IN THE HIGH COURT OF JUSTICE Case No: CO/150/2021

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

GOVERNMENT OF THE UNITED STATES OF AMERICA

Appellant

v

JULIAN PAUL ASSANGE

Respondent

APPLICATION ON BEHALF OF THE RESPONDENT
FOR CERTIFICATION AND LEAVE TO APPEAL
TO THE SUPREME COURT

Introduction

1. On 10 December 2021, Lord Burnett CJ and Holroyde LJ gave judgment on this appeal ([2021] EWHC 3313 (Admin)); holding that **(a)** the district judge's decision on section 91 had not been wrong (judgment §§62-93), but **(b)** the concerns she had identified had been met by subsequent assurances (judgment §§29-61).

2. Mr Assange respectfully submits that this Court should certify that this appeal involves points of law of general public importance, concerning the Court's approach to assurances, and that it also should grant leave to appeal to the Supreme Court, pursuant to s.114 of the 2003 Act.

Section 114 of the Act

3. Section 114 of the Act provides, so far as is material, that:

> *'...(1) An appeal lies to the Supreme Court from a decision of the High Court on an appeal under section ... 105...*
> *(2) An appeal under this section lies at the instance of—*
> *(a) the person whose extradition is requested;...*
> *(3) An appeal under this section lies only with the leave of the High Court or the Supreme Court.*
> *(4) Leave to appeal under this section must not be granted unless—*
> *(a) the High Court has certified that there is a point of law of general public importance involved in the decision, and*
> *(b) it appears to the court granting leave that the point is one*

which ought to be considered by the Supreme Court.

(5) An application to the High Court for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the court makes its decision on the appeal to it...'

Points of law

4. Is the provision of assurances governed by the principles in ***Hungary v Fenyvesi*** [2009] 4 All ER 324?

5. Is it permissible to approach oppression under section 91 of the 2003 Act on the basis that it may be imposed if brought about by the defendant's own alleged conduct?

6. Is it permissible to approach article 3 ECHR on the basis that inhuman or degrading treatment may be imposed if brought about by the defendant's own alleged conduct?

Grounds for Grant of Certificate and Leave to Appeal

The first question: receipt of the assurances

7. The introduction of fresh '*evidence'* in support of an appeal against an adverse ruling, in order to repair holes identified in that ruling, where the evidence was available but deliberately not adduced below, is generally prohibited by the principles first enunciated in ***Miklis v Lithuania*** [2006] EWHC 1032 (Admin) at §3 and authoritatively stated in ***Fenyvesi*** (supra). Those principles have been repeatedly approved and applied by this Court as necessary in the public interest.

8. The ***Fenyvesi*** principles apply with equal force to a fresh '*issue'*, introduced in like circumstances for the first time on appeal, and where that issue requires for its determination materials not before the court below (***Satkunas v Lithuania*** [2015] EWHC 3962 (Admin) at §§21-22; ***Herdman v City of Westminster Magistrates' Court*** [2010] EWHC 1533 (Admin) at §§22-26; ***Khan v USA*** [2010] EWHC 1127 (Admin) at §§43, 54).

9. The only issues that can be raised for the first time on appeal, without being subject to ***Fenyvesi***, are those which emerge entirely from the existing evidence and materials adduced below (***Hoholm v Norway*** [2009] EWHC 1513 (Admin) at §19; ***Soltysiak v Poland*** [2011] EWHC 1338 (Admin), etc.)

10. ***Fenyvesi*** strikes a balance between competing public interests. On the one hand, there is the public interest in (a) the fulfilment of international treaty obligations (i.e. to extradite). Against, on the other hand, there is the public interest in (b) finality of litigation, (c) procedural fairness, and (d)

where it is the state seeking to introduce fresh evidence / issue, in the right to liberty.

11. Of late, however, this Court has sought to remove assurances from the ambit of the ***Fenyvesi*** principles and subject them to a different, lower, admissibility test.

12. The process began in ***Giese (No. 2) v USA*** [2016] 4 WLR 10 at §14 where this Court held that assurances are not '*evidence'* within the meaning of s.106(5). They remained, however, a '*fresh issue'* (***ibid*** at §§11-15); such that the ***Fenyvesi*** principles ought to continue to apply, per ***Satkunas, Herdman*** etc.

13. Next, in a series of cases - ***Chawla (No. 1)*** [2018] EWHC 1050 (Admin) at §§30-31, ***Giese (No. 4)*** [2018] 4 WLR 103 at §§37-39; ***Palioniene v Lithuania*** [2019] EWHC 944 (Admin) at §§32-33; ***Ozbek v Turkey*** [2019] EWHC 3670 (Admin) at §§24-25 and ***India v Dhir*** [2020] EWHC 200 at §36 - this Court has taken ***Giese*** to mean that '*the Court may consider undertakings or assurances at various stages of the proceedings, including on appeal*', unconstrained by ***Fenyvesi*** principles.

14. In the present case, that particular approach has led this Court to explicitly reject the submission that ***Fenyvesi*** governs the introduction of assurances for the first time on appeal (judgment §34). Instead, the Court has developed (at judgment §38) alternative criteria which are permissive, contrary to the ***Fenyvesi*** approach, of their introduction despite being *'at the disposal of the party wishing to adduce it and which he could...with reasonable diligence have obtained'* at the extradition hearing.

15. It is respectfully submitted that the Supreme Court ought to have the opportunity to consider whether this approach to assurances (as distinct from other evidence or even issues) is (a) correct in principle, (b) compatible with the Act (here s.106(5)), and (c) correctly balances the public interests in play. Quite apart from everything else, profound issues of natural justice arise where assurances are introduced by the Requesting State for the first time at the High Court stage, and therefore cannot be tested by reference to the ***Othman v. United Kingdom*** **[**2012] 55 EHRR 1 criteria at the evidentiary extradition hearing before the primary decision maker.[1] These issues have never been addressed by the Supreme Court.

16. The Supreme Court will likely also wish to consider the related subsidiary question of the legality of a requirement on judges to call for assurances rather than proceeding to order discharge (i.e. their obligatory receipt post-hearing / pre-judgment thus avoiding the ***Fenyvesi*** enquiry). The invocation of the ***Aranyosi*** EU law obligation in a Part 2 case is controversial. The issue was conceded by counsel in ***Chawla (No. 1)***, on

[1] In the deportation case of ***Othman,*** where the House of Lords was satisfied that the assurances addressed the potential article 3 breach, there had been a full evidentiary hearing to test the assurances at first instance before the Special Immigration Appeal Commission itself.

the basis that there existed a treaty power to request and receive further information (article 11(6) of the Indian extradition treaty) said to be equivalent to article 15 of the Framework Decision (see §33). The same concession was repeated in ***Dhir*** (§38). A power is not the same as an obligation. Article 15(2) FD contains an obligation, binding in EU law, on the UK as executing judicial authority ('*the executing judicial authority...shall request'*). Whereas Part 2 treaties (including that with India and article 10 of the UK/USA treaty in play here) are (deliberately) worded differently and bestow no more than a power. In short, the Article 15 FD duty does not run in Part 2, and the District Judge's obligations are not the same. The most that can properly be said in a Part 2 (and this) case is that the judge has power to adjourn to seek assurances.

<u>The second question; approach to the assurances</u>

17. If the assurances are capable of being admitted, then the second draft question addresses this Court's approach to those assurances.

18. Specifically, this Court upheld the District Judge's finding that exposure of Mr Assange to the risk of suicide by reason of detention under SAMs, and/or at ADX, would render extradition '*oppressive'* within the meaning of section 91. But the assurances introduced on appeal and relied on by this Court contemplate the exposure of Mr Assange to SAMs and/or ADX '*in the event that, after entry of this assurance, he was to commit any future act that met the test*' for the imposition of SAMs or designation to ADX.

19. In respect of this potential exposure of Mr Assange to treatment that the District Judge legitimately found to be *'oppressive'*, this Court has now held that '*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'* (judgment §48) – clearly, the future act referred to here could include any act of speech on Mr Assange's behalf.

20. On that basis, this Court held that the assurances were adequate to meet the risk of an '*oppressive'* extradition identified by the District Judge.

21. It is respectfully submitted that section 91 bars (or ought in principle to bar) oppressive treatment whether or not the requesting state justifies its imposition by reference to conduct (which could include speech) attributed to the Requested Person. This principle is particularly important where the Requested Person is suffering from mental disorder. Section 91 is expressly concerned with extradition rendered unjust or oppressive by reason of the requested person's *'mental condition'*; and such mental condition may inevitably influence any conduct said to justify the imposition of a particular prison regime. This suggests that the notion that the requested person in some way invited the imposition of oppressive treatment by his own conduct is singularly inappropriate. Quite apart from that, it is fundamentally inconsistent with general principles developed in the context of Article 3.

22. In this respect there are clear analogies between the protection afforded by section 91 and that afforded under Article 3 in the case of a mentally disordered person. The protection under section 91 cannot reasonably be waived or lost as a result of conduct said to justify the exposure to oppressive conditions. For that reason the analogy with the absolute protection under Article 3, as described by the ECtHR in ***Trabelsi v Belgium*** (140/10), (2015) 60 E.H.R.R. 21 (2014), is highly relevant:-

> *'...116. Under well-established case-law, protection against the treatment prohibited under Article 3 is absolute...*
>
> *117. Moreover, the Court reiterates that it is acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights...It considers it legitimate, in the face of such a threat, for Contracting States to take a firm stand against those who contribute to terrorist acts (ibid). Lastly, the Court does not lose sight of the fundamental aim of extradition, which is to prevent fugitive offenders from evading justice, nor the beneficial purpose which it pursues for all States in a context where crime is taking on a larger international dimension (see Soering, cited above, § 86).*
>
> *118. However, none of these factors have any effect on the absolute nature of Article 3. As the Court has affirmed on several occasions, this rule brooks no exception. The principle has therefore had to be reaffirmed on many occasions since Chahal v. the United Kingdom (15 November 1996, §§ 80 et 81, Reports of Judgments and Decisions 1996-V), to the effect that it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3 (see Saadi, cited above, § 138; see also Daoudi v. France, no. 19576/08, § 64, 3 December 2009, and M. S. v. Belgium, no. 50012/08, §§ 126 and 127, 31 January 2012)...'*

23. Mr Assange's activities cannot justify, as a matter of law, him being subject to inhuman or degrading treatment contrary to Article 3. On the same principled basis it cannot justify him being exposed to treatment that the District Judge had found to render his extradition oppressive.

24. For the same reasons, no-one can forgo of the protections of Article 3 ECHR. In ***FG v Sweden*** (2016) 41 BHRC 595, the Grand Chamber held (at §156) that:

> '*…Having regard to the absolute nature of Articles 2 and 3 of the Convention, though, it is hardly conceivable that the individual concerned could forego the protection afforded thereunder. It follows therefore that, regardless of the applicant's conduct, the*

competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal...'

25. Even if protection against inhuman treatment (or oppressive treatment) could theoretically be waived, it could not be done by the mere act of doing something which '*met the test*' for the imposition of SAMs or designation to ADX. See:

- ***Pocasovschi and Mihaila v Moldova and Russia*** (2018) 67 EHRR 41 at §61 ('... *Insofar as the Government submitted that the applicants were warned about the conditions of detention in prison no. 8 and agreed to them before being transferred there, the Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (Muršić v. Croatia [GC], no. 7334/13, § 96, ECHR 2016). The Government's submission could raise the question whether a waiver of the right under Article 3 is possible, notwithstanding the absolute nature of the prohibition. However, even assuming that such a waiver might be possible, the circumstances of the present case do not permit the conclusion that there has been any valid waiver. Indeed, the applicants were deprived of their liberty, and thus within the power of the authorities (see, mutatis mutandis, M.S. v. Belgium, no. 50012/08, § 124, 31 January 2012). As the Court has held with respect to the waiver of certain procedural rights, a waiver must be of the applicant's own free will and must be established in an unequivocal manner and attended by minimum safeguards commensurate to its importance (see, among others, Scoppola v. Italy (no. 2) [GC], no. 10249/03, § 135, 17 September 2009). However, the Government did not clarify the nature of the guarantees which would assure a free decision by the applicants....*')

- ***NA v Finland*** (2020) 71 EHRR 14 at §59 ('...*The Court notes that Article 3 of the Convention, together with Article 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see Soering v. the United Kingdom, 7 July 1989, § 88, Series A no. 161). In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention (see Pretty v. the United Kingdom, no. 2346/02, § 49, ECHR 2002-III). Without taking a stand in abstracto on whether the rights guaranteed under Articles 2 and 3 can be waived, the Court notes that a waiver must, if it is to be effective for Convention purposes, in any event be given of one's own free will, either expressly or tacitly, be established in an unequivocal manner and be attended by minimum safeguards*

commensurate with its importance (see Scoppola v. Italy (no. 2) [GC], no. 10249/03, § 135, 17 September 2009, and M.S. v. Belgium, no. 50012/08, § 123, 31 January 2012)...')

26. It is respectfully submitted that the Supreme Court ought to have the opportunity to consider whether, in this respect, there should be any difference of approach under section 91 than there is under Article 3. In other words, the question is whether a requested person suffering from mental disorder can, by reason of his own prospective conduct, be deprived of the protection from oppressive conditions afforded by section 91.

The third question

27. The third and alternative question is based on Mr Assange's Article 3 objection to extradition in itself. The Court has made a ruling under the heading 'Additional Submissions' at paras 94-95 that Mr Assange's Article 3 claim is co-terminous with his section 91 claim. In particular this Court has found at para 95 that '*the DJ would have been bound to find that the assurances sufficiently answered any concerns'* under Article 3, as well as those under section 91.

28. However, the assurances relied on expressly allow for the exposure of Mr Assange to conditions under SAMs or in ADX, that would be inhuman for someone suffering from his mental disorder, if the imposition of those prison regimes are judged by the US authorities to be justified by his own conduct. To justify treatment that is *prima facie* contrary to Article 3 on the asserted basis that the victim has committed an act that justifies the imposition of the relevant inhuman treatment is expressly contrary to the principled and consistent body of ECHR case law cited above. It is respectfully submitted that the Supreme Court should have the opportunity to consider whether such a significant departure from established ECHR principles can ever be justified and whether it is justified in this case.

Conclusion

29. The USA succeeded on its section 91 appeal (and according to this judgment also on article 3 ECHR) only by reason of the provision of assurances. This Court's approach to the receipt of, and application of, those assurances is therefore dispositive of the ultimate result of this case.

30. Accordingly, Mr Assange respectfully submits that, in all the circumstances, the Supreme Court's guidance is required upon the questions of law involved in this case and that leave to appeal should be granted.

Thursday, 23 December 2021

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