Sir Anthony May said in Jansons at [7]. What matters is that at each stage all reasonable precautions would be taken to prevent a successful attempt at suicide."* NM (Vietnam) v. Czech Republic [2020] EWHC 409 (Admin) Nicol J at §37(vi).

52. The prosecution submits that the Judge's approach is to erect a barrier to extradition that no state could meet (and which the United Kingdom would not meet if this was a test which applied to it). Indeed, it was uncontroversial in these proceedings that the suicide rate in US prisons is substantially lower than it is in prisons in this jurisdiction. Professor Fazel's evidence on prevalence was that comparative data showed that suicide rates in prisons in England and Wales are substantially higher than in United States prisons [see CAB/12/page 638].

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

54. The point is reiterated that the Court's assessment here was predictive. This case is distinct from most of the above cited cases in that they concerned individuals who were suicidal at the point of the Court's determination or had a history of serious self-harm (or had attempted suicide). In this case, the District Judge's assessment rested upon her finding that that there was a real risk that Mr Assange would be subject to SAMs and detained in ADX post- conviction and that he would be suicidal (because of these conditions) and that he would be able to circumvent measures intended to protect him from suicide (although absent any real analysis as to why he would be able to do so save for the general observation about his intellect).

55. In Mr Assange's case, his own expert described the William Truesdale Detention Center (or "ADC"), the prison that Mr Assange would be detained in whilst awaiting trial, as having a "stellar" record on suicide prevention [Judgment at §353, CAB/1/page 115]. As is clear, the Court's analysis was thus based upon a long- term projection of what the position might be post- trial and contingent upon a number of events that might eventuate. See Judgment at §340 *et seq*, CAB/1/page 110.

56. It is submitted that the District Judge's approach was ultimately wrong because the Turner test is in fact orientated towards: (i) individuals who are suffering from profound mental illness of a kind which means that the individual does not have the capacity to resist suicide; and (ii) in the context of such a mental illness and because of such a mental illness would seek to circumvent all measures to designed to prevent suicide; and (iii) the requesting state would not have appropriate systems and structures in place to able to cope with this.

57. The Turner test requires the Court to find that the mental condition of the person is such that it removes his capacity to resist the impulse to commit suicide (§39(4), above). This test goes to the nature of the mental condition of the individual. The District Judge did not apply this test- she merely found [at §347, CAB/1/page 112] that Mr Assange's suicidal impulses would come "from his psychiatric diagnoses rather than his own voluntary act". This was not sufficient to meet the Turner test. The emphasis in Turner is whether the individual's illness is such that he or she lacks the ability to make a rational choice about whether to take their own life or not.

58. In Turner the applicant had already attempted suicide prior to extradition. It was accepted that there was a substantial danger that she might attempt suicide again if she were extradited [§49]. She was described as adamant that she would commit suicide [see §71]. The High Court nonetheless concluded that this would be a matter of choice for the applicant – it did not deprive her of a rational ability to make that choice. The court appears to have accepted that she might seek to overcome suicide prevention measures in the United States:

> "72. It is to be hoped that the appellant will not seek to carry out her present intentions to commit suicide. The evidence suggests that if the extradition process proceeds then appropriate risk management procedures can be put into place which should discourage further attempts. It is to be hoped that the appellant will not seek to defeat any procedures which are put in place."

59. Thus, whilst Wolkowicz did not preclude the existence of cases whereby the individual could establish that measures to prevent suicide would not be effective - these would be very rare. It is submitted that neither Turner nor Wolkowicz intended that individuals resisting extradition could meet this threshold by demonstrating that they had the will or intelligence to evade suicide prevention.

60. Again, a number of points of distinction arise. Mr Assange does not currently have a mental health condition which precludes his extradition. He is fit to participate in legal proceedings. He has not made the sort of serious attempt on his life or have the history of serious self- harm seen in other cases. He has never previously

suffered from the sort of mental health condition that deprived him of the ability to make rational choices. He has no formal psychiatric history save for the single incident referred to in his early adulthood.

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

62. Furthermore, Professor Kopelman's opinion that Mr Assange's mental health would deteriorate so that he would become suicidal in the future was based upon a number of contingencies. One of these was that Mr Assange would receive an extremely lengthy sentence (see Prof. Kopelman's report of 13th August 2020 (CAB/5/pages 499 et seq) at CAB/5/page 508, citing Eric Lewis "Persons charged with espionage are sentenced harshly. The charges against Mr Assange are unprecedented and highly publicised.", at CAB/5/page 510, citing Thomas Durkin "He stated that it was very likely that Mr Assange would face a sentence of imprisonment "that will constitute the rest of his likely natural lifespan.", at CAB/5/page 518, "All the U.S. lawyers, cited above, believe that Mr Assange will be placed in conditions of near-total solitary confinement, potentially for a lifelong sentence, following extradition to the United States." and at CAB/5/pages 519 and 520 "On top of these three factors, others are that: he is white, male, on remand, and facing a potential life sentence…and also because of his acute awareness of the prospect he faces (segregation, social isolation, sensory deprivation, a lifelong/indefinite sentence)".

63. That Mr Assange would receive a sentence of this length was highly contested by the prosecution. It put material before the Court to demonstrate that the sort of sentences imposed under the provision with which Mr Assange is charged. There was no evidence that a court in the United States had ever imposed a sentence longer than 63 months for the Section 793 provisions under which Mr. Assange faces charges. The District Judge made no finding about sentence and did not therefore address the question of whether Mr Assange's prognosis would be as poor as the defence contended, if he received a much shorter sentence than the defence contended. This is not just demonstrative of a failure to take into account relevant considerations, it is a demonstration of the sort of consideration that the Court must engage in if it is going to make the sort of predictive assessments asked of it by the defence. It illustrates the difficulty of making a predictive assessment not just about a future mental health condition but a future mental health condition contingent upon possible future conditions of detention.

64. In summary, the District Judge applied the wrong test, and failed to consider relevant factors under section 91 for the following reasons:

(i) She failed to focus on the nature of the mental condition that Mr Assange might develop in the future and failed to determine whether that condition would be of such a nature as to deprive him of the capacity to resist suicide.

(ii) Rather the Judge focused on Mr Assange's intellectual ability to circumvent suicide prevention measures.

(iii) In so doing, she failed to consider that it could be said of many prisoners that they have the ability to circumvent preventative measures and that the Turner test still required robust analysis as to the sorts of treatment available in a foreign state (so as to avoid an individual becoming acutely suicidal) and the steps available so as to prevent suicidal prisoners taking their own lives.

(iv) The District Judge ultimately proceeded on the basis that it was not impossible that Mr Assange could take his own life. The focus ought to have been on the reasonable steps that the requesting state could take to prevent that outcome.

(iv) The overall effect of the District Judge's approach was to dilute the Turner test.

(v) Additionally, the District Judge relied upon the evidence of Professor Kopelman about the sorts of factors which would bear upon Mr Assange's future psychiatric state. One of these was the length of sentence that Mr Assange would be subject to. Professor Kopelman's evidence was premised upon Mr Assange serving an extremely lengthy prison sentence. This was a highly contested issue. The District Judge did not however make any ruling as to the length of sentence that Mr Assange would be subject to.

(vi) The District Judge then failed to make the overall assessment required by section 91 as to whether extradition would be oppressive.

65. Had the Judge applied the correct test, and considered all relevant and appropriate matters, she would not have ordered discharge.

The approach under the Convention

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

67. Under the Convention mental or physical illness will only, in very limited and compelling circumstances, give rise to an issue under the Convention. In N v United Kingdom (2008) 47 E.H.R.R. 39 the European Court concluded where life expectancy would be 'significantly reduced' if an individual was to be removed from UK, this was not sufficient in itself to give rise to breach of Article 3 [§42]. Rather the critical focus was on the standard of care that would be afforded in the state to which the individual will be removed: see N at [42]: "*The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling …"* As is apparent the test presupposes that the conditions in the other state are inferior to those in the UK.

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

69. The European Court has identified that in addition to situations of imminent death, there may be "other very exceptional cases" where the humanitarian considerations weighing against removal are equally compelling; N. v. the United Kingdom [GC], no. 26565/05, ECHR 2008 § 43. In Paposhvili v Belgium [2017] Imm AR 867 the European Court clarified [at §183] that such "other very exceptional cases" should be understood to refer to "situations involving removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health

resulting in intense suffering or to a significant reduction in life expectancy". The Court pointed out "that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness" [at 183]. The approach in Paposhvili has also been applied in the context of long term schizophrenia (Savran v Denmark [2019] ECHR 651). It has also been given effect domestically (by the Supreme Court in AM (Zimbabwe) v. Secretary of State for the Home Department [2020] 2 W.L.R. 1152).

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

> "189. As regards the factors to be taken into consideration, the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 (see paragraph 183 above)."

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

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

Ground 2: The Court failed to give the Requesting State the opportunity to offer undertakings in the light of her findings on prison conditions.

73. As set out above, the finding by the District Judge that Mr Assange's extradition was precluded by operation of section 91 was intrinsically linked to her findings about the conditions in which Mr Assange might be detained. Specifically, she found that there was a real risk that Mr Assange would be subject to Special Administrative

Measures ("SAMs") [CAB/1/page 94 §295] and a real risk that, upon conviction, he would be sent to ADX Florence [CAB/1/page 96 §305].

74. The District Judge's findings about SAMs and ADX cannot be separated out from the District Judge's overall conclusions as to why she considered it would be oppressive to extradite Mr Assange on grounds of mental health; see Judgment at §§355-363, CBA/1/pages 116-118. This crystallises at §355 of the Judgment: "*I am satisfied that, if he is subjected to the extreme conditions of SAMs, Mr. Assange's mental health will deteriorate to the point where he will commit suicide…..*"

75. The District Judge cited evidence from two defence witnesses about the effect of the imposition of SAMs pre- trial as part of her ruling (at §§297- 300, CAB/1/pages 94-5). However, it is of note that the European Court has rejected that being subject to SAMs pre -trial renders extradition a breach of Article 3. In Ahmad, Aswat, Ahsan and Abu Hamza (2010) 51 E.H.R.R. SE6 the European Court ruled that being subject to SAMs pre-trial (having regard to the duration of SAMs and the level of isolation involved) would not be incompatible with Article 3 (and would not be incompatible with Article 3 in respect of individuals with mental illness) [§131].

76. That aside, it is clear that, on the Judge's approach, absent Mr Assange being subject to SAMs and if he were not sent to ADX Florence, the substantial risk of suicide would not eventuate.

77. In India v Chawla [2018] EWHC 1050 (Admin) the Divisional Court noted:

> "[29] Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may show that the requested person will not be exposed to such a risk by providing an assurance that the individual will be held in particular conditions which are compliant with the rights guaranteed by article 3 of the ECHR. Such assurances form an important part of extradition law, see Shankaran v India [2014] EWHC 957 (Admin) at paragraph 59. The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in Othman v UK at paragraphs 188 and 189 and those principles have been applied to assurances in extradition cases in this jurisdiction, see Badre v Court of Florence, Italy [2014] EWHC 614 .30.
>
> [30] The Court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see Florea v Romania and USA v Giese [2015] EWHC 2733 (Admin) , and the Court may consider a later assurance even if an earlier undertaking was held to be defective, see Dzgoev v Russia [2017] EWHC 735 at paragraph 68 and 87.

[31] It is established that an assurance is not evidence. This is because it is a diplomatic assurance provided by the requesting state about the future treatment of the requested person. In United States of America v Giese [2015] EWHC 3658 (Admin); [2016] 4 WLR 10 there was consideration of the powers of the Divisional Court to allow an appeal on the basis of a new assurance. It was held at paragraph 14 that an assurance was an "issue" and not "evidence" for the purpose of section 106(5) (a) of the Extradition Act 2003 .

[32] "….the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end". This approach has been applied in Georgiev at paragraph 8(ix) and (x)."

78. In India v Dhir [2020] EWHC 200 (Admin) the Divisional Court endorsed this approach, namely that when prison conditions might cause extradition to be refused, the correct approach was for the District Judge to postpone final judgment until a reasonable time had elapsed in which undertakings could be sought:

[35] Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may nevertheless show that the requested person will not be exposed to such a risk by providing an assurance that the individual will not be subjected to that treatment. Such assurances form an important part of extradition law, see Shankaran v India [2014] EWHC 957 (Admin) at paragraph 59, India v Chawla [2018] EWHC 1050 (Admin) at paragraphs 29 to 33 and Giese v USA (No.4) [2018] EWHC 1480 (Admin), [2018] 4 WLR 103 at paragraphs 37 to 39.

[38] It was common ground before us that similar principles apply to India, which is an Extradition Act category 2 State …

[39] Where a real risk of inhuman and degrading treatment is established, it is not appropriate to discharge the requested person but to enable the requesting state "to satisfy the court that the risk can be discounted" by providing assurances, see Georgiev v Bulgaria [2018] EWHC 359 (Admin) at paragraph 8(ix). If such an assurance cannot be provided within a reasonable time it may then be necessary to order the discharge of the requested person, see Aranyosi and India v Chawla at paragraph 47.

79. In this case, the requested state provided seven affidavits and declarations dealing with the issues raised in the extradition proceedings. It filed dedicated evidence about the conditions that Mr Assange might be held in and about mental health treatment available [see the Declaration of Gordon Kromberg dated 3rd September 2020

[CAB/13] and Declaration of Alison Leukefeld dated 24th August 2020 [CAB/14]]. It instructed two expert psychiatrists who did not agree with Professor Kopelman's prognosis. Unusually, this was not a case where the requesting state agreed that there was a real risk Mr Assange would be subject to SAMs or be detained in ADX (compare the position in Ahmad and others (cited above) where this was conceded by the United States). In short, every single issue relevant to section 91 was contested.

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

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

82. It is respectfully submitted that the District Judge, having determined that the threshold for section 91 was met because of conditions which Mr Assange might be held in, ought to have afforded the requesting state an opportunity to offer assurances about those conditions.

III. EVIDENTIAL GROUNDS

Ground 3: The court ought to have ruled the evidence of Professor Kopelman inadmissible or alternatively attributed very little weight to it (he having misled the Court).

Ground 4: The Court erred in its overall assessment of the evidence going to the risk of suicide.

83. These grounds are considered together. In circumstances where an individual has gone to extraordinary and cunning lengths to avoid extradition; demonstrated themselves to be sophisticated in their dealings with another state so as to avoid extradition (here Ecuador); demonstrated themselves to be highly adept operators in a global arena and having withstood seven years living in an embassy; claims that their mental health is a bar to extradition, must be approached with anxious scrutiny.

84. In this case, the District Judge found in express terms that she had been misled by Professor Kopelman. She appears to have excused him on grounds that his conduct was 'misleading and inappropriate' but 'human' (Judgment, §330, CAB/1/page 107).

85. It is submitted that this was wrong. There is no scope for an expert to mislead the court on this sort of basis. Once it is accepted that an expert has misled the Court on a material issue, their evidence ought to be ruled inadmissible. First: misleading the Court constitutes a breach of the core obligations that an expert owes the Court. Those core duties relevant here include (per Cresswell J in National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyds Rep 68, 81 as applied in the criminal context in R v Harris [2006] 1 Cr App R 5 [271-272]):

    a. Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

    b. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

    c. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

86. The Judge's finding that Professor Kopelman had misled her for 'human reasons' is to excuse conduct which cannot be accepted on the part of an expert:

    a. First: "Expert witnesses therefore owe a unique, elevated duty to the court, with a concomitant duty to ensure that they do not mislead the court, regardless of the impact this may have on the party for whom they have been called. There is, therefore, a further principled justification for special rules for experts and, in particular, for requiring that all experts, regardless of their client, disclose matters which may have a bearing on the reliability of their evidence." Law Commission Report Expert evidence in criminal proceedings in England and Wales , Law Com No 325 (2011) cited by the Supreme Court in Kennedy v Cordia (Services) LLP [2016] UKSC 6.

    b. Second, a lack of impartiality goes to admissibility rather that weight; Kennedy v Cordia, Lord Reed and Lord Hodge: (with whom Lady Hale, Lord Wilson and Lord Toulson agreed) at 51: "*But the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence*".

87. That an expert has misled the Court about a material issue is sufficient to demonstrate that they lack impartiality and integrity- they have demonstrated that they are willing to put their client's interests above their duty to their court. This should render their evidence inadmissible per se (per Kennedy v Cordia). Moreover, when an expert has been misleading about one material issue, it raises an immediate issue as to how the Court is to trust their opinion on another material issue. It is respectfully submitted that no court should ever be in this position. If that position is reached, the evidence should not be admitted.

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

> "Where the report is a psychiatric report, often diagnosing PTSD or some form of depression, there are often observations of behaviour at the interview, and a recounting of the answers given to questions about relevant conditions eg dreams and sleep patterns. Sometimes these answers are said to be consistent with what has been set out as the relevant history of the applicant. It is more difficult for the psychiatrist to treat what he observes as objectively verified, than it is for the description of physical conditions, because they are the more readily feigned; it is rare for a psychiatrist's report to be able to indicate that any part of the observations were undertaken in a way which makes them more objectively verifiable. It is the more difficult for there to be any verification of conditions which the psychiatrist cannot observe and for which he is wholly dependent on the applicant."

89. As noted above, the prosecution experts (particularly Dr Blackwood) attached considerable importance in contrasting the observations recorded about Mr Assange by clinical staff at HMP Belmarsh which he considered to be at odds with Professor Kopelman's opinion [Judgment at §322, CAB/1/page 104].

90. The usual principle which applies in appellate proceedings is that the Court will only rarely disturb a judge's finding of fact reached after hearing oral evidence from a witness whose credibility is in issue. This is not sacrosanct. As Knowles J observed in Kotsev v. Bulgaria [2019] 1 W.L.R. 2353 [§27]:

> "There is, no however, no rule that there must be absolute deference, as Sedley LJ's use of the word "ordinarily" makes clear. The degree of deference which is due to the trial court's findings of fact will depend upon the nature and circumstances of the case. In the Assicurazioni Generali

> SpA case, para 15, Clarke LJ said that in appeals against conclusions of primary fact, the approach of an appellate court will depend upon the weight to be attached to the findings of the judge, and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. It is well recognised, for example, that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue: see e g Cook v Thomas [2010] EWCA Civ 227 at [48]."

91. Revisiting expert evidence is different. Expert evidence is primarily that of opinion and set out in an expert report. The usual deference which might be applied to a judge's assessment of credibility of an ordinary witness of fact does not apply, in the same way, to the assessment of expert evidence. There may well be issues as to an expert's credibility but these will usually relate to issues such as whether an expert has the requisite expertise or whether their opinion has a credible, empirical foundation.

92. It is no answer here to say that the District Judge was best placed to assess Professor Kopelman's credibility having found that he had misled her, or to say that credibility is of real relevance here because Professor Kopelman misled the Court. The short point is the prior one - a Court should never be in the position of having to assess the credibility of an expert who has been misleading. If a report is submitted which is misleading, it should not be admitted. It lacks a fundamental characteristic of expert evidence.

93. Even, if the approach was adopted that a lack of independence could go to weight, it was plainly not sufficient here for the Court merely to find that the expert had misled her for "human" reasons. That finding ought to have prompted a far more exacting analysis as to why Professor Kopelman had been willing to compromise himself and his obligations to the Court. It ought to have prompted the Court to consider further that Professor Kopelman's opinion, about the severity of Mr Assange's condition, differed in significant aspects from that of two, other, entirely independent experts.

Application to admit further evidence going to Professor Kopelman's lack of independence

94. Since Judgment was given in this case, the Requesting State has found an interview which Professor Kopelman gave to the British Journal of Psychiatry in 2017 as follows: (Professor Kopelman having set out his views on aspects of medical practice).

> "It is perhaps this disillusionment that partly drives his medico-legal work, in which he is fearless in tackling injustice head-on. On many occasions he has been involved in headline-grabbing courtroom dramas that could themselves be the stuff of fiction. Interestingly, he highlights a radical human rights lawyer as the anti-establishment role model for his own legal work.
>
> 'Gareth Peirce is superb at using the legal rules to beat authoritarians and government. She plays within the system, but she does it better than the government lawyers and beats them. That fits my temperament. Not shouting or protesting on the streets, but playing the system to get justice for people.'
>
> Clashes with the establishment have seen Professor Kopelman fight for the falsely convicted and for Guantánamo detainees. He said:
> 'I got into false confession cases, which I see as a form of memory disorder, and was involved in overturning convictions; one from 50 years ago, another after 25 years, and a delusional memory case at 26 years.'
> He added:
> 'Then with two others – a therapist and a GP – I wrote a report in 2010 on people who had come back from Guantánamo, including some prominent names, and this resulted in them getting substantial amounts of compensation. Ken Clarke announcing this in Parliament made the somewhat ambiguous statement, "We must never let this happen again." I feel in some ways I have done more good from this sort of work than anything else, and that's what I'm going to do in my retirement.'"

95. The prosecution is alarmed that a psychiatrist instructed to give expert evidence about the psychiatric condition of individuals who are wanted for crimes by foreign states, should refer to playing the system to get justice for people. The prosecution considered that the extent to which Professor Kopelman misled the Court meant that his opinion could not be trusted and submitted that the Court could not rely on it. Independently and worryingly, this interview gives the appearance that Professor Kopelman has an agenda when giving evidence which extends beyond giving a psychiatric opinion.

96. If permission to appeal is granted, the prosecution will seek leave to rely upon this interview as corroborating its concern that Professor Kopelman's conduct in this case demonstrates him to lack the independence and impartiality fundamental to an expert's role in litigation. This would likely only arise if the High Court did not agree that once the District Judge had concluded that Professor Kopelman had misled the Court, she ought to have treated his report as inadmissible (or as carrying little or no weight).

97. The prosecution did not know that Professor Kopelman had concealed, in his first report, information that Mr Assange had fathered children whilst in the embassy. That this was possible only became apparent when Professor Kopelman's handwritten notes were provided to the prosecution at 15:49 the day before he was due to give evidence. After he was cross examined submissions were made to the District Judge that his evidence could not be relied upon. [Closing Submissions on behalf of the United States at §404].

98. Applying Fenyvesi and another v. Hungary [2009] EWHC 231 (Admin), at §§33 to 35 it will be submitted that:

    a. The interview given by Prof. Kopelman did exist at the time of the extradition hearing;

    b. However, that he might have misled the Court only became apparent the night before he gave evidence.

    c. The District Judge rejected the prosecution submission that Professor Kopelman's evidence could not be relied upon, because she regarded him as having misled her for 'human' reasons. The interview goes to countering that approach – it suggests that it is possible that Professor Kopelman's motivation may have been a desire to 'play the system'.

Ground 4: The Court erred in its overall assessment of the evidence going to the risk of suicide.

99. Further and additionally, it is submitted that the Judge erred in accepting Professor Kopelman's evidence and rejecting that of the prosecution experts (both of whom as forensic psychiatrists had particular expertise in assessing and treating prisoners). Professor Fazel is forensic psychiatrist with a specific expertise in suicide in prisons. His published research was referred to by all the other psychiatrists. Professor Fazel did not consider Mr. Assange's risk factors to be strongly predictive of suicide (and rejected Professor Kopelman's reliance on *his* research as the foundation for Professor Kopelman's opinion that Mr Assange fulfilled the warning signs for a completed suicide) [CAB/12/page 634 at 5.8].

100. Professor Fazel explained what a "high risk" of suicide meant in this context [CAB/29/page 1150]:

> "Yes. I think it is important to clarify this. So, usually when psychiatrists talk about high risk they mean it is more than the general population of similar age and gender. So, it means it is elevated. And then it is important also to contextualise what that means because if the comparison group has a very, very low risk then high risk has to be seen in that light. So, for instance, for prisoners in England and Wales, about one in a thousand prisoners will die from suicide in any one year. So, when you talk about high risk or an elevated risk of suicide in prisoners that has to be borne in mind. It is still, we are talking about you know, an increase maybe from one, to two, three, or four usually [----] for out of a thousand, yes, so it is less than one per cent risk in any given year."

101. Professor Fazel also rejected that an individual's suicide risk could be anticipated on a long -term basis [CAB/29/ page 1150].

> "The other thing about suicide risk, and I think this is also very important to state upfront, is that it, something that changes, so it is not something you can say today I can anticipate someone's suicide risk in six months, you have to understand that suicide risk is a dynamic. They use the word "dynamic" which just means that it changes in relation to circumstances and that has to be also borne in mind that you can talk about someone's risk when you see them but it is very, very difficult to anticipate with any certainty what someone's suicide risk will be in a month, in two months, particular if their situation has changed. And normal good practice is that you would then do a new assessment at that time to establish the suicide risk at that time."

102. Professor Fazel also pointed to the fact that suicide as an outcome is rarer in US prisons than it is in UK prisons [see CAB/29/page 1151]. This reflected his report at §6.6 which stated that comparative data indicates that suicide rates in prisons in England and Wales are substantially higher than in US prison [see CAB/12/page 638]

103. The District Judge did not properly take this into account in her assessment of all the expert evidence before her. She regarded Professor Fazel's analysis as "helpful" but "preferred" Professor Kopelman's opinion that "statistics only take you so far". This was a mischaracterisation of Professor Fazel's evidence. His evidence went to demonstrating that high risk of suicide did not mean a probable risk of suicide (far from it) and that it was not possible to predict a risk of suicide on the sort of long-term basis envisaged here.

104. The District Judge also failed to take into account Professor Fazel's opinion (like that of Dr Blackwood) that Mr Assange's condition was not sufficiently severe so that it removed his capacity to resist suicide [CAB/29/page 1151].

105. On the issue of capacity to resist the impulse to commit suicide, the District Judge expressed herself as preferring the evidence of defence expert Dr. Deeley (along with Professor Kopelman, at §349 of the Judgment, CAB/1/page 113). Quite apart from applying the wrong test (to which see above), the Judge failed properly to consider the impact of the defence evidence on this subject. Dr. Deeley's opinion was that Mr. Assange would "perceive his extradition not only as unjust but as a form of exemplary punishment and humiliation, which he would find intolerable. He would also find methods employed in US jails to prevent suicide, such as being placed in a restraining jacket, to be intolerable. Mr. Assange's propensity for analytic and systematic thought, with extreme focus, has resulted in him minutely considering the likely sequence of events and, in his opinion, Mr. Assange would kill himself **rather** than face these events" (Judgment §319, CAB/1/page 102). As Dr Deeley himself would state in his report (CAB/7/page 556, §31.11) "Suicide would represent an assertion of agency in a situation where he would be otherwise disempowered". In other words, Mr. Assange would commit suicide through choice, electing not to undergo the humiliation of the

criminal process, and not because his ability to resist the urge had been removed, as an assertion of "agency".

106. In summary, it is submitted that the District Judge erred significantly in her assessment of the evidence. She should have weighed crucial factors differently, such that her overall evaluation of oppression for the purposes of section 91 was wrong. In particular:

    a. She ought to have found that Professor Kopelman's evidence was inadmissible or that no weight could be attributed to it, he having misled the Court on a material issue.
    b. She did not take into account Professor Fazel's evidence about risk and/ or appears to have misinterpreted it.
    c. She discounted Dr Blackwood's evidence despite that it was based upon the only source of objective evidence available against which Mr Assange's account could be tested (i.e. the ongoing, long term observations made about Mr Assange by the clinical staff at HMP Belmarsh about Mr Assange).
    d. The District Judge does not appear to have taken into account that the evidence of three of the experts was to the effect that Mr Assange did not have a mental health condition which deprived him of the ability to resist suicide.

Ground 5: Assurances

107. As set out above [at 72], the giving of undertakings constitutes an 'issue' for the purposes of section 106(5), not fresh evidence. They can be given on appeal.

108. As also explained above, the prosecution has never accepted that Mr Assange's condition was as severe as Professor Kopelman suggested. It did not accept that Mr Assange's mental health would deteriorate in the way suggested by Professor Kopelman. It did not accept that Mr Assange would be subject to SAMs or would be imprisoned in ADX (only that this was possible). It did not accept that there were not adequate systems and measures in place to prevent suicide in prisons in the United States generally or in respect of Mr Assange. The requesting state served evidence to counter each of these submissions. The prosecution did not contemplate offering assurances in this case (its entire case was martialled to demonstrate that the conditions that Mr Assange would be detained in would not breach Convention rights or warrant discharge under section 91). It would have considered offering assurances

had the District Judge notified it that she was minded to find the threshold for discharge had been reached.

The prosecution maintains that the District Judge erred in her approach to section 91 and in her underlying factual findings. Notwithstanding that, the United States has provided to the United Kingdom a package of assurances which are specifically responsive to the findings made by the District Judge.

109. These assurances deal comprehensively with the conditions of detention which the District Judge found would precipitate Mr Assange becoming suicidal.

110. It is submitted that, separately and additionally, to all of the grounds set out above, permission to appeal should be granted so that the High Court can consider these assurances. Permission to appeal is thus sought on every ground set out in this appeal.

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11 February 2021