IN THE HIGH COURT OF JUSTICE

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

Applicant

-v-

JULIAN ASSANGE

Respondent

Respondent's Notice of Objection and Submissions on Approach to Any Cross-Appeal

Part A sets out the Respondent's Notice of Objection to the US application for Permission to Appeal and the reasons why permission should be refused.

Part B addresses the situation if leave is granted and sets out the potential grounds of cross-appeal.

PART A: NOTICE OF OBJECTION

1. Introductory Summary

1.1. The US seeks permission to appeal a carefully considered and fully reasoned judgment by the District Judge under section 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] At the extradition hearing the judge received oral and written evidence as to Mr Assange's mental state from 4 psychiatrists. She accepted the evidence of Professor Kopelman[2] that Mr Assange *'suffers from a recurrent depressive disorder which was severe in December 2019 and sometimes accompanied by psychotic features*, *often with ruminative suicidal ideas*' **[para 332, Judgment]**. 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'* **[para 333, Judgment]**. She accepted the evidence that there was a very real risk of suicide which she characterised as '*high'* or '*very high'* and certainly '*substantial'* within the test laid down in ***Turner v US*** [2012] EWHC 2426 [**paras 344 – 346, Judgment].** 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'* **[para 348, Judgment]** and concluded that there was a real risk he would commit suicide whatever steps were taken **[para 361, Judgment]**. In reaching that conclusion she took into account the risk that he would be subjected to isolation under Special Administrative Measures ('SAMs') **[paras 355 – 357];** but she also relied on the risk that he would be deprived of many of the protective factors currently available in the UK at HMP Belmarsh **[para 358].** In her final conclusion, she stated that the conditions he was likely to face in the US, together with his own compulsion to take his life if extradited, was such that it was likely that in the US '*Mr Assange's mental health would deteriorate, causing him to commit*

[1] The Court will be aware that the US's criminal complaint which gave rise to these proceedings itself dated back to December 2017.

[2] As the District Judge 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'* **[Para 312, Judgment].**

suicide' with the '*single minded determination of his autism spectrum disorder'* **[para 362].**

1.2. It is submitted that every one of these findings was justified on the evidence that the District Judge had heard. And the findings were reached after a detailed exchange of written submissions from both sides, addressing the evidence and the test in great detail.

1.3. 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 section 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, Wolkowicz v Poland*** [2013] 1 W.L.R. 2402 **,** and ***Love v US*** [2018] 1 WLR 2889**.**

1.4. 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, these conditional assurances are produced too late to be properly tested; they do not undermine the principal findings of the District Judge on the Respondent's mental condition and risk of suicide; and they wrongly and unfairly undermine the primacy of the extradition hearing.

1.5. Finally, 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 District Judge to determine for herself the issues of the reliability and weight of the expert witnesses she herself heard. And their approach wholly undermines the primacy of the extradition hearing itself and the deference due to the findings and evaluations of the District Judge, who is expressly entrusted by Parliament to make these assessments.

1.6. We will briefly summarise our position on each of the prospective grounds and then deal with them in detail in the successive sections below.

1.7. As to **Ground 1,** it is submitted that the Prosecution have identified no errors of law in the approach taken by the District Judge, who scrupulously applied the test laid down ***Turner*** and ***Wolkowicz,*** and applied by the High Court in the case of ***Lauri Love.***

1.8. As to **Ground 2**, it is submitted that in a Section 91 case the District Judge is under no duty to invite the prosecution to address concerns about prison conditions by offering them an opportunity to provide assurances. As to the actual assurances now provided under **Ground 5,** the two most important relate to detention under SAMs and detention in ADX Colorado. There are two further assurances as to medical treatment and potential repatriation to Australia. Focusing on the assurances as to SAMs and detention in ADX Colorado they are **conditional** in nature; they do not remove the risk of administrative isolation in any event; and they only address part of the District Judge's overall reasons for discharging Mr Assange under section 91. That is because her main conclusions are based primarily on the profound nature of Mr Assange's mental disorders and the high risk of suicide that they give rise to in the event of extradition – regardless of what preventative measures may be taken in the US. So this is very far from being the type of case where a simple assurance on a single issue, such as the death penalty or location in a particular prison, is adduced at the appellate stage and then disposes of all the relevant issues.

1.9. Moreover, it is further submitted that it would be unfair, contrary to principle and unjust to permit the prosecution to adduce for the first time on appeal the two key conditional assurances, whose impact on the section 91 issue cannot be evidentially tested in the High Court, where oral evidence is only heard in very exceptional circumstances. If such evidence was to be produced at all, it should have been produced before the District Judge so that its impact on the overall issues could be considered at the hearing itself. There have been numerous cases in which assurances have been both proffered and tested at

the extradition hearing itself, including the very recent case of ***United States v Motiwala,*** where an assurance that were would be no detention in a particular prison was given in the context of a challenge brought under Article 3 ECHR and section 91.

1.10. The approach adopted by the US in issuing conditional assurances only at this stage has gained them a tactical advantage at the expense of fairness and in a manner that has ensured Mr Assange's prolonged detention even after the order for his discharge. The issue of isolation had been identified from the very start of proceedings both in relation to pre-trial and post-trial custody. The US Department of Justice ('DOJ') has now been actively engaged in these proceedings for nearly two years, providing significant volumes of evidence, without making any suggestion assurances were being considered, though the offer of assurances at first instance is commonplace. This meant that none of the defence witnesses could comment on the assurances that are now produced. The DOJ's approach of not offering assurances in the Court below gave them the further advantage that they could obtain extradition without providing any assurances if they could persuade the District Judge of the correctness of their approach. Now that they have failed, they seek belatedly to bring forward these conditional and untested assurances in the High Court. But this is a forum where it is difficult to re-determine at this stage the complex issues of fact and overall evaluation necessary in a section 91 case.

1.11. As to grounds 3 and 4, in substance these are merely complaints as to the weight the District Judge should have given to the expert evidence. And yet, on clearly established principles, she was in the best position to assess the weight of that evidence. She rehearsed all the relevant evidence and gave rational and legitimate reasons for each of her conclusions on the evidence of the experts.

1.12. Each of these points will be addressed in turn below.

2. <u>Ground 1: Alleged Misapplication of the Legal Test</u>

2.1. The prosecution firstly submit that the learned District Judge 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 District Judge's *'approach was to dilute'* the ***Turner*** test **[para 64(iv), Perfected Grounds ('PG')]**. But, in fact, the learned judge scrupulously applied the successive tests laid down in ***Turner,*** as set out below***.*** There is a further criticism that the learned judge failed to '*make the overall assessment required by s.91 as to whether extradition would be oppressive'* **[para 64(vi), PG].** This is not correct. The District Judge expressly and clearly applied this test of making such an *'overall assessment'*. She did so in the light of Mr Assange's mental disorder, the specific nature of the risk of suicide in his case and her careful assessment of the procedures in place to prevent such suicide **[paras 350 – 363, Judgment].** When at paragraph 355 the District Judge factored in Dr Deeley's medical assessment that Mr Assange would develop a '*single-minded determination'* to take his life, that was on the basis of Dr Deeley's clinical assessment of how his ASD condition, which she 'a*ccepted'* to be present at paragraph 333, would operate to condition his suicidal conduct. A suicidal act brought about by his underlying mental disorder in this way would be the very opposite of a rational decision by a mentally stable person, that they will take their own life rather than submit to extradition. So this was much more than a mere finding that he was intelligent enough to defeat suicide prevention measures as suggested by the prosecution at paragraphs 48 and 59 of their Perfected Grounds. And the judge expressly found at paragraph 349 on the basis of Professor Kopelman and Dr Deeley's evidence that *'Mr Assange's suicidal impulses will come from Mr Assange's psychiatric condition rather than his own voluntary act'.*

2.2. The prosecution add nothing to the case by their repeated reference to the need in cases where mental disorder creates a risk of suicide for the Court to engage in ***'robust'*** analysis **[paras 46, 61 and 64(ii), PG]**. This novel 'robustitude' test does not feature in any of the decided case law. The District Judge's detailed and thorough judgment was based on a correct statement of law and involved a very careful and exacting analysis of whether the relevant

legal tests were met. She was certainly no less ***'robust'*** in her approach than the High Court in the comparable case of ***Love.*** If the prosecution simply mean by the expression '*robust'* that the test should result in few people succeeding under section 91, then the special facts of this case and the strong medical evidence did amply satisfy the relevant tests and the judge's reasoning was fully consistent with such a 'robust' approach. But, in any event, as was observed in ***Republic of South Africa v Dewani*** [2013] 1 WLR 82***,*** even the characterisation of the test as imposing a high threshold is not particularly helpful because *'this inevitably risks taking the eye of the parties and the court off the statutory test'* [§73]. In the 2003 Act, Parliament has clearly and advisedly given the judiciary this important power to protect the mentally disordered from extradition where their mental disorder is such that extradition to a foreign state is *'oppressive'*. Extradition judges are entitled, and indeed obliged, to apply the test laid down by Parliament. Here it was properly and conscientiously applied in accordance with established principles.

2.3. In order to demonstrate that the District Judge correctly applied the test laid down in ***Turner*** we will analyse below the successive propositions laid down in ***Turner*** and the way in which the District Judge both directed herself correctly on each of the successive propositions and applied them scrupulously to the facts of the case.

The Basic Propositions of Law Set Out in ***Turner***

2.4. In the case of ***Turner***, seven propositions were put forward by the Court at paragraph 28 in relation to '*the law*'. This did not lay down a seven-stage test. Rather it put forward seven propositions, though many of those propositions did lay down mandatory tests to be applied. Thus Proposition One is general and lays down the overall approach which is that the Court should '*form an overall judgment on the facts of a particular case*' (as laid down in ***Tolman*** [2008] 3 AER 150 at para 50). Propositions Two, Three, Four and Five **do** lay down questions that must be answered and/or tests that must be satisfied. Proposition Six requires the Court to have regard to the appropriateness of

the arrangements in the prison system of the Requesting State and '*whether those authorities can cope properly with the person's mental condition and the risk of suicide*'. But it has to be addressed against the background of the answer to the test posed in the Fifth Proposition, namely whether the risk is such '*that the person will succeed in committing suicide, whatever steps are taken*'. Proposition Seven is more general and requires the Court to recognise the importance of '*the public interest in giving effect to treaty obligations*'.

2.5. It is submitted that the Judge in this case had regard to all seven propositions, and she scrupulously complied with the requirement to apply each of the tests and have regard to all the factors specified in Propositions Two to Six.

2.6. We will deal with each of these in turn.

Proposition One: the overall value judgment

2.7. ***Turner*** Proposition One makes clear that the Court '*must form an overall judgment*' whether it would unjust or oppressive to return a person by reason of their mental disorder.

2.8. In the case of ***Love***, the focus was on the '*oppressiveness*' (see in particular paras 115-122). In this case too the Judge rightly focussed on this limb. In this case, as in ***Love***, that involved a value judgment based on the degree of the mental disorder, the extent of the risk of suicide, and the extent to which the prison conditions in the United States that the requested person was likely to face would alleviate or aggravate the risk of deterioration.

2.9. The High Court has made it clear in cases such as ***Love***, ***McDaid*** [2020] EWHC 1527 and **The Government of the United States of America v Stanley Tollman, Beatrice Tollman** [2008] EWHC 184 (Admin) (***Tollman no. 2'***) that it will only interfere with the Judge's decision if it concludes that the statutory question – here the question of whether it would be oppressive to extradite by reason of mental disorder – '*ought to have been decided*

differently because the overall evaluation was wrong; ***crucial factors should have been weighed so significantly differently as to make the decision wrong,*** *such that the appeal in consequence should be allowed*' (as set out in ***Love*** at paragraph 26, and applied in ***McDaid***).

2.10. In deciding whether the overall judgment was fundamentally wrong, the Court will give weight to the findings of fact and assessments of the District Judge who heard the evidence and assessed the witnesses (see, for example, ***McDaid*** at paragraph 50 and ***Tollman no. 2*** at paragraph 171). This is in accordance with well-established precedent that the Court should defer to the findings of the specialist judge who is in a better position to assess the reliability and weight of the evidence they themselves have heard. As Lord Justice Sedley put it in the well-known authority of ***Wiejak v Olsztyn Circuit Court of Poland*** [2007] EWHC 2123 (Admin) at paragraph 23, the appeal court '*must consider the District Judge's reasons with great care in order to decide whether it differs from her and, secondly, that* ***her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety'.***

Proposition Two and Three

2.11. Proposition Two in ***Turner*** requires the Court to apply a high threshold and Proposition Three requires the Court to ask itself whether there is a substantial risk in the sense that there is '*a risk of the Appellant succeeding in committing suicide whatever steps are taken*' which is '*sufficiently great to result in a finding of oppression*'.

2.12. The District Judge rightly and justifiably found not only that the risk in this case was '*substantial*' but that it was '*high*' or '*very high'*. Thus she made a finding that the risk was *'substantial'* at paragraph 337. And at paragraph 344 she found that the risk was either '*high* or '*very high*' and that, on any view, there was a very real risk of suicide (paras 344 and 346). At para 355 she declared herself '*satisfied that, if he is subjected to the extreme conditions of SAMS, Mr*

Assange's mental health will deteriorate to the point <u>where he will commit suicide</u>' with the '*single-minded determination*' described by Dr Deeley **[Paras 355 and 349**, **Judgment]**. Though the real risk of SAMs played a part in her reasoning, that risk still remains. Moreover there is the additional likelihood in any event of some form of administrative segregation, leading to extreme isolation, even if SAMs are not applied. That was the evidence of both Yancey Ellis[3] and Eric Lewis[4] as to the nature of his detention at the Alexandria Detention Centre ('ADC') where both the prosecution and defence agreed he was likely to be detained pre-trial.

2.13. The District Judge also effectively found at paragraph 361 that Mr Assange was at substantial risk of committing suicide whatever steps are taken. Thus she applied, and found satisfied, the tests laid down in Propositions Two and Three.

<u>Proposition Four: suicide risk directly attributable to psychiatric condition</u>

2.14. Proposition Four in ***Turner*** lays down a specific requirement '*that the mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide. That is because otherwise it will not be his mental condition but his own voluntary act that puts him at risk of dying and if that is the case there is no oppression in ordering extradition*'.

2.15. There is no doubt that the District Judge did apply this very exacting test. She expressly found at para 349 that Mr Assange's mental condition would be responsible for his suicidal impulses; and she accepted Professor Kopelman's evidence that '*Mr Assange's suicidal impulses will come from his psychiatric condition rather than his own voluntary act*'. She made this clear finding on the basis of the evidence of both Professor Kopelman and Dr Deeley and her

[3] Yancey Ellis as the judge noted is *'an experienced attorney'* **[Para 353, Judgment],** who practices in the area of Virginia in which Mr Assange's trial and pre-trial detention will take place, and has extensive experience of conditions of detention at the ADC.

[4] Dr Eric Lewis is an attorney with over 35 years of experience who *'represented Ahmed Abu Khatallah, an inmate detained in a SAMs regime at the ADC for a period of years'* **[Para 353, Judgment].**

preference for their evidence over the opinion of Dr Blackwood (see the first two sentences of para 349). At paragraph 348 she has already expressly accepted Professor Kopelman's evidence that '*it was Mr Assange's mental disorder that would lead to an inability to control his wish to commit suicide*'. And she rehearsed and accepted Dr Deeley's evidence to like effect.

2.16. Therefore, there can be no doubt that the District Judge expressly found that the exacting test laid down in Proposition Four of ***Turner*** was satisfied.

Proposition Five

2.17. Proposition Five in ***Turner*** lays down the requirement that the Court should consider that '*the risk that the person will succeed in committing suicide, whatever steps are taken*' is '*sufficiently great to result in a finding of oppression*'.

2.18. There can be no doubt that the District Judge made this express finding. Thus, at paragraphs 355, 359, 360 and finally and expressly in the last sentence of paragraph 361 she found that the '*procedures described by Dr Leukefeld* [i.e. the procedures put in place in the US] *will not prevent Mr Assange from finding a way to commit suicide*'. In effect, she therefore found, after a careful consideration of all the relevant factors set out at paras 355-361, that the Fifth test in ***Turner*** was satisfied, namely that there was '*a sufficiently great risk*' that, '*whatever steps are taken*', Mr Assange '*will succeed in committing suicide*'.

Proposition Six

2.19. The Sixth Proposition in ***Turner*** requires the Court to have regard to the question whether there are '*appropriate arrangements in place in the prison system of the country to which extradition is sought so that these authorities can cope properly with the person's mental condition and the risk of suicide*'. This test is obviously not entirely freestanding since it has to be considered in conjunction with the question in proposition five whether the risk is such that

'*whatever steps are taken*' there is a sufficiently great risk that '*the person will succeed in committing suicide*'. But clearly the Judge **did** ask herself the question posed in ***Turner*** namely whether the authorities in the US could '*cope properly*' with the specific risk posed by Mr Assange's '*mental condition and the risk of suicide*'. In this connection she made three significant findings that clearly answered the question posed in Proposition Six so as to support a finding that extradition was oppressive:-

(i) Firstly, she found at paragraph 361 that the procedures in place in the US and specifically the '*procedures describe by Dr Leukefeld*' '***will not*** *prevent Mr Assange from finding a way to commit suicide*'. She was quite satisfied of this fact and expressly stated:- '*I am satisfied that the procedures described by Dr Leukefeld will not prevent Mr Assange from finding a way to commit suicide*', (see the last sentence of paragraph 361 of her judgment).

(ii) Secondly, she expressly found that the likely prison conditions in the US - and she had found a real risk of conditions of isolation in the US at paragraphs 357 and 358 - would actually increase, rather than manage and reduce, his suicide risk.

(iii) Thirdly, she found that he would be deprived in the US of the '*protective factors*' present in the UK system currently which had enabled the risk of suicide to be adequately managed. (see paras 342 and 358). In the first sentence of paragraph 358 she clearly stated:- '*Thirdly many of the protective factors currently in place in HMP Belmarsh would be removed by these conditions*'.

2.20. Therefore the Learned Judge did clearly make the necessary finding as to whether appropriate arrangements were in place in the prison system of the US to cope with his mental condition and risk of suicide, as required by Proposition Six in ***Turner***. And she expressly found that because of his mental condition, and because of the likely prison conditions in the US, the

authorities there could not '*cope properly with the person's mental condition and the risk of suicide*'.

Proposition Seven – the public interest in giving effect to treaty obligations

2.21. Turning to Proposition Seven, the Learned District Judge expressly recognised that '*oppression as a bar to extradition requires a high threshold*'. She expressly accepted '*that there is a strong public interest to giving effect to treaty obligations and that this is an important factor to have in mind*' so there can be no doubt that she had full regard to Proposition Seven and applied the tests laid down in both proposition one and proposition seven correctly.

The application of the ***Laurie Love*** approach

2.22. The ***Turner*** propositions were laid down in 2012. The Judge clearly applied the relevant tests laid down in that case in 2012.

2.23. But the Learned Judge also adopted and applied the approach taken by the High Court in the more recent case of ***Love*** in 2018, with which there are obvious parallels in this case. The parallels are both in respect of the dual diagnosis of depression and Autistic Spectrum Disorder ('ASD') in ***Love*** as in this case; the requested person's determination to take his life irrespective of precautionary measures in both cases; and the contrast in both cases between the situation in the UK and the attendant protective factors there, and the risk of detention in conditions of harsh isolation in the US together with the loss of those '*protective factors*' (see ***Love*** at paragraphs 118 – 122). Indeed, the Judge expressly referred to the ***Love*** case at paragraph 283 of her judgment and made a clear comparison between the two cases at paragraph 360.

2.24. The parallels with the ***Love*** case provide an additional reason why the approach of the Learned Judge in this case was both correct and fully in accordance with High Court precedent. Moreover that High Court precedent goes back as far as the case of ***Janson v Latvia*** [2009] EWHC 1845 where

again the High Court found, in respect of the Requested Person, '*that the risk that he will succeed in committing suicide, whatever steps are taken, is on the evidence, sufficiently great to result in the finding of oppression*'.

2.25. More recently, in ***Farookh v Judge of the Saarbruken Regional Court, Germany*** [2020] EWHC 3143 (Admin) at para 7, the High Court has compressed the series of ***Turner*** propositions set out above into a single, compendious test which was adopted and applied again in ***Fletcher v Government of India*** [2021] EWHC 610 (Admin) para 39. The test is formulated in terms of the following question:

> *'whether, on the evidence, whatever steps are taken – and even if the Court is satisfied that appropriate arrangements are in place in the prison system of the country to which extradition is sought so that those authorities will discharge their responsibilities to prevent the requested person 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'* [***Farookh,*** **Para 9].**

If that test, which is directly derived from ***Turner,*** is applied to this case, then there can be no doubt that this test is fully satisfied on the basis of the District Judge's detailed findings, and in the light of the psychiatric evidence of Professor Kopelman and Dr Quinton Deeley – which the District Judge accepted on these very issues.

2.26. For all these reasons there is no proper basis to suggest that the Learned Judge either applied the wrong legal test or departed from past precedent in any way in reaching her decision.

3. **Assurances (Grounds 2 and 5)**

The Prosecution's Position In Ground 2

3.1. The prosecution submit in **Ground 2** that the Court **should have adjourned** so as to seek assurances as to placement on SAMs and location in ADX Florence.

3.2. Firstly, the prosecution cite a series of cases in relation to **Article 3** where the Court reaches a *prima facie* view that the conditions that the requested person will face would violate Article 3. In those circumstances there is binding case law that the Court should identify the fact that they have formed a *prima facie* view and adjourn. When it comes to section 91, there is no comparable body of case law requiring the Court to adjourn and seek assurances where prison conditions may be one the contributing factors to the risk of suicide. For example, nothing of this sort was suggested in the case of ***Love*** where the Divisional Court's findings on prison conditions played a significant part in their conclusion that it would be oppressive to extradite. For these reasons it is not correct to assert that in a section 91 case the District Judge is under a duty to invite the prosecution to provide assurances in the light of her likely findings that the risk of suicide will be affected by prison conditions. Moreover, the prosecution never even suggested this as a possibility if the judge was concerned about the potential prison conditions as one of the factors contributing to the risk of suicide.

3.3. Secondly, the decision in ***India v Dhir*** [2020] EWHC 200 makes clear that there is an onus on the requesting state to indicate its willingness to provide an assurance **at the case management stage of the extradition hearing** and the Court is under no obligation, even in Article 3 cases, to endlessly adjourn the extradition hearing for assurances to be given.[5] This principle must apply *a fortiori* to the introduction of assurances at such a late stage as this, to justify reversing the District Judge's concluded findings on the appeal.

3.4. **Thirdly, we turn to the assurances which have now been offered as the basis for Ground 5**. It is submitted that it is totally unfair for the issue of assurances to be raised at this stage – given the length of the extradition hearing and the thoroughness with which the oral evidence was heard and tested and the way in which its overall impact on Mr Assange's mental

[5] See for example para 43 of the High Court judgment as to the course that should have been adopted at the extradition hearing before the district judge: '*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.'*

condition was considered by the district judge. The significance of the issue of SAMs and of potential detention in ADX Colorado to the defence case had been flagged up in the early reports of Eric Lewis in October 2019 and developed in subsequent reports from Joel Sickler[6], Maureen Baird[7] and Lindsay Lewis[8]. The prosecution at no stage over the long period leading up to the extradition hearing sought to adduce undertakings or assurances that SAMs would not be applied and that detention in ADX would not take place. This means that there was no opportunity to hear or test evidence in relation to these assurances. Nor was the District Judge afforded any opportunity to take account of them in reaching her overall assessments. That is despite the fact that the defence evidence raising the issue of isolation was served at an early stage of the proceedings; that there were numerous postponements of the evidential hearing during the period from February – September 2020; that the oral hearing itself was a prolonged one throughout September; that lengthy periods were allowed for closing submissions in writing by both parties; and that the District Judge then took some time to consider her judgment until January 2021.

3.5. Against that background, these assurances have now been parachuted into the case in a totally inappropriate and unfair manner that seeks to subvert the extradition hearing and deprive Julian Assange of the liberty to which he would otherwise be entitled after the lengthy extradition process summarised above.

3.6. There is an important principle at stake her. That is the principle that the parties to an extradition hearing should deploy all their evidence and raise all relevant issues at a single extradition hearing. This is a long-held and vitally important principle. As a consequence the Courts have repeatedly held that it is not satisfactory to hold back a point like this for deployment on appeal.

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[6] Joel Sickler, noted by the judge to be *'head of the Justice Advocacy Group LLC in Alexandria, Virginia'* **[Para 353, Judgment]** is an expert on prison conditions in the Federal System.

[7] Maureen Baird *'had been employed as Senior Executive Service (SES) warden at the Metropolitan Correctional Center in New York ('the MCC') between 2014 and 2016'* and so *'was familiar with the pre-trial SAMs regime'* **[Para 289, Judgment]**.

[8] Lindsay Lewis is a '*US criminal defence attorney*' who '*currently represents Mostafa Kamel Mostafa (formerly known as Abu Hamza)'* **[Para 300, Judgment]**.

3.7. That was recognised in the context of a prosecutorial appeal based on new evidence in extradition proceedings in the case of ***Hungary v Fenyvesi*** [2009] EWHC 231 (Admin)***.*** The Court in ***Fenyvesi*** invoked Sir Thomas Bingham's statement in ***Barrow v Bankside Agency Limited*** [1996] 1 WLR 257 at page 260, that:

> *'The rule in Henderson v Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all.'*

3.8. The High Court in ***Fenyvesi*** confirmed that '***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'*** [para 3]. The maintenance of this principle is important in this case because, if the assurances had been given in good time at the extradition hearing, then the defence witnesses could have commented on the nature and efficacy of the SAMs assurances and could have developed the point that, even in the absence of SAMs, some form of administrative segregation involving an equal measure of isolation would be applied in any event. The liability to such administrative segregation, irrespective of SAMs, was recognised in the evidence of the defence experts Yancey Ellis and Eric Lewis; and it could have been further developed by the defence expert Maureen Baird, a former prison warden in the Federal system, and by Lindsay Lewis, who dealt with detention in ADX Colorado. The defence psychiatrists too would have needed to comment more fully on the effect of such forms of isolation other than SAMs. In fairness to Mr Assange, it is unlikely that the High Court could now adequately consider further evidence from all these experts to address the position that arises in the light of these belatedly proffered and conditional assurances.

3.9. By characterising the proffered assurances in this case as concerned with a **new issue** rather than adducing new evidence the prosecution cannot escape the application of the underlying principle that they should put forward their whole case at the extradition hearing itself. As the High Court observed in the case of ***Satkunas v Lithuania*** [2015] EWHC 3962 (Admin):

> *'…it is incumbent on the person raising the issue to do so at the stage of the extradition hearing and not later…I respectfully agree with the observations of Thomas LJ in Mehtab Khan. At least where an issue may depend significantly or determinatively upon evidence it is only in special circumstances that the issue can be raised on appeal.*

3.10. Finally, the assurances offered are not in fact such as will remove the risk of isolation. Thus:-

(i) Firstly, the evidence was that administrative segregation and isolation in the pre-trial phase at the Alexandria Detention Centre in Virginia were likely even if Mr Assange was not subject to SAMs. This was the clear evidence of the expert witnesses Joel Sickler, Yancey Ellis and of Eric Lewis. And the recent suicide attempt by Chelsea Manning in March 2020 whilst detained at the Alexandria Detention Centre, but not under SAMs, was also in evidence and considered relevant by the District Judge **[para 361, Judgment].**

(ii) Secondly, the assurance as to SAMs does not rule out any real risk of detention under SAMs. The assurance provides that the US government *'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'.*

(iii) Thirdly, the assurance in relation to ADX Colorado does not in fact rule out detention in ADX Colorado. The relevant assurance specifically

allows for such detention in the event of '*any future act that meant he met the test for such designation'* to ADX Colorado.

(iv) Finally, experience has shown in the cases of Abu Hamza, Aswat and many other cases that 'conditional assurances' which are contingent on nothing changing, like predictions as to future location, often provide no sure guide as to what will actually happen after extradition to the US. To say this does not involve an assertion of bad faith. Rather it is a reflection of the fact that the categorisation of a prisoner (e.g. as deserving of SAMs) or the appropriate location of a prisoner, is inevitably kept under review by different authorities at different times. That is to meet their view of what is required and to meet the need for consistency of treatment within the prison population. So even if the assurances had been given at the hearing there would have been a real issue to be litigated as to whether a SAMs assurance would have removed the risk of isolation under another form of administrative segregation in any event or a future application of SAMs. And the late provision of these conditional assurances has deprived Mr Assange of the opportunity to litigate this issue before the appropriate tribunal.

3.11. In order to fairly meet the prosecution case, there is a whole body of evidence relating to many individual cases that Mr Assange could deploy as to the way in which assurances or indications, particularly those relating to the placement of mentally or physically disabled defendants facing extradition to the United States, have either not been kept or have been adhered to only in the most technical sense. In this way the English High Court and the European Court have been led in more than one case to proceed on the mistaken basis. The evidence of Lindsay Lewis before the District Judge showed this in the case of Abu Hamza, where both the English High Court and the European Court were led by statements from the US authorities to proceed on the basis that it was extremely unlikely, if not impossible, that Mr Hamza would be detained in ADX Colorado for any length of time in excess of a few months. Despite that, he remains there today, some 7 years later. If necessary and appropriate, the defence can provide an overall summary of this history of misleading

indications and assurances, for the purposes of supporting our notice of objection. This would make clear just how unfair it is to raise the issue of such assurances for the first time at this stage in these particular extradition proceedings.

The Natural Justice Issue Raised by Ground 5 in This Case

3.12. The District Judge heard detailed evidence about the degree of risk of isolation with or without SAMs in the pre-trial period. She also heard detailed evidence over 2 weeks in relation to ADX Colorado and indeed the question of assurances. To produce assurances at this stage without the opportunity for the overall issue to be addressed by oral evidence, cross examination and submissions before the primary decision maker at an extradition hearing is fundamentally unfair. It deprives Mr Assange of the opportunity to test the assurances at an oral hearing and to have the reliability and efficacy of these assurances addressed by his own expert witnesses and in particular Maureen Baird and Lindsay Lewis. It totally distorts the extradition process to have this issue raised at this stage without the opportunity for a full evidentiary hearing before the primary decision maker, so as to test the reliability, realism and deliverability of these new assurances.

3.13. Any fair assessment of the assurances would also have to be balanced against the many factors that will not change, whatever assurances are given. These factors included the loss of family contact, the loss of support mechanisms such as the Samaritans phoneline and the fact of imprisonment in a foreign country at the pre-trial stage. All these factors were important to the District Judge's decision and her overall assessment.

The Australian Repatriation Assurance

3.14. The US have also provided an assurance that, if extradited and convicted, Mr Assange will be eligible to apply for transfer to serve his sentence in Australia and that they will not oppose such a transfer. However, they had every

opportunity to offer such an assurance at the extradition hearing itself, since the relevant Council of Europe Treaty has been in operation for many years. Moreover, such a transfer under the specific provisions of the Treaty could not take place until the conclusion of the trial and all appellate processes – which are obviously likely to be very prolonged. In the meantime Mr Assange would be detained in the conditions of isolation identified by the defence expert witnesses and in any event, in an alien and hostile environment far from his family. Again, the practical impact of such repatriation assurances on his mental health and on the risk of suicide whilst he was still detained in the US would have to be tested by detailed expert evidence. Proper examination of these issues is now extremely difficult for both the High Court and the parties, given the woefully belated manner in which this assurance has been put forward as a new issue for the first time on appeal.

Assurance as to Clinical and Psychological Treatment

3.15. We turn finally to the US assurance that Mr Assange will receive the clinical and psychological treatment recommended by a clinician employed or retained by the prison at which he is detained. This assurance is **too general** to provide meaningful protection or to add anything to the evidence provided by the US prison authorities to the District Judge at the extradition hearing itself. Moreover, the evidence before the District Judge was that the US prison authorities are, in fact, not in a position to deliver such adequate treatment even if it was recommended; and that security considerations take priority over therapeutic considerations in cases of this nature. But the real point is that, regardless of any such general assurance as to treatment, the restrictive and isolating nature of the prison regime to which Mr Assange would be exposed would seriously damage his psychological health; and would, in any event, be incapable of preventing him from taking his own life under the influence of his mental disorder. The assurance cannot undermine the District Judge's findings on this issue.

4. Ground 3, The District Judge's Decision to Rely on the Evidence of Professor Kopelman

4.1. The prosecution's complaint is that the District Judge placed too much weight on the evidence of the defence experts. This attack totally fails to recognise the entitlement of the primary decision maker to reach her own decision on the weight to be attached to the expert evidence of the defence on the one hand and the prosecution experts on the other. That is particularly so where there was no dispute between the experts that Mr Assange was suffering from mental disorder in the form of depression; no dispute between Professor Kopelman and Professor Deeley on the one hand and Professor Fazel on the other that there was a '*high risk'* of suicide; and no dispute that the risk would be aggravated by the very fact of extradition to the United States.

4.2. The prosecution dress up their attack on the District Judge's careful assessment of the weight of the expert evidence in the following way. Firstly, they seek to misrepresent the judge's findings on Professor Kopelman's evidence **[Paras 84 – 93, PG].** Then in Ground 4 they suggest that she did not give sufficient weight to Professor Fazel's evidence **[Paras 99 - 103, PG].** Finally they claim that she wrongly assessed Dr Deeley's conclusions as to how Mr Assange's underlying mental disorder would operate to cause him to commit suicide **[Para 105, PG].** We will deal with these in turn.

<u>The Judge's Assessment of Professor Kopelman's Evidence</u>

4.3. **The prosecution have wrongly claimed that the judge found '*in express terms'* that she had been misled by the defence expert.** That is the basis of their claim that his evidence should have been treated as inadmissible. In fact the District Judge made no such finding. She found that Professor Kopelman had, in an initial report which she did not rely on in coming to any conclusions, made misleading statements that did not disclose his knowledge that Stella Moris had had two children by Mr Assange **[Para 329, Judgment].** But she heard Professor Kopelman's explanation of his reasons when he gave his evidence, and when he explained that it was out of a desire to protect the privacy of Stella Moris in his initial report – an explanation which the District Judge accepted in her judgment **[Para 330, Judgment]**.

4.4. Moreover, after the prosecution placed substantial reliance on this matter in their closing submissions in November 2020, the Judge admitted an additional statement from Professor Kopelman dated 25 November 2020, a statement from Mr Assange's solicitor Gareth Peirce dated 1 December 2020, and detailed further submissions from counsel in writing on this issue. The fuller explanation then given was that Professor Kopelman had not disclosed the relationship in his first preliminary report in December 2019 out of concern to protect Stella Moris' privacy; that this December 2019 report was expressly said to be preliminary and he had at the time fully expected to discuss the question of disclosure of the Stella Moris relationship with counsel in conference in the near future; that the case was then adjourned from February until May and then until September 2020; that by then the full nature of the relationship between Stella Moris and Julian Assange and the fact they had children together had been fully explained to the District Judge in March 2020, in a statement by Stella Moris for the purposes of bail; and Professor Kopelman had made full reference to the relationship in his report of August 2020. That report of August 2020 was submitted well in advance of any evidentiary hearing at which he was to give evidence. So there never in fact any prospect of the Court being misled.

4.5. In the light of that full explanation, the District Judge found that, though the decision not to disclose the relationship in Professor Kopelman's initial, provisional report was misleading and inappropriate, she **had not in fact been misled,** nor had she relied on that initial December 2019 report; and that Professor Kopelman's original non-disclosure was '*an understandable human response to Mrs Moris' predicament'* **[see para 330, Judgment].** That predicament included real fears of harassment or worse born out by specific evidence that was before the judge.[9] Moreover, as the District Judge further pointed out, '*the Court had become aware of the true position in April 2020, before it read the medical evidence or heard evidence on this issue'* **[*Ibid*]**. So, contrary to the prosecution's assertion **she made no finding that '*she***

[9] The potential risk to Ms Moris and the children of harassment, intrusive monitoring or worse was the basis of an application for anonymity that was made at the bail application in March/April 2020.

had been misled by the defence expert'; and she clearly accepted the explanation and apology put forward by both Professor Kopelman and Gareth Peirce in relation to the circumstances surrounding the non-disclosure in the first, and expressly preliminary, report.

The Inadmissibility Attack on Professor Kopelman's evidence

4.6. At no stage in their closing submissions did the prosecution submit that Professor Kopelman's limited initial disclosure of the full family situation in his preliminary report of December 2019 **should render his evidence inadmissible**. Nor is this a tenable position. This is a matter that could only go to the weight of his evidence and had to be considered by the District Judge with reference to all the relevant circumstances. Those circumstances include firstly the fact that this was a preliminary report; secondly the explanation given which the District Judge accepted, namely a concern to protect the privacy of Julian Assange's partner and young family at that initial stage; thirdly the fact that his initial caution in disclosing the full family position was as a result of discussion between Professor Kopelman and Mr Assange's solicitor; and finally the fact that the judge was never misled since she had never even read the provisional report until after the matter had been fully remedied. Moreover there was never any prospect of Professor Kopelman giving actual evidence to the Court without disclosing the full position.

The New Evidence of the 'BJ Psych Bulletin' Article

4.7. The prosecution have further put before the Court an article referring to an interview with Professor Kopelman, published in the 'BJ Psych Bulletin' in 2017, in order to further cast doubt on his reliability [**see paras 46 – 47, PG].** No formal application has been made to adduce this as fresh evidence. No explanation is put forward as to why this was not adduced and put to him at the extradition hearing. And no affidavit has been sworn as to the circumstances in which it is said to have been '*found'.* This ad-hoc and informal manner of introducing prejudicial material at the appellate stage is flatly contrary to the general rule laid down in ***Hungary v Fenyvesi*** [2009]

EWHC 231 (Admin) [para 32]. The rule in ***Fenyvesi*** requires the party seeking to adduce new evidence at the High Court stage should provide a witness statement, explaining the circumstances in which the newly discovered evidence came to light. The same requirements are contained in Criminal Procedure Rule 50.20(6)(b). Those requirements too have not been complied with by the US in producing this supposed 'fresh evidence'.

4.8. Moreover, Professor Kopelman was exhaustively cross-examined at the extradition hearing. It is totally unfair to put in such an article now, when Professor Kopelman cannot rebut it in oral evidence before the Court and the primary decision maker cannot assess his response. Again this process totally subverts the primacy of the extradition hearing itself. It is submitted that the test laid down in s.104 4(a) that the evidence '*was not available at the extradition hearing*' is manifestly not satisfied. Nor can it be said that the evidence could not have been obtained with reasonable diligence – given that the prosecution launched a well-prepared and comprehensive attack on Professor Kopelman at the September 2020 extradition hearing.

4.9. In any event the points made are totally devoid of merit. On any reasonable interpretation of the article in question the position is as follows:

(i) Firstly, the overall context is a discussion of Professor Kopelman's work concerning '*the falsely convicted and … Guantanamo detainees'*. Given that context, it is absolutely plain that Professor Kopelman's remarks are not commending anything other than the righting of clear injustices by working within the legal system to achieve justice. The full text of the article makes this abundantly clear.

(ii) Against that background, the relevant quote in full is as follows:
'*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 street but playing the system to get justice for people'.*

(iii) Therefore, it is entirely clear that the expression '*playing the system to get justice for people'* does not have the sinister meaning attributed to it. It has to be interpreted in the light of his earlier commendation of the human rights lawyer Gareth Peirce for '*playing **within** the system...to get justice'.*

4.10. Standing back, this is in truth a somewhat undignified and misleading attempt to tarnish the reputation of a truly distinguished psychiatrist in a situation where he now has no proper opportunity to answer back by giving oral evidence. In fact the article quoted by the prosecution was '*adapted from an interview first published in the Royal College of Psychiatrists' Neuropsychiatry Newsletter in 2015'*, which was itself based on an interview given to the author Dr Norman Poole in 2014. The prosecution failed to provide this context. Before any weight at all could be given to the expression '*playing the system',* that the prosecution have sought to belatedly introduce to these proceedings, all the background set out above would have to be examined and a full opportunity given to both the author of the article and Professor Kopelman to explain the entirely innocent nature of the remark when taken in context.

4.11. This whole exercise is the result of a miserable and belated trawling of the psychiatric journals to locate some stray comment and then present it out of context so as to discredit Professor Kopelman. But it is respectfully submitted that it should not cause the Court to question the District Judge's own assessment of him and the quality of his work. She had, after all, heard him give evidence over a full day in the witness box. She had seen his reports tested against the background of contrary evidence from reputable prosecution experts and she had herself conducted an exhaustive study of the prison medical records and reached her own conclusions as she was manifestly entitled and required to do.

4.12. The prosecution wrongly claim that the judge accepted Professor Kopelman's evidence '*without questions'* [at para 32 of their Perfected Grounds]. However the judge gave careful and detailed reasons for accepting the evidence of Professor Kopelman, particularly at paragraphs 331 – 332.

4.13. Thus at paragraph 331, the District Judge fully analysed and rejected the suggestion of partiality. She expressly found in relation to the razorblade incident and the general attacks on his reliability:

> '*I noted that Professor Kopelman recorded this incident faithfully and without embellishment. I did not find that he gave the incident undue weight but that he considered it as one of very many factors indicating Mr. Assange's depression and risk of suicide. In short,* ***I 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'.***

4.14. At paragraph 332 the District Judge gave detailed reasons for accepting Professor Kopelman's opinion:

> *I accepted Professor Kopelman opinion that Mr. Assange suffers from a recurrent depressive disorder, which was severe in December 2019, and sometimes accompanied by psychotic features (hallucinations), often with ruminative suicidal ideas. Professor Kopelman is an experienced neuropsychiatrist with a long and distinguished career. He was the only psychiatrist to give evidence who had assessed Mr. Assange during the period May to December 2019 and was best placed to consider at first-hand his symptoms. He has taken great care to provide an informed account of Mr. Assange background and psychiatric history. He has given close attention to the prison medical notes and provided a detailed summary annexed to his December report. He is an experienced clinician and he was well aware of the possibility of exaggeration and malingering. I had no reason to doubt his clinical opinion*

4.15. These are careful and detailed findings on the evidence of an important expert witness by the District Judge who had actually heard him give evidence and undergo lengthy cross-examination. They are entitled to great respect from an

appellate court, in accordance with very well established principles set out above and below.

5. **Ground 4**

5.1. **Ground 4** is based primarily on the Applicant's assertion that **insufficient weight** was given to Professor Fazel's evidence [**paras 99 – 103, PG];** and that the judge failed to factor in observations made in Dr Deeley's **written** report which the prosecution suggest could be interpreted to mean that any decision to commit suicide would be rational rather than the product of mental disorder [**para 105, PG].**

5.2. The starting point is the basic principle that an appellate court should accord great respect to the findings of fact and evaluations of the weight and reliability of the evidence made by the primary decision maker in extradition proceedings. The relevant case law was helpfully summarised by Knowles J in the case of the ***Kotsev v Bulgaria*** [2019] 1 W.L.R. 2353 at paras 25 – 26:

> *'In Tyrakowski's case [2017] EWHC 2675 at [37], I said: 'The approach of this court to its task of deciding whether the district judge should have decided the case differently, particularly in the context of its evaluation of the evidence, was set out in Wiejak v Olsztyn Circuit Court of Poland [2007] EWHC 2123 (Admin) , and has been acted upon regularly since then see, eg, Government of Rwanda v Nteziryayo [2017] EWHC 1912 (Admin) at [21]. In Wiejak's case, Sedley LJ said at para 23: 'The effect of sections 27(2.)(3) of the Extradition Act 2003 is that an appeal may be allowed only if, in this court's judgment, the district judge ought to have decided a question before her differently. This places the original issues very nearly at large before us, but with the obvious restrictions, first, that this court must consider the district judge's reasons with great care in order to decide whether it differs from her and, secondly, that her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety.''*

*26. This passage is an application in the extradition context of the **general principle that an appellate court which does not hear evidence is often at a disadvantage in relation to the court which did hear the evidence and so had an opportunity to assess the witnesses' demeanour etc, as part of its fact-finding function**: see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577, paras 6–23 per Clarke LJ and paras 193–197 per Ward LJ, passages which were approved by the House of Lords in Datec Electronic Holdings Ltd v United Parcels Service Ltd [2007] 1 WLR 1325 , para 46. Accordingly, in general terms, the appellate court should defer to the trial court in relation to its findings of fact.'*

5.3. Against that background, we will deal in turn the Applicant's contentions regarding the weight that should have been accorded to Professor Fazel's evidence and their suggested criticisms of the judge's reliance on Dr Deeley's evidence.

Professor Fazel, Paras 99 – 103 of Perfected Grounds

5.4. As to Professor Fazel, the District Judge rightly noted that Professor Fazel generally supported Professor Kopelman's assessment of Mr Assange's mental state **[para 325, Judgment].** She correctly recorded Professor Fazel's evidence as to what he meant by a high risk of suicide and that it '*did not necessarily translate into a high probability of suicide'* [**para 327, Judgment].** She based her conclusions on the '*capacity to resist the impulse to suicide'* on a careful assessment of the evidence on this issue from Professor Kopelman, Dr Deeley and Professor Fazel who '*agreed that severe depression and isolation might reduce Mr Assange's capacity to resist suicide* [**para 348, Judgment].** After considering all the views on this issue she stated:- '*I had no reason to doubt the informed and careful opinion of Professor Kopelman on this issue'* [**para 349, Judgment].**

Criticism of the District Judge's Reliance on Dr Deeley, Para 105 of Perfected Grounds

5.5. The prosecution criticise the judge for relying on the evidence of Dr Deeley as well as Professor Kopelman on the issue of Julian Assange's capacity to resist the impulse to commit suicide. It is true that the judge stated that '*I preferred the opinions of Professor Kopelman and Dr Deeley over those of Dr Blackwood'* on this issue [**para 349, Judgment].** She recorded Professor Kopelman's *'clear and unequivocal view that Mr Assange's suicidal impulse will come from his psychiatric condition rather than his own voluntary act'* [**para 349, Judgment].** The prosecution quote from Dr Deeley's written report as to the reasons why his underlying condition would lead him to commit suicide. What the prosecution fail to point out was that, in his oral evidence, Dr Deeley explained just how Mr Assange's underlying Autistic Spectrum Disorder would lead him to the conclusion that he had to commit suicide and that the suicidal decision would be caused by the underlying condition. The District Judge expressly dealt with this point in her summary of Dr Deeley's evidence at para 339:-

> *'Secondly, Dr. Deeley also considered Mr. Assange's risk of suicide to be substantial. His view of risk was partly informed by his diagnoses of autism spectrum disorder and Asperger's syndrome. These conditions are characterised in part by rigidity and inflexibility of thought and he considered that Mr. Assange's propensity for analytic and systematic thought with extreme focus has led him to minutely examine the likely sequence of events should he be extradited and face trial, leading Mr. Assange to conclude that he would kill himself rather than face these conditions.*'

5.6. Therefore, both Professor Kopelman and Dr Deeley expressly dealt with the point that it would be the underlying mental disorder, rather than a rational decision to take his life, that would drive Julian Assange to commit suicide. And the District Judge further recorded Dr Deeley's evidence as to the absence in the US of the kind of *'protective factors'* which had assisted Julian Assange to resist suicidal actions in the UK. And she referred to his many, many calls to the Samaritans from his cell to obtain support. The Court is

respectfully referred to paragraph 342 of the District Judge's judgment, dealing with Dr Deeley's evidence on this issue.

5.7. For these reasons it is submitted that the judge neither misunderstood nor misdirected herself as to nature and significance of Dr Deeley's evidence on this particular issue under the ***Turner*** criteria – namely whether the underlying mental disorder would be a factor truly responsible for suicide.

6. **Final Point on US Appeal**

6.1. This application for permission to appeal comes at the end of a much delayed and prolonged extradition hearing which started two years ago, in April 2019. Mr Assange remains in custody to this day, despite the District Judge's order for his discharge on 4 January 2021, solely because the prosecution have made this application for permission to appeal.

6.2. The grounds of appeal include evidence not adduced below (the article from BJ Psych Bulletin, dated 2017) and points not taken below (the admissibility point and assurances). All these matters should, and could, have been addressed in the Court below. The prosecution had every opportunity to raise them there and then. The Court will be aware that the first defence evidence was served in October 2019, the final hearing took some 4 weeks, the prosecution called two expert witnesses of its own and submitted numerous statements from Mr Kromberg, the Assistant United States Attorney with conduct of the extradition proceedings, and from US prison officials. The prosecution invoke a novel principle of 'anxious scrutiny' of the defence case. But the defence respectfully submit that the only 'anxious scrutiny' should be of whether it is right to further prolong this extradition process, and Mr Assange's detention, even after the carefully reasoned judgment of the District Judge on the section 91 and her order for his discharge.

6.3. In part B below, the Court has Mr Assange's submissions on the considerable prolongation of proceedings in the event that permission is granted and an appeal actually proceeds. That would follow from the fact that even if

permission were granted and the matter went to a full hearing, and even if the points were found to have some merit in them, the only fair result would be a remission of the section 91 issue to the Court below for a further hearing. Moreover Mr Assange still has the right to cross-appeal on the serious and substantial points of law in respect of which the District Judge ruled against him.

6.4. For all these reasons, it is submitted that these proceedings have been sufficiently prolonged, that the discharge ordered by the District Judge should stand and that, after this length of time, Mr Assange should now be given his liberty, in accordance with the District Judge's judgment. We respectfully submit that justice does require some finality here, both in Mr Assange's own interests, and in the wider interests of the public.

PART B: Submissions on the course of the appeal, in the event that permission is granted, and the potential grounds of cross appeal.

7. **Consequences of Successful Appeal by the US**

7.1. In this part the Respondent goes on to consider the full implications if permission is granted and if there then is a successful appeal on the s.91 issue, by the US government.

7.2. This case has not been sent to the Secretary of State under s.87(3). So there can, in law, be no appeal brought by Mr Assange under s.103 against any of the matters determined *against* him by the District Judge.

7.3. Likewise, extradition has not been ordered under s.93(4), or consideration given by the Secretary of State to any of the matters required by s.93(2). There can, in law, be no appeal by Mr Assange under s.108 against any matters which may (or may not) be determined against him by the Secretary of State.

7.4. The sole cause before this Court is the Government's s.105 appeal against discharge.

7.5. This Court's powers on a s.105 appeal are contained in s.106. Section 106 contains no provision for cross-appeals. Section 106 provides instead that:

*'...**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) <u>If the court allows the appeal[10] it must</u>—

(a) quash the order discharging the person;

(b) <u>remit the case to the judge;</u>

(c) <u>direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing</u>.

(7) <u>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.</u>

(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),

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[10]. Under subsection (1)(a).

it must remand the person in custody or on bail.

(10) If the court remands the person in custody it may later grant bail...'

7.6. It is submitted that the clear structure of s.106 is that the High Court is seized of the '*relevant question'* only (here physical or mental condition under s.91). In respect of the '*relevant question'*, this Court may do one of three things:

(i) First, uphold the judgment of the District Judge on the s.91 question and dismiss the appeal (s.106(1)(c)). The District Judge's discharge order then stands as final (subject only to any further appeal under s.114);

(ii) Secondly, decline to decide the merits of the s.91 question – and remit it to the District Judge for fresh determination by her (106(1)(b)).[11] Generally that will be the case where the judge applied erroneous legal principles and the s.91 question falls to be re-taken against a different legal framework as applied to the evidence before her. In that situation, the District Judge's fresh decision determines the appeal (s.106(7)-(8)). If the District Judge decides s.91 in favour of the USA, then the position is that she must proceed to send the case to the SoS under s.87(3) (s.106(7));

(iii) Thirdly, the High Court may conclude that the District Judge erred in her assessment of the s.91 question and allow the appeal (s.106(1)(a)). Then the case automatically returns to the District Judge to proceed as if she had decided s.91 differently at the extradition hearing (s.106(6)(b)(c)).[12] Here, in light of all her other rulings, and given that no issues remain undetermined, that means to proceed immediately to send the case to the SoS under s.87(3). She cannot hear further s.91 evidence / submissions. Any attempt to make further s.91 arguments have to happen under cover of an application to re-open the s.105 appeal (***Chawla v India*** [2020] 1 WLR 1609 at §§33-43). The same

[11]. This is a power peculiar to Part 2. It does not feature under Part 1 (s.29).
[12]. As it would under Part 1 (s.29(5)).

applies to any submissions on fresh issues not raised at the original extradition hearing (***Dempsey v USA (No 2)*** [2020] 1 WLR 3103 at §§15-27).

7.7. On its face, the scheme of the Act is clear: If the case goes back to the District Judge under s.106(1)(b) or s.106(6)(b), and is then sent to the SoS under s.106(7) or s.106(6)(c), *then* Mr Assange will possess a right of appeal under s103 against all of the antecedent decisions that resulted in the case being sent to the SoS (excluding s.91 which, if to be taken further by him, would need to be the subject of an application to re-open the s.105 appeal – ***Chawla***). And he would *then* also possess a right of appeal under s.108 against the additional decisions thereafter taken by the SoS.

7.8. Section 106 does not envisage cross-appeals at this stage. Apart from anything else, it would result in the s.103 appeal issues being heard before, and separately from, the s.108 issues (contrary to the mandatory terms and intention of s.103(5)).

7.9. Neither does the Crim PR r.50 envisage or make provision for cross-appeals. In particular, r.50.21 talks only about the provision by Mr Assange of '*grounds of opposition'* to the USA's '*grounds of appeal'*.

7.10. The Court is invited to compare the civil procedure rules (CPR r.52.13(2)) and the Crim PR in other criminal contexts (Crim PR r.42.16(3)); which *do* contemplate and make procedural provision for cross-appeals. It is submitted the absence of any such procedure under the 2003 Act is not accidental:

(i) The Consolidated Criminal Practice Directions do not mention cross-appeals under the Act.

(ii) The currently available N162EX form contains no section relating to cross-appeals.

7.11. The absence of any cross-appeal provision is important: see s.116. The creation of non-statutory mechanisms for review of decisions made by a District Judge under the Act is not possible.

7.12. In sum, the Respondent's position is that any cross-appeal is neither called for nor contemplated by the terms of the Act. On the contrary, the Act provides a procedure (remittal, followed by sending to the SoS, followed by s.103 appeal) for the resolution of issues determined against him by the District Judge, if resolution is called for.

8. The Cross Appeal

8.1. The Respondent does acknowledge that ***Dempsey (No 1) v USA*** [2018] 4 WLR 110 involved a s.105 appeal where this Court entertained (and dismissed) an application for 'permission' to cross-appeal (see §§5 & 18-20). But there was no discussion of the basis in law for such a procedure. No authority has examined, or articulated, the basis of the jurisdiction of the court to hear a cross-appeal.

8.2. Two authorities suggest that the court's jurisdiction to hear a s.103/108 appeal after a s.106(6) remittal is limited. Both however are concerned with different scenarios/issues and neither suggest that the Court would not have full s.103/108 jurisdiction *here* following a s.106(1)(b) or s106(6) remittal:

(i) ***Chawla*** (supra) concerned a party trying to gain a second appeal on the *same issue* decided against him in the first (prosecution) s.105 appeal. Because it was the same issue as had been decided by this Court under s.105, the '*relevant decision'* which led to his case being sent by the District Judge to the SoS under s.106(6)(c), and which Chawla wished to appeal, had been taken in substance by the High Court on the first appeal, not by the District Judge. ***Chawla*** holds (at §§33-42) that '*in those circumstances'* a defendant wishing to achieve what Mr Chawla wished to achieve is therefore required to apply to re-open the s.105 appeal. ***Chawla*** deliberately says nothing about what

happens, following s.106(6) remittal, regarding other decisions that *had* been taken by the District Judge (and had not been the '*relevant question*' determined by the s.105 appeal), as here: see §43. In particular, ***Chawla*** is not authority for the proposition that no s.103 appeal will follow in respect of such issues where a District Judge sends a case to the SoS following a s.106(6) direction.

(ii) ***Dempsey (No 2)*** (supra) concerned a party trying to raise a s103 appeal (following s.106 remittal) in respect of an issue not raised or decided previously at all at the extradition hearing. ***Dempsey (No 2)*** holds that the hearing following s.106 remittal is not the 'extradition hearing', such that fresh issues cannot be raised in it. In Dempsey's case, there could be no s.103 appeal at all because there were no issues that he had raised at the extradition hearing which had not already been determined by the High Court (as to which, see ***Chawla***). ***Dempsey (No 2)*** therefore is likewise not concerned with what happens, following s.106(6) remittal, regarding decisions that *had* been taken by the District Judge at the extradition hearing (and had not been determined by the s.105 appeal).[13]

8.3. ***Dempsey (No 2)*** however refers, again without analysis, to the cross-appeal in ***Dempsey (No 1)***) (§3), and proceeds to hold that it was open to Mr Dempsey to apply to re-open the s.105 appeal to raise the fresh issue (§27), presumably by way of further cross-appeal.

8.4. Jurisdiction aside, as a matter of practicality, the injection into this s.105 appeal of all of the other issues decided by the District Judge would add very significantly to its size, duration and manageability. It would add at least two weeks to the time estimate of this appeal. All in circumstances where, if the s.105 appeal is unsuccessful, High Court time and recourses need never be occupied by those matters.

[13]. I.e. what would have happened in Dempsey's case had he raised Article 3 ECHR at his extradition hearing and had the district judge ruled against him.

8.5. In the circumstances, in the event that permission is granted, the Applicant is respectfully invited to indicate (without prejudice to precedent) that it agrees that the hearing of a cross-appeal is inappropriate in the circumstances of this particular case and that the issues decided against the Respondent at the extradition should properly be the subject of a separate s.103 appeal, if they arise.

8.6. In the event that the Applicant Government does not so agree, or the Court is minded not to approve of such an agreement, then the Respondent seeks an early CMH in order to determine and manage this issue properly.

Grounds of Cross Appeal

8.7. For the avoidance of doubt, however, and without prejudice to the submission outlined above, the Respondent specifies the following grounds of cross-appeal in order that no technical jurisdiction or timing point may be taken against him at any future point.

8.8. The District Judge erred in ruling:

(i) That the request is not an abuse of process, or a breach of article 5 of the European Convention on Human Rights ('the ECHR') , in circumstances where the UK-US Extradition Treaty prohibits extradition for a political offence;

(ii) That extradition is not barred by reason of extraneous considerations, pursuant to s.81(a) and/or (b);

(iii) That extradition would not be unjust and oppressive by reason of the lapse of time, pursuant to s.82;

(iv) That aspects of the request would not be barred by reason of forum, pursuant to s.83A;

(v) That the allegations meet the 'dual criminality' requirements of s.137;

(vi) That extradition is not in breach of Article 3 ECHR (inhuman and degrading treatment) and should not be refused, pursuant to s.87:

(vii) That extradition is not in breach of Article 6 ECHR (denial of a right to a fair trial) and should not be refused, pursuant to s.87 of the EA 2003:

(viii) That extradition is not in breach of Article 7 ECHR (a novel and unforeseeable extension of the law) and should not be refused, pursuant to s.87 of the EA 2003:

(ix) That extradition does not in breach of Article 10 ECHR (right to freedom of expression) and should not be refused, pursuant to s.87 of the EA 2003:

(x) That the request does not misrepresent the facts [***Castillo v Spain*** [2005] 1 WLR 1043, ***Spain v Murua*** [2010] EWHC 2609 (Admin), and ***Zakrzewski v Regional Court in Lodz, Poland*** [2013] 1 WLR 324];

(xi) That the request is not being pursued for ulterior political motives and in good faith [***R (Bermingham and Others) v Director of the Serious Fraud Office*** [2007] QB 727 and ***R (Government of the USA) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157];

(xii) That the new conduct contained in the second superseding indictment ought not to have been excised by the Court for reasons of procedural unfairness; and alternatively that she was under no obligation to adjourn the hearing so that the defence could adduce evidence to address the new indictment.

8.9. For the avoidance of doubt, the Respondent cross-appeals every decision the judge reached adverse to Mr Assange.

8.10. In the event that the Court rules that these issues are to be decided within the context of the present s.105 appeal, the Respondent will provide detailed submissions and evidence in support of his grounds of cross appeal.

Edward Fitzgerald QC

Mark Summers QC

Florence Iveson

6 April 2021