Neutral Citation Number: [2021] EWHC 3313 (Admin)

Case No: CO/150/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2021

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
LORD JUSTICE HOLROYDE

- -

Between:

THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Appellant**
- and -	
JULIAN PAUL ASSANGE	**Respondent**

- -
- -

James Lewis QC, Clair Dobbin QC and Joel Smith (instructed by **The Crown Prosecution Service**) for the **Appellant**
Edward Fitzgerald QC, Mark Summers QC and Florence Iveson (instructed by **Birnberg Peirce**) for the **Respondent**

Hearing dates: 27 and 28 October 2021

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Approved Judgment

LORD BURNETT OF MALDON CJ:

1. This is the judgment of the court to which we have both contributed.

2. Following an extradition hearing that lasted many weeks before District Judge Baraitser ("the judge"), on 4 January 2021 she discharged Julian Assange whose extradition is sought by the United States of America ("USA"). She was satisfied that "his mental condition ... is such that it would be oppressive to extradite him". That is the test laid down by section 91 of the Extradition Act 2003 ("section 91"; "the 2003 Act") which, if satisfied, bars extradition.

3. The background to the request for Mr Assange's extradition is well-known. He is a founder of the Wikileaks website. He has been indicted in the USA on 18 counts connected with obtaining and disclosing defence and national security material through the website, primarily in 2009 and 2010 but also to some extent since. Those charges relate to alleged actions on the part of Mr Assange which have been summarised by the USA as follows:

> "His complicity in illegal acts to obtain or receive voluminous databases of classified information;
>
> His agreement and attempt to obtain classified information through computer hacking; and
>
> His publishing certain classified documents that contained the unredacted names of innocent people who risked their safety and freedom to provide information to the United States and its allies, including local Afghans and Iraqis, journalists, religious leaders, human rights advocates, and political dissidents from repressive regimes."

4. On 20 July 2020 the USA requested Mr Assange's extradition to stand trial on those charges. The request was certified by the Secretary of State as valid on 29 July 2020.

5. The US proceedings followed an earlier request in December 2010 by Sweden for extradition for alleged sex crimes. An extradition order was made but was challenged by Mr Assange. On 30 May 2012 the Supreme Court finally rejected his appeal against the extradition order: see [2012] UKSC 22; [2012] 2 AC 471. In the meantime, Mr Assange had failed to surrender to the court as required by the grant of bail. Following the decision of the Supreme Court he entered the Ecuadorian Embassy in June 2012 and remained there until 11 April 2019. He was then arrested and later convicted of an offence under the Bail Act 1976. He was sentenced to 50 weeks' imprisonment. Three of the offences for which he was wanted in Sweden became time barred in August 2015 and on 19 May 2017 the Swedish prosecutor announced that she was discontinuing the prosecution for the fourth.

6. Since he left the Ecuadorian Embassy Mr Assange has been in custody either in connection with the Bail Act offence or pending resolution of the extradition request of the USA of 6 June 2019.

The judgment below

7. The judge set out the many issues which had been raised before her in a detailed judgment. One of those issues was that extradition was challenged pursuant to section 91 on the ground that it would be oppressive.

8. Section 91 provides:

> "**91 Physical or mental condition**
>
> (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."

9. In this context, the word "oppressive" relates to hardship to the requested person resulting from his physical or mental condition in the context of facing criminal proceedings and their consequences in another country: *Kakis v. Cyprus* [1978] 1 WLR 779 at p782 *per* Lord Diplock. It has not been suggested that Mr Assange's extradition would be unjust.

10. The judge addressed the evidence of the conditions in which Mr Assange would be likely to be held, as these were relevant to the risk of suicide. It was common ground between the parties that pre-trial Mr Assange would be likely to be held at "ADC", an adult detention centre in Alexandria, Virginia. The judge noted that there were seven categories of detention at the ADC: the general population; administrative segregation ("ADSEG"); disciplinary segregation and pre-hearing segregation; medical segregation; protective custody; and the critical care mental health unit. Having considered the evidence on both sides, the judge concluded that there was a real risk that Mr Assange would be subject to restrictive special administrative measures (SAMs), both pre-trial and post-trial. She further found there was a real risk that, if convicted, Mr Assange would be held at the Administrative Maximum Security prison, Florence ("the ADX"). The discussion about "real risk" derives from the test applied in cases where the issue is whether conditions of detention would fail to meet the standards required by article 3 of the European Convention on Human Rights ("the Convention"). She considered the evidence about conditions there for an inmate subject to post-trial SAMs, and noted that in *Babar Ahmad v United Kingdom* (2013) 56 EHRR 1 the Strasbourg Court, having taken into account the mental health of the applicants in that case, held at p76 –

> "that there would be no violation of art.3 of the Convention as a result of conditions at ADX Florence and the imposition of special administrative measures post-trial if [the applicants] were extradited to the United States."

11. In relation to the section 91 issue, the judge summarised the medical evidence which had been adduced by the parties and set out her findings. She found Professor Kopelman, an Emeritus Professor of Neuropsychiatry, honorary consultant neuropsychiatrist and chartered psychologist instructed on behalf of Mr Assange, to be an impartial and dispassionate witness. She accepted his 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. She referred to his opinion that –

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

12. Professor Kopelman's evidence has been subjected to substantial criticism to which we shall return.

13. The judge also accepted the opinion of Dr Deeley, a consultant psychiatrist instructed on behalf of Mr Assange, that he suffers from autism spectrum disorder, albeit that he is a "high functioning autistic case", and Asperger's syndrome disorder. In a report dated 14 August 2020 Dr Deeley expressed his opinion that there was a substantial risk of suicide if Mr Assange were extradited to the USA and came under the control of the US authorities:

> "… in my opinion his depression and anxiety symptoms would worsen. Relevant factors would be removal from his family and support network; perceived humiliation and persecution; and the intrinsic stresses of a trial process when detained under conditions of close supervision and isolation with no perceived prospect of acquittal or appeal. In my opinion his Asperger Syndrome diagnosis would render him less able to manage these conditions. The cognitive rigidity and intense focus associated with Asperger Syndrome would conduce to greater rumination about his predicament, increasing anxiety and worsening low mood and cognitive symptoms of depression. In these circumstances his risk of attempted suicide would be high."

14. The judge preferred the expert opinions of Professor Kopelman and Dr Deeley to those of Dr Blackwood, a consultant forensic psychiatrist instructed on behalf of the USA who did not accept the diagnosis of severe depressive episode with psychotic features from 2019, and did not agree that Mr Assange met the diagnostic threshold for an autism spectrum disorder. She noted that Dr Blackwood only had limited contact with Mr Assange within a period of a week,

whereas Professor Kopelman had carefully gathered information through a series of interviews with those who knew Mr Assange well, including his current partner and so was likely to have "a fuller picture of his pre-morbid personality".

15. The judge then considered the criteria set out in the decision of this court in *Turner v United States* [2012] EWHC 2426 (Admin) ("*Turner*"). She was satisfied that the risk that Mr Assange will commit suicide is a substantial one. Her reasons for being so satisfied were –

    i) that was the view of both Professor Kopelman and Dr Deeley;

    ii) that if detained subject to the restrictions of pre-trial SAMs, Mr Assange would be held in conditions of significant isolation, which would be maintained if SAMs continued post-trial at the ADX, which all the expert psychiatric witnesses agreed would have a deleterious impact on Mr Assange's mental health;

    iii) that Dr Blackwood had not addressed the possible conditions of detention;

    iv) that Mr Assange currently had the benefit of protective factors, such as contact with his family: the fact he had not attempted suicide whilst held at HMP Belmarsh could therefore not be taken as evidence that the risk of suicide was low or was capable of being adequately managed;

    v) that whilst she accepted the evidence of Professor Fazel (a Professor of Forensic Psychiatry and honorary consultant forensic psychiatrist, instructed by the USA) about the difficulties of evaluating a suicide risk, she accepted Professor Kopelman's evidence that "statistics and epidemiology take you only so far";

    vi) that she had formed the view, from the evidence as a whole, that Mr Assange was "a depressed and sometimes despairing man, who is genuinely fearful about his future".

16. The judge found that Mr Assange's suicidal impulses would come from his psychiatric diagnoses rather than his own voluntary act, again preferring the evidence of Professor Kopelman and Dr Deeley to that of Dr Blackwood.

17. The judge then considered the evidence as to the mental health care which would be available to Mr Assange if detained in the USA. She was satisfied that, if he is subjected to the extreme conditions of SAMs, Mr Assange's mental health would deteriorate to the point where he would commit suicide. Again, she accepted Professor Kopelman's opinion on that issue. She accepted that it was "by no means certain" that SAMs would be imposed on Mr Assange, but was satisfied that there was "a real risk that he will be kept in the near isolated conditions imposed by the harshest SAMs regime, both pre-trial and post-trial". Mr Assange would not have the protective factors available to him at Belmarsh. She found that he has the determination, planning and intellect to circumvent measures designed to prevent him from committing suicide. Preventative measures could not always prevent the suicide of a determined prisoner. The judge was satisfied that the

measures about which she had heard evidence would not prevent Mr Assange from finding a way to commit suicide.

18. The judge concluded:

> "362. I accept that oppression as a bar to extradition requires a high threshold. I also accept that there is a strong public interest in giving effect to treaty obligations and that this is an important factor to have in mind. However, I am satisfied that, in these harsh conditions, Mr Assange's mental health would deteriorate causing him to commit suicide with the 'single minded determination' of his autism spectrum disorder.[1]
>
> 363. I find that the mental condition of Mr Assange is such that it would be oppressive to extradite him to the United States of America."

19. For that reason, the judge ordered the discharge of Mr Assange, pursuant to section 91(3).

20. The judge found against Mr Assange on each of the other grounds on which he had resisted extradition. They were that:

    i) The US-UK Extradition Treaty forbids extradition for political offences with the consequence that the court lacked jurisdiction to hear the case;

    ii) The allegations against Mr Assange did not meet the dual criminality test found in section 137 of the 2003 Act;

    iii) Extradition would be unjust or oppressive by reason of the passage of time pursuant to section 82 of the 2003 Act;

    iv) Extradition is barred by reason of extraneous considerations by virtue of section 81(a) and (b) of the 2003 Act;

    v) Extradition is barred by section 87 of the 2003 Act because it would breach the Convention by violating article 6 (denial of a fair trial), article 7 (expose Mr Assange to a novel and unforeseeable extension of US law) and article 10 (right to freedom of expression). The judge concluded that she did not need to decide an argument that extradition would expose him to treatment contrary to article 3 of the Convention given her conclusion on section 91;

    vi) The extradition request is an abuse of process because it proceeds on a misrepresentation of the facts and because the prosecution is being pursued for an ulterior political motive and is not brought in good faith.

[1] The judge was here quoting from Professor Kopelman's evidence. Dr Deeley had used similar phraseology.

21. Thus the sole ground on which the judge discharged Mr Assange, and the focus of this appeal, is her finding pursuant to section 91 that it would be oppressive to extradite him.

The grounds of appeal

22. The USA appeals against the order discharging Mr Assange on five grounds:

    i) Ground 1: The judge made errors of law in her application of the test under section 91. Had she applied the test correctly she would not have discharged Mr Assange;

    ii) Ground 2: Having decided that the threshold for discharge under section 91 was met, the judge ought to have notified the USA of her provisional view to afford it the opportunity of offering assurances to the court;

    iii) Ground 3: Having concluded that the principal psychiatric expert called on behalf of the defence (Professor Kopelman) had misled her on a material issue, the judge ought to have ruled that his evidence was incapable of being relied upon (or that little weight should be attached to it) or that his lack of independence rendered his evidence inadmissible. The district judge failed to interrogate or adequately assess the reasons for Professor Kopelman misleading her (seemingly concluding that it was sufficient that he had misled her for 'human' reasons) or to assess adequately how his willingness to mislead her impacted upon the overall reliability of his evidence. Had she not admitted that evidence or attributed appropriate weight to it, the judge would not have discharged Mr Assange pursuant to section 91;

    iv) Ground 4: The judge erred in her overall assessment of the evidence going to the risk of suicide, in particular in her predictive assessment of a future, long term risk which was based upon several contingencies which might or might not eventuate;

    v) Ground 5: The USA has now provided the United Kingdom with a package of assurances which are responsive to the judge's specific findings in this case. In particular, the US 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 USA has also provided an assurance that they will consent to Mr Assange being transferred to Australia to serve any custodial sentence imposed on him if he is convicted.

23. The USA appeals pursuant to section 105 of the 2003 Act. Those representing Mr Assange have made clear that if the appeal succeeds, he in turn would seek to appeal pursuant to section 103 by challenging each of the conclusions adverse to him reached by the judge. That position was explained on 11 August 2021 at the oral application for permission to pursue grounds 3 and 4. Permission had originally been refused by Swift J on the papers on those grounds. Written argument that the 2003 Act does not make provision for a cross appeal in these

circumstances was accepted by the court: [2021] EWHC 2528 (Admin) at [31]. We have heard argument on the USA appeal alone. We note that in *Government of Turkey v. Tanis* [2021] EWHC 1675 (Admin) Jeremy Johnson J indicated in an *obiter dictum* his provisional view that a respondent to an appeal could reargue all the grounds on which he lost to show that the overall outcome would have been the same, even if the appeal grounds succeed. We have heard no argument on this point. It may call for full argument in a suitable case.

24. The powers of this court on an appeal under section 105 of the 2003 Act are contained in section 106, which provides:

> "(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."

25. In the circumstances of this case, the "relevant question", which the judge answered in the affirmative, was whether Mr Assange's mental condition was such that it would be oppressive to extradite him.

26. The USA contends that had the judge approached the evidence surrounding the issue of oppression correctly (grounds 1 to 4) she would have decided the question differently and sent the case to the Secretary of State. In consequence the appeal should be allowed. In the alternative the question should be remitted for redetermination. There were no assurances before the judge (ground 5). They are now offered in response to the finding on oppression. The contention of the USA is that the assurances raise a new issue for the purposes of section 105 of the 2003 Act and that had the assurances been available to the judge she would have decided the oppression question differently. It is submitted that on that basis alone, the appeal should be allowed.

27. On behalf of Mr Assange it is submitted that the judge gave a careful judgment, in which she followed all the steps required by the decision in *Turner*. The judge had heard all the evidence and her findings of fact and value judgments must be respected. She was entitled to find that Professor Kopelman was an impartial and reliable witness, notwithstanding the criticisms made of him, and to accept his expert evidence. She was entitled to find, on the evidence as a whole, that if extradited Mr Assange would be driven by his mental condition to commit suicide whatever preventative steps were taken and that it was therefore oppressive to extradite him. There was no error of law in her approach. The USA is in reality

simply trying to relitigate the case. The offer of assurances comes too late. They do not remove the real risk of detention subject to SAMs and/or in ADX, or the real risk of detention in ADSEG and at Alexandria Detention Centre. In any event, even if the assurances are admitted the appeal should not be allowed but the case remitted to the judge with a direction to decide the relevant question again.

The appeal

28. A mass of written material has been placed before the court and the oral submissions of counsel occupied two full days. The USA seeks to rely on the assurances which have been offered since the hearing before the judge. It also seeks to adduce fresh evidence relating to a report of a journalist's interview with Professor Kopelman. Mr Assange seeks to adduce a substantial volume of fresh evidence in response to the assurances and in response to the criticisms made of Professor Kopelman. We indicated at the start of the hearing that we would consider all the new material and proposed fresh evidence *de bene esse* and address issues as to its admissibility when giving judgment.

Grounds 2 and 5

29. Grounds 2 and 5 involve consideration of whether the judge should have given the USA an opportunity to consider offering assurances before she made her decision to discharge Mr Assange, whether this court can and should receive the assurances offered subsequent to the judge's decision and whether those assurances effectively answer all the points which led the judge to decide that extradition would be oppressive.

30. The four assurances on which the USA relies, which it contends entirely answer the concerns which caused the judge to discharge Mr Assange, are contained in Diplomatic Note no. 74 dated 5 February 2021:

> "1. The United States will not impose Special Administrative Measures (SAMs) on Mr Assange, pretrial 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.
>
> These assurances are binding on any and all present or subsequent individuals to whom authority has been delegated to decide the matters."

31. In a further Diplomatic Note (no. 169 dated 19 October 2021) the USA referred to the long history of cooperation between the USA and the United Kingdom on extradition matters and said:

> "The United States has provided assurances to the United Kingdom in connection with extradition requests countless times in the past. In all of these situations, the United States has fulfilled the assurances it provided. Further, the United States is unaware of a single instance where the United Kingdom communicated a concern about any U.S. assurance going unfulfilled. In the event the United Kingdom had concerns regarding fulfilment of an assurance, or were to believe an assurance had not been fulfilled, it could communicate its concerns, or a protest, directly to the United States. The United States values its extradition relationship with the United Kingdom and would take any concern raised very seriously.
>
> As regards the assurances provided in the case of Haroon Aswat, which the United States understands has been raised in the Assange proceedings, the United States was requested to provide assurances to the United Kingdom regarding, among other things, the manner by which Mr Aswat's mental health needs would be initially evaluated upon his extradition to the United States and his detention pending that evaluation. There were no specific assurances regarding his confinement or the manner or form of medical or mental health treatment in the event it was determined that he could be transferred to another facility without compromising his health and safety. The United States wishes to emphasize that the United Kingdom has not raised with the United States any concerns regarding

> the assurances provided in the Aswat case. Further, neither Mr Aswat nor a representative of Mr Aswat has advised the United States that any assurance provided to the United Kingdom has not been fulfilled.
>
> Finally, the United States notes that its assurances are binding on any and all current or subsequent individuals to whom authority has been delegated to decide the matters. This includes the federal prosecutors on this case as well as any relevant current or future officials with authority over the matters set forth in the assurances."

32. Mr Summers QC on behalf of Mr Assange on this part of the appeal responded to the offer of those assurances as follows.

33. First, he submitted that the judge's finding of the high risk of suicide, and her finding that extradition would be oppressive, were not specifically related to the prospect that Mr Assange would be subject to SAMs and/or detained at the ADX, and therefore the proposed assurances would not alter her decision.

34. Secondly, by offering the assurances at this late stage the USA is trying to change its case, which had previously been conducted on the basis that the SAMs regime was not oppressive, even having regard to Mr Assange's mental condition. It is submitted that it is too late for such a change to be made now, at any rate without complying with the criteria in *Municipal Court of Szombathely v Fenyvesi* [2009] EWHC 231 (Admin) ("*Fenyvesi*"). Those criteria have not been met. Mr Assange relies on the statement in *Fenyvesi* at paragraph [35] that the court will not readily admit fresh evidence which should have been adduced before the lower court and which is tendered to try to repair holes which should have been plugged before that court. He further relies on *Satkunas v Lithuania* [2015] EWHC 3962 (Admin) at paragraph [21] as establishing that if a party wishes to raise an issue which is likely to depend upon evidence which could be led by one or both sides, it is incumbent upon him to do so at the extradition hearing and not later.

35. Thirdly, he submitted that the assurances now offered are conditional, qualified and aspirational, and leave open the possibility that Mr Assange will be subject to SAMs and/or to detention at the ADX. Mr Assange's case is that designation onto SAMs is very likely, especially given the involvement of the Central Intelligence Agency in decision-making and the seriousness with which the USA views the conduct alleged against him. He submitted that Mr Assange need not be shown to have committed an offence before he could be made subject to SAMs: he is vulnerable to designation to SAMs on the basis of any word or deed, at any time since the assurances were offered, which is subjectively assessed by USA as meeting the criteria for designation.

36. Fourthly, Mr Summers submitted that even if the assurances were effective to remove any possibility of Mr Assange being subject to SAMs and/or detained at the ADX, there remains a substantial risk that he will be subject to other restrictive forms of detention (such as ADSEG, or detention in a high-security prison) which will cause him to be largely isolated from contact with others, and so will exacerbate his mental condition and lead to his suicide. He faces the prospect of a

very long period of pre-trial detention because he will make many preliminary challenges in the proceedings. Even if he is acquitted, he may be summoned to give evidence before a grand jury.

37. Lastly, even if the assurances on their face exclude any substantial risk of detention in conditions which would exacerbate Mr Assange's mental condition, this court is invited to doubt the trustworthiness of the assurances in the exceptional circumstances of this case. Mr Summers referred to other cases in which the USA is said to have acted in breach of assurances given to the United Kingdom. He accepted that the court should start from a presumption of good faith but submitted that the presumption may have been rebutted and should be considered by the judge. She has lived with the case over a long period and is familiar with the intricacies of its background.

38. Mr Assange has put forward a substantial bundle of material to support these submissions. We accept that we should receive the evidence which is in admissible form put forward in response to assurances offered only at the appeal stage. General statements of opinion calling into question the good faith of the USA from those who establish no relevant expertise to give such an opinion are of no more value than a journalistic opinion culled from an internet search. We have nonetheless considered all the material *de bene esse*.

39. A diplomatic note or assurance letter is not "evidence" in the sense contemplated by section 106(5)(a) of the 2003 Act: it is neither a statement going to prove the existence of a past fact, nor a statement of expert opinion on a relevant matter. Rather, it is a statement about the intentions of the requesting state as to its future conduct: see *USA v Giese* [2016] 4 WLR 10 at paragraph [14]. For the purposes of section 106(5), an offer of an assurance at the appeal stage is an "issue": see *India v Chawla* [2018] EWHC 1050 (Admin) at [31].

40. In *India v Dhir* [2020] EWHC 200 (Admin), a Part 2 case in which the issues related to article 3 of the Convention, at paragraphs [36] and [39] the court said –

> "36. The court may consider undertakings or assurances at various stages of the proceedings, including on appeal, 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 and *Giese v USA (no 4).*
>
> …
>
> 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 … *India v Chawla* at paragraph 47."

41. We respectfully agree. Other cases relied on by Mr Assange, including *India v Ashley* [2014] EWHC 3505 (Admin) at paragraphs [42] and [43], do not provide support for the argument to the contrary. In *Romania v Iancu* [2021] EWHC 1107 (Admin) further information and a related assurance had been submitted outside a time limit and after the conclusion of the hearing. The District Judge refused to admit it when to do so would result in a further hearing and in further delay to proceedings. As Chamberlain J said at paragraph [22], "it is inherent in the concept of a time limit that failure to comply with it may have consequences". The present case is different.

42. In our view, a court hearing an extradition case, whether at first instance or on appeal, has the power to receive and consider assurances whenever they are offered by a requesting state. It is necessary to examine the reasons why the assurances have been offered at a late stage and to consider the practicability or otherwise of the requesting state having put them forward earlier. It is also necessary to consider whether the requesting state has delayed the offer of assurances for tactical reasons or has acted in bad faith: if it has, that may be a factor which affects the court's decision whether to receive the assurances. If, however, a court were to refuse to entertain an offer of assurances solely on the ground that the assurances had been offered at a late stage, the result might be a windfall to an alleged or convicted criminal, which would defeat the public interest in extradition. Moreover, as Mr Lewis QC pointed out on behalf of the USA, a refusal to accept the assurances in this case, on the ground that they had been offered too late, would be likely to lead only to delay and duplication of proceedings: if the appeal were dismissed on that basis, it would be open to the USA to make a fresh request for extradition and to put forward from the outset the assurances now offered in this appeal, subject, of course, to properly available abuse arguments.

43. Of significance in this case is that Mr Assange put forward numerous grounds for resisting extradition. He took every conceivable point. The judge found against him on all but one of those grounds. If the submissions now made on behalf of Mr Assange were correct, it would follow that the USA should before the hearing have offered contingent assurances capable of meeting every possible combination of outcomes, to the extent that assurances could negative them. It cannot, in our view, be correct that a requesting state must engage in such an artificial exercise, on pain of having any later offer of assurances rejected merely on grounds of delay. In any event, an assurance may be unnecessary depending on factual and evaluative findings made by the judge. A requesting state should not be forced to approach the extradition hearing on the basis that its primary arguments will necessarily fail. An offer of assurances in an extradition case is a solemn matter, requiring careful consideration by the requesting state of its willingness to give specific undertakings to another state. It would not be appropriate to require that to be done on a contingent or hypothetical basis; and we doubt the practicability of such an approach. We do not accept that the USA refrained for tactical reasons from offering assurances at an earlier stage, or acted in bad faith in choosing only to offer them at the appeal stage.

44. We observe that the decision that all closing submissions should be made in writing, in a case in which the arguments had ranged far and wide over many days of hearing, may well have contributed to the difficulty faced by the USA in

offering suitable assurances any earlier than it did. Had there been an oral hearing, even if only a short one supplementing the detailed written submissions, we think it very likely that the USA would have been able to identify the issue(s) which appeared to weigh most heavily with the judge, and to request an opportunity to offer suitable assurances if necessary. As it was, the issues to which any such assurances might relate only crystallised when the judge provided counsel with a draft of her judgment. We think it would have been better at that stage had the judge offered the USA the opportunity to consider providing assurances rather than proceeding straight to the discharge of Mr Assange. Had she done so, we have no doubt that the USA would have offered the assurances before the final decision was made.

45. Extradition proceedings are not private law proceedings but a process through which solemn treaty obligations are satisfied in the context of a framework which ensures that a requested person is provided with proper safeguards. When extradition is resisted on grounds which suggest that the requested person will be exposed to conditions, for example of detention, trial or medical facilities, which place a bar on extradition but which may be remedied by suitable assurances the requesting state should generally be provided with an opportunity to provide them, and have them tested.

46. We are satisfied that we can receive the assurances notwithstanding the stage of proceedings at which they were put forward.

47. The assurances offered in Diplomatic Note no. 74 are expressly stated, at the outset, to be offered by "the Government of the United States of America … [to] … the Government of the United Kingdom of Great Britain and Northern Ireland". Thereafter, the proposed assurances are in the form of undertakings offered by "the United States". It is not possible to interpret that phrase, as Mr Assange seeks to do, as referring only to an unspecified sub-set of state or federal officials or prosecutors. That is clear from the concluding words of Diplomatic Note no. 74 ("These assurances are binding on any and all present or subsequent individuals to whom authority has been delegated to decide the matters") and Diplomatic Note no. 169 ("Finally, the United States notes that its assurances are binding on any and all current or subsequent individuals to whom authority has been delegated to decide the matters. This includes the federal prosecutors on this case as well as any relevant current or future officials with authority over the matters set forth in the assurances"). It is accordingly clear that Diplomatic Note no. 74 contains solemn undertakings, offered by one government to another, which will bind all officials and prosecutors who will deal with the relevant aspects of Mr Assange's case now and in the future.

48. The first and fourth assurances wholly exclude the possibility of Mr Assange being made subject to SAMs, or detained at the ADX, either pretrial or after conviction, unless, after entry of the assurances, he commits any future act which renders him liable to such conditions of detention. It is difficult to see why extradition should be refused on the basis that Mr Assange might in future act in a way which exposes him to conditions he is anxious to avoid.

49. The second assurance is an express undertaking that the USA will consent to an application by Mr Assange, if he is convicted, to be transferred to Australia to

serve his sentence. The USA has therefore already made its decision as to how it will respond to any request for such a transfer and has given as explicit an assurance as it can. The possibility that Australia may not be willing to receive a transfer cannot be a cause for criticism of the USA, or a reason for regarding the assurances as inadequate to meet the judge's concerns.

50. The third assurance is an undertaking that whilst Mr Assange is in custody in the USA he will receive appropriate clinical and psychological treatment as recommended by a qualified treating clinician at the prison where he is held. The USA has suitably-qualified medical practitioners working in its prisons. Subject to the submission that the court should doubt the reliability of these assurances, it is difficult to see why the third assurance does not meet any concerns about the medical treatment which will be afforded to Mr Assange if extradited.

51. For those reasons, we see no merit in the criticisms made of the individual assurances. The reality is that this court is being invited to reject the USA's assurances either on the basis that they are not offered in good faith or that they are for some other reason not capable of being accepted at face value. That is a serious allegation, particularly bearing in mind that (as Diplomatic Note no. 169 says) the United Kingdom and the USA have a long history of cooperation in extradition matters, and the USA has in the past frequently provided, and invariably fulfilled, assurances.

52. In *Babar Ahmad v USA* [2006] EWHC 2927 (Admin) the court addressed a similar submission to the effect that there was a substantial risk that the USA would not honour assurances given in Diplomatic Notes. Laws LJ, at para [74], referred to the fundamental assumption that a requesting state is acting in good faith, subject to the possibility of that assumption being displaced by evidence. At paragraph [75] he went on to say that the USA –

> "… is a state with which the United Kingdom has entered into five substantial treaties on extradition over a period of more than 150 years. Over this continued and uninterrupted history of extradition relations there is no instance of any assurance given by the United States, as the requesting state in an extradition case, having been dishonoured."

53. Mr Assange seeks to counter that approach by reference to the cases of other persons who have been extradited to the USA. Mr Summers submitted that a diplomatic assurance was breached in the case of Haroon Aswat. We do not accept that is so. The explanation given by the USA in Diplomatic Note no. 169 (see [31] above) shows the need for a requested person to consider with care the precise terms of an offered assurance, but it does not show that the USA acted in breach of an assurance.

54. We take a similar view of two other cases relied on by Mr Assange, namely those of David Mendoza and Abu Hamza. Both can be said to show that the USA may be expected to apply the strict letter of an assurance which it has given; but neither provides any evidence of a failure to comply with an assurance and neither provides any support for Mr Assange's submission that this court should not regard the offered assurances as reliable.

55. There is no reason why this court should not accept the assurances as meaning what they say. There is no basis for assuming that the USA has not given the assurances in good faith.

56. The question becomes whether the assurances are sufficient to meet the concerns which led to the judge's decision and, if so, what course this court should now take.

57. The USA submitted that the risk that Mr Assange would be made subject to SAMs and/or would be detained at the ADX was "front and centre" of the opinions of both Professor Kopelman and Dr Deeley, and was the basis of the judge's decision that extradition would be oppressive. Once that risk is removed by the assurances, the judge would have reached a different decision.

58. Mr Assange submitted that it was the fact of extradition in itself, not the specific conditions of detention in the USA, which underpinned the judge's decision. In the alternative, the judge's concerns about conditions of detention were not premised on SAMs and/or detention in the ADX specifically but applied to other restrictive custodial regimes which would place Mr Assange in isolation or near-isolation and would exacerbate his mental health issues.

59. We are unable to accept Mr Assange's submissions. We have quoted at [18] above the conclusion which the judge expressed at para 362 of her judgment. We have no doubt that when she spoke there of "these harsh conditions" she was referring back to what she had said in paragraphs 355 to 361 where she focussed upon SAMs and/or detention in the ADX. Similarly, when she referred a little earlier in her judgment at para 344 to Mr Assange facing "the bleak prospect of severely restrictive detention conditions designed to remove physical contact and reduce social interaction with the outside world to a bare minimum", she was referring to the conditions of detention under SAMs and ADX, as described in preceding paragraphs. Her assessment of the risk of suicide was based on her view as to the effect on Mr Assange's mental health of detention under such conditions. Although other custodial regimes which might be applied to Mr Assange would involve some degree of isolation, the key point about his being subject to SAMs and/or detained in the ADX was that those were identified as the most restrictive regimes, involving almost-complete isolation of Mr Assange from contact with others.

60. Given the emphasis which the judge placed on the "harshest SAMs regime", and given that the evidence of Professor Kopelman and Dr Deeley of the risk of suicide was premised on Mr Assange being held under harsh conditions of isolation, we are unable to accept the submission that the judge's conclusion would have been the same if she had not found a real risk of detention in those conditions. As we have noted, the judge acknowledged at para 357 that the imposition of SAMs was by no means certain. If it was her view that that was a point of no practical significance, because her conclusion would be the same even if the conditions of detention were somewhat less harsh, we are confident that she would have made that clear. Far from doing so, she went on to find that there was a real risk that Mr Assange would be detained in "the near isolated conditions produced by the harshest SAMs regime, both pre-trial and post-trial", and her decision flowed from that finding.

61. We are therefore satisfied that the judge based her decision on her findings of a real risk of Mr Assange being subject to SAMs and/or detained at the ADX. That risk is in our judgment excluded by the assurances which are offered. It follows that we are satisfied that, if the assurances had been before the judge, she would have answered the relevant question differently. That being clear, we do not accept the submission on behalf of Mr Assange that the case should go back to the judge for her to decide the relevant question afresh.

62. That conclusion is sufficient to determine this appeal in the USA's favour. We will nonetheless express our conclusion briefly on ground 1 and deal with grounds 3 and 4 in a little more detail because they raise a serious question about the obligations of an expert in extradition proceedings.

Ground 1

63. The law relating to "oppression" and suicide risk for the purposes of sections 25 and 91 of the 2003 Act is well-trodden. It may be collected from the judgments of Aikens LJ in *Turner* and Sir John Thomas P in *Polish Judicial Authority v Wolkowicz* [2013] 1 WLR 2402. It will rarely be necessary to look outside those two authorities for the applicable principles. Mr Lewis was concerned that the judge's approach applied a test which amounted to an obligation on a requesting state to guarantee that a requested person could not commit suicide in any circumstances. Mr Fitzgerald did not suggest that such an obligation arises. Section 91 and the decisions of this court do not impose such an unrealistic standard on requesting states. Mr Lewis submitted that the judge went too far in a predictive assessment of what might happen in the long term, depending on a number of contingencies, and failed to focus on Mr Assange's mental condition at the time of extradition. He further submitted that the judge erred in failing to make the overall determination required by section 91.

64. On behalf of Mr Assange, Mr Fitzgerald QC (who dealt with all aspects other than the assurances) submitted that no valid criticism can be made of the judge's approach.

65. In *Turner*, Aikens LJ set out, at paragraph [28], seven propositions established by previous case law. The third to sixth of those propositions required the court to consider the following questions:

> "(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]."

66. As to the sixth proposition, in the circumstances of that case, Aikens LJ at paragraph [38] expressed himself in the following terms:

> "I am quite satisfied that Florida has the proper facilities to cope both with Ms Turner's mental illness and, so far as anyone can, the risk of her attempting to commit suicide if extradited." [our emphasis]

67. In *Polish Judicial Authority v Wolkowicz* [2013] 1 WLR 2402 ("*Wolkowicz*"), the court heard appeals in three cases, each of which raised the issue whether extradition should be refused because of the risk that the requested person might commit suicide by reason of his or her mental condition.

68. At paragraph [8] of the judgment, the court cited the seven propositions enunciated in *Turner*, which it accepted as a "succinct and useful summary" of the approach which a court should adopt to sections 25 and 91 of the 2003 Act. The court went on to say at paragraph [10], under the sub-heading "The importance of preventative measures":

> "10. The key issue, as is apparent from propositions (3), (5) and (6), will in almost every case be the measures that are in place to prevent any attempt at suicide by a requested person with a mental illness being successful. As [counsel] correctly submitted on behalf of 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 v Poland* [2011] EWHC 659 (Admin) at [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 Qazi (Saraj)* [2011] Cr App R (S) 32. (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's* case [2012] 1 WLR 270, para 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 *Krolik v Regional Court in Czestochowa, Poland (Practice Note)* [2013] 1 WLR 490, paras 3-7 and the authorities referred to and *Rot's* case [2010] EWHC 1820 (Admin) at [10]-[11]. 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. …"

69. Having reflected on the judge's application of those principles to the present case, we are unable to accept the USA's submission that she adopted an incorrect approach to the issue under section 91. We bear in mind that the judge had to take into account the evidence of a witness called by Mr Assange who considered the ADC to be a very well-run jail, accepted that there had been no successful suicides at the ADC since its last inspection in 2017 and considered that the ADC had "a stellar record" on preventing suicide. She had to take into account the evidence that Mr Assange would be entitled to a speedy trial within 70 days, and that the suggested delays caused by pre-trial motions would not arise if he chose to take advantage of that speedy trial provision. She also had to take into account the possibility that Mr Assange – who asserts that he has a complete defence to the charges against him - will be acquitted: cf *Howes v Lord Advocate* [2009] HCJAC 94 at paragraph [14]. She had to consider carefully whether the required link between Mr Assange's mental condition was satisfied when the evidence was that he would pursue his intention to commit suicide with a "single-minded determination".

70. We are not persuaded that the judge failed to take such matters into account. She directed herself correctly in law, referring in particular to the propositions enunciated in *Turner*. We do not accept that she failed to make the necessary overall determination in answering the relevant question. We therefore reject Ground 1.

Grounds 3 and 4

71. Mr Lewis submitted that the judge erred in admitting, or giving any significant weight to, the evidence of Professor Kopelman on a number of bases, most notably because he signed a declaration at the end of one of the reports which he knew to be untrue (see [87] below) and that the report was actively misleading. Her conclusions were very largely based upon his evidence. In particular, he was the only expert witness who gave evidence that Mr Assange's mental health condition

removed his ability to resist the impulse to commit suicide. Thus, her decision was based on an insufficient foundation, and an incorrect overall assessment of the risk of suicide, and was wrong.

72. Mr Fitzgerald submitted that the judge directed herself correctly and was entitled to accept Professor Kopelman as a reliable witness despite the shortcomings of his evidence. In any event, he was not the sole foundation of her decision.

73. It will be apparent that Grounds 3 and 4 depend upon the proposition that the judge should not have admitted, or given weight to, Professor Kopelman's evidence because he had misled her.

74. When writing his first report, dated 17 December 2019, Professor Kopelman knew that Mr Assange had a relationship with Ms Stella Moris. He also knew that Mr Assange had formed that relationship, and had fathered two children by Ms Moris, whilst living in the Ecuadorian Embassy. He accepted in cross-examination before the judge, as he was bound to do, that the fact of that enduring relationship and the fact that Mr Assange had two young children by it were relevant to the assessment of the risk that Mr Assange's mental condition would lead him to commit suicide and to the objectivity of any opinion expressed by Ms Moris as to Mr Assange's mental state. These facts were not mentioned.

75. Professor Kopelman included in his report a detailed account of Mr Assange's personal and family history, referred to his three children by previous relationships and quoted Mr Assange's account that he had been "effectively in solitary confinement for 60 hours a week" in the Embassy. He also referred to a traumatic event which Mr Assange had suffered as a child and gave his opinion that Mr Assange had suffered a form of retraumatisation since being isolated in the Embassy and in custody. He reported that Mr Assange had commenced a close relationship with a woman which was of continuing importance and support to him, but did not name Ms Moris and merely said that the woman concerned "has two children". Professor Kopelman went on to refer to Mr Assange's mood in August 2019, when "an obligation to his children" was said to be one of only two things which stopped him from committing suicide. He reported that by October 2019 Mr Assange "no longer thought that feelings for his children would prevent him from committing suicide". Professor Kopelman said that Mr Assange had met Ms Moris, whom he said had been employed by the respondent in February 2011. He referred to Ms Moris having twice met the respondent's adult son. He also referred to her having seen Mr Assange in HMP Belmarsh on five occasions. But he made no reference to her current relationship with Mr Assange or her children by him. He recorded her belief that the respondent would commit suicide if he were to lose the case.

76. The consequence of the terms in which Professor Kopelman expressed himself in that report was that the reader would have no inkling that Ms Moris was the partner with whom Mr Assange had recently formed a continuing relationship and that they had two young children together. Nor would the reader be aware that Mr Assange's "solitary confinement" had not prevented him from forming and developing that relationship.

77. Because of delays affecting the progress of the extradition proceedings, Professor Kopelman's evidence was not given until a considerable time later. In the meantime, in mid- March 2020 Mr Assange told Dr Blackwood that

> "His current relationship was established while he was in the Ecuadorian embassy: he has had two children within this relationship."

We note that Mr Assange provided that information at a time when he was preparing to make a bail application, which was lodged on 20 March 2020 and which relied on his family relationship with Ms Moris.

78. In addition, Ms Moris made a witness statement (which was served on the court on 24 March 2020, in relation to the bail application) in which she disclosed her relationship with Mr Assange. She then disclosed the relationship to a newspaper. In his second report, dated 13 August 2020, Professor Kopelman referred to that disclosure. He also said that Mr Assange was receiving a number of visits each week from his partner and their children. However, he still did not reveal that he had known about the relationship when he wrote his first report: instead, he began the relevant section of his report by saying that "Ms Moris revealed to the newspapers in April that she was Mr Assange's partner" and then moved immediately to a report of his conversation with Ms Moris in May 2020. That was actively misleading.

79. In cross-examination by Mr Lewis QC on behalf of the USA, Professor Kopelman was questioned about his failure, when referring in his first report to his interview of Ms Moris, to say that she is Mr Assange's partner and mother of two of his children. Professor Kopelman's answer, and the subsequent questions and answers, were as follows:

> "A: Well, maybe I did not perform my duty to the court there but I was trying to be diplomatic and respect her privacy.
>
> Q: All right. And is not the fact that she is also his partner relevant to her independence and the weight of what she says?
>
> A: Um, that might be the case, yes. It depends what she is saying that that might contribute to.
>
> Q: Because she is naturally going to want to say helpful things to Mr Assange, is she not?
>
> A: Yes.
>
> Q: And the court should be aware of that when assessing the veracity of her account to you. Do you agree?
>
> A: Yes, but we do know, the court did know from that report, and they now know anyhow because it is in the second report, that she was his partner, and they did know from that report that she had worked closely with him.

Q: All right.

A: So, she would have some loyalty from that fact alone."

80. After the evidence had been concluded, and after Mr Assange's representatives had submitted their written closing submissions, Professor Kopelman and Mr Assange's solicitor each made statements in which they said that there had never been any intention that Professor Kopelman would withhold relevant information from the court. They explained that when Professor Kopelman completed his first report, they were fast approaching the deadline which had at that stage been set for the service of expert evidence. They knew that Professor Kopelman would in due course prepare a further report, when additional information was available. They knew that Ms Moris had serious concerns about the safety of herself and her family. They were not immediately able to obtain advice from counsel. After considering the position, they felt that neither the conclusions in the report, nor the basis for those conclusions, would be affected if the report was served in its existing terms, pending a consultation with counsel at which the matter could be further considered. In the event, as we have said, there were subsequent alterations to the timetable of proceedings and a consequent delay in serving the second report.

81. The judge began her findings on the medical evidence by saying that she did not accept that Professor Kopelman had failed in his duty to the court when he did not disclose Ms Moris' relationship with Mr Assange. She then referred, however, to two passages in his report, which she described as "misleading": the first, because he had not said that Ms Moris was the current partner of Mr Assange and mother of two of his children; and the second, because it implied that Mr Assange was not the father of the two children of the woman who had "remained very supportive" of him. The judge went on, at paragraph [330] of her judgment, to say this:

> "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 Moris' 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."

82. The judge nonetheless found Professor's Kopelman's opinion to be impartial and dispassionate, and said that she had been given no reason to doubt his motives or the reliability of his evidence. For the reasons which she explained, she concluded that she accepted the evidence of Mr Assange's expert witnesses, Professor Kopelman and Dr Deeley, in preference to the expert evidence on which the USA relied.

83. In this court, the USA submits that the judge, having found that Professor Kopelman had given misleading evidence, should have ruled his evidence to be inadmissible, or should have given it little or no weight. It places reliance on a

profile of Professor Kopelman published in the bulletin of a medical organisation to support the proposition that he lacks the objectivity required of an expert in legal proceedings. We say at once that we ignore that item, and decline to receive it as fresh evidence, for three reasons: it fails the *Fenyvesi* criteria because it would have been available to the USA in the court below if an appropriate internet search had been carried out; it would not be right to assess Professor Kopelman's conduct in this case by reference to what he is reported as having said in an interview by a journalist in 2017; and in any event, the passage on which reliance is placed does not clearly or unambiguously bear the meaning for which the USA contends.

84. On behalf of Mr Assange, it is emphasised that Professor Kopelman's first report was clearly not a final report and was always going to be followed by a further report after further enquiries had been made. It is submitted that the judge – who had of course seen and heard all the evidence, and was well aware of the criticisms made in the cross-examination of Professor Kopelman - accepted that he had made two misleading statements in his first report but concluded nonetheless that his expert opinion was impartial and reliable. She was entitled to come to that conclusion and there is no basis on which this court can go behind it. It is further submitted that Professor Kopelman faced a very difficult dilemma as to his professional duty, a proposition which Mr Assange seeks to support by adducing as fresh evidence a report by a consultant forensic psychiatrist; Professor Rix.

85. We readily accept that Professor Rix is an acknowledged expert in his field, but his report is plainly inadmissible and we decline to receive it as fresh evidence. Professor Kopelman was entitled to explain to the judge why he acted as he did and what he believed his professional duties to be. The question for the judge was whether she found his conduct to cast doubt on the impartiality and reliability of his expert evidence. The question for this court is whether she was entitled to reach the conclusion she did in that regard. The proposed evidence of Professor Rix cannot assist this court to answer that question: his view of where Professor Kopelman's professional duty lay has no relevance either to the decision of the judge or to our decision.

86. We do not accept that Professor Kopelman was confronted with a dilemma of such difficulty as has been claimed. No reason has been put forward why, if it was felt that concern for Ms Moris' safety made it necessary to conceal her identity, he could not simply have reported all relevant facts but indicated that he did not think it right to name her. That, indeed, is what Mr Assange's solicitor seems to have expected him to do: her statement says that she canvassed with Professor Kopelman whether the identification of Ms Moris as Mr Assange's partner could be deferred, and the report served, without detriment to or qualification of its conclusions or their basis. Thus she was not proposing that the report should contain anything misleading, only that for the time being Ms Moris should not be named.

87. Nor has any reason been given why an application could not have been made to the court pursuant to rule 19.9 of the Criminal Procedure Rules which enables material to be withheld in appropriate circumstances. But in any event, even making every allowance for his being placed in a difficult situation, we cannot agree with the judge's view that Professor Kopelman did not fail in his professional duty. As the judge found, he made at least two statements which were misleading; and we see

no escape from the inference that he did so deliberately, having decided to obscure certain facts in order to avoid mentioning the obviously-relevant facts of Ms Moris' recent and continuing relationship and of the children whom she had by Mr Assange. At the conclusion of his first report, and in accordance with rule 19.4 of the Criminal Procedure Rules, he signed a declaration in the form required by paragraph 19B.1 of the Criminal Practice Direction. In this, he stated amongst other things –

> "(vii) I have exercised reasonable skill and care in order to be accurate and complete in preparing this report.
>
> (viii) I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion. …
>
> (x) I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification."

88. In our view, Professor Kopelman plainly did not comply with those statements, because in his first report he chose not to state what he knew of the relationship between Mr Assange and Ms Moris when opining on the effects of Mr Assange's "solitary confinement" in the Embassy and the risk of suicide; and subsequently he failed to correct his report or to make clear his earlier knowledge of the relationship. We regret to say that declaration (viii) was simply untrue. His second report did nothing to correct the misleading impressions created by the first. On the contrary, it maintained his silence about his knowledge at the time of the first report.

89. With all respect to the judge, we cannot agree with her implicit finding that Professor Kopelman's failings could be excused or overlooked merely because his conduct could be viewed as "an understandable human response". Many people mislead courts for reasons which might be understandable but that does not excuse the behaviour and it is incompatible with the obligations of an expert witness to do so. Nor was it relevant to the judge's assessment of his evidence that she had learned of Mr Assange's relationship with Ms Moris before she read the medical evidence: it was no thanks to Professor Kopelman that she had done so.

90. There were, therefore, substantial reasons for the judge to question the impartiality and reliability of Professor Kopelman's opinion. With respect to the judge, we would have expected to see a rather fuller analysis than she gave of her reasons for deciding that she could accept his evidence not least because it was central to the success of Mr Assange on the single ground which led to his discharge.

91. The question for this court, however, is whether she was entitled to accept his evidence. Mr Lewis confirmed that the USA did not submit to the judge that the professor's evidence was inadmissible and should be excluded but rather that it should be given little weight, particularly where it was not supported by other expert evidence or contemporary medical records. In the end the argument before the judge devolved to one of weight. It is highly unusual for the court to be

considering an expert witness whom a judge has found to have given misleading evidence but whose evidence has nonetheless been accepted. The circumstances in which an appellate court will disturb evidential findings of a judge at first instance are well-known to be limited. Unusual though the judge's conclusion was regarding Professor Kopelman, we are unable to say that it was not one open to her having heard all the expert evidence in the context of much other evidence of Mr Assange's mental condition, both from people who knew him and records. She was entitled to reach that conclusion, having heard all the evidence, having seen how Professor Kopelman responded to cross-examination and having explicitly recognised that aspects of his first report were misleading.

92. Moreover, whilst Professor Kopelman's evidence was undoubtedly a weighty factor in the judge's findings about Mr Assange's mental condition and the risk of suicide, it was not the only evidence which supported her decision on the relevant question. It is clear that Dr Deeley's evidence was also influential; and the judge was entitled to prefer Dr Deeley's evidence to that of Dr Blackwood. In particular, she was entitled to accept Dr Deeley's evidence that Mr Assange suffers from Asperger's syndrome disorder, an important factor in her overall conclusion.

93. Whether the mental condition of a requested person is such that it would be oppressive to extradite him is inevitably a fact-specific decision – see *South Africa v Dewani* [2013] 1 WLR 82 at paras [73] and [76]. Respecting, as we must, the judge's findings of fact and evaluation of the evidence, we conclude that she was entitled to reach the conclusion she did in answering the relevant question. We accordingly reject Grounds 3 and 4.

Additional submissions:

94. A draft of this judgment was provided to counsel so that they could assist the court with written submissions as to any consequential issues. On behalf of Mr Assange it was submitted that the DJ had declined to rule on two issues, namely, Mr Assange's Article 3 rights and a submission that extradition would be an abuse of the process because the USA was prompted by ulterior motives. It was submitted that, in accordance with section 106(6)(c) of the 2003 Act,[2] the case must be remitted to her to decide those issues. The USA opposed those submissions.

95. We do not accept that either of the issues remains to be resolved. As to the first, it is in the circumstances of this case unrealistic to suggest that, if the DJ had decided the section 91 issue as this court has found she ought to have done, it would nonetheless have been open to her properly to find that extradition would breach Mr Assange's Article 3 rights. Even accepting for present purposes that the submission correctly identifies differences between the test for section 91 oppression and the test for Article 3 inhumanity, the DJ would have been bound to find that the assurances sufficiently answered any concerns about the latter as well as the former.

96. As to the second issue, the DJ was satisfied that the federal prosecutors who brought the charges against Mr Assange acted in good faith. In a section of her judgment

[2] See paragraph [24] above.

headed "Abuse arguments" she said[3] that it was unnecessary for her to consider abuse of process because of her decision under section 91, but added "for completeness" her views on two arguments raised by the defence. She concluded that section of her judgment by saying[4]

> "I reject the defence submissions concerning staying extradition as an abuse of the process of this court."

97. In the light of that section of her judgment it is, again, unrealistic to suggest that she had left unresolved an issue which could properly have been decided in Mr Assange's favour. We accept the submission of the USA that the DJ determined all issues raised as an abuse of the process.

98. It follows that, in the light of our decision allowing the appeal, the DJ – proceeding, in accordance with section 106(6)(c) of the 2003 Act, "as [she] would have been required to do if [she] had decided the relevant question differently at the extradition hearing - would be bound to send the case to the Secretary of State.

Conclusion:

99. For those reasons we reject Grounds 1, 3 and 4, but allow the appeal on Grounds 2 and 5. We accordingly quash the order discharging Mr Assange. We remit this case to the Westminster Magistrates' Court, with a direction to proceed as the DJ would have been required to do if she had decided differently the relevant question of whether Mr Assange's mental condition was such that it would be oppressive to extradite him, namely by sending the case to the Secretary of State. Pursuant to section 106(9), we remand Mr Assange in custody.

[3] At paragraph [365]
[4] At paragraph [409]