In The Supreme Court of the United Kingdom

ON APPEAL

FROM A DIVISIONAL COURT OF HER MAJESTY'S HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT) (ENGLAND AND WALES)

Neutral citation of judgment appealed against: [2021] EWHC 3313 (Admin)

BETWEEN:

JULIAN PAUL ASSANGE

Applicant

v

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

APPLICATION FOR LEAVE TO APPEAL

Introduction

1. As legitimate human rights-based objections to extradition have become widely recognised and accepted at international level, so too have state-level assurances (promises) of human rights-compliant treatment become a practical, pragmatic means of achieving extradition if human rights are to be safeguarded at the same time.

2. The High Court's embracing of assurances as an answer to all prospective human rights problems, has gone too far; it has lost sight of what is at stake. Assurances are accepted without rigorous scrutiny of their content. Restrictions imposed by the House of Lords have been unilaterally swept away. Procedural fairness has been jettisoned. Assurances have become a simple panacea.

3. In this case, Mr Assange was discharged after a 4-week evidentiary hearing, at which compelling evidence was heard as to his mental condition, his high risk of suicide if he were extradited, and the likely effects on him of detention in isolation in the US. The findings of the district judge were upheld by the High Court as justified on the evidence she heard. But the High Court then proceeded (in accordance with a practice it has developed) to allow the appeal on the basis of assurances introduced for the first time on appeal, which could not be tested at an evidentiary hearing, and were not considered by the primary decision-maker.

4. By the question of general public importance certified in the present case, the High Court asks whether the practice it has developed regarding assurances is correct in principle. It is not, and Mr Assange's case serves as a clear example of

why. The manner in which assurances were permitted to be introduced in this case, for the first time on appeal, totally undermines the primacy of the extradition hearing and deprives the defendant of an opportunity to test them and their implications before the district judge.

The background

5. Extradition to the USA for the conduct and offences that Mr Assange stands accused of involves his potential exposure to, *inter alia*, Special Administrative Measures ('SAMs') and/or detention at an Administrative Maximum Security prison ('ADX'). Detention at either, on the evidence before the Magistrates' Court, could or would involve near or complete and potentially indefinite solitary confinement, in a windowless cell, with no meaningful exercise or recreation, with food posted through a hatch, and extremely limited access to visitors or indeed any human contact.

6. It was Mr Assange's contention before the district judge that his extradition and subsequent exposure to SAMs and/or ADX (or other isolating regimes) would violate Article 3 ECHR. He further argued that due to his specific mental health issues (depressive disorder coupled with autistic spectrum disorder), such exposure would be likely to lead him to take his own life, and would therefore also be 'oppressive' within the meaning of s.91 of the Extradition Act 2003.

7. Moreover, he pointed out, one of the bodies with competency to trigger SAMs is the Central Intelligence Agency ('CIA'). There was evidence adduced before the Magistrates' Court that that agency's interest in Mr Assange extends beyond the pursuit of normal or acceptable criminal justice objectives. For example, the evidence before the district judge (and presently the subject of ongoing criminal investigation) disclosed a documented CIA plot to poison and kidnap Mr Assange. All that bore upon the likelihood of SAMs being applied to him, and arbitrarily.

8. It was open to the USA throughout the lengthy proceedings before the district judge to issue an assurance to the effect that SAMs and/or ADX would not be applied to Mr Assange. The USA deliberately elected not to. It desired instead to preserve to itself the possibility of subjecting Mr Assange to these measures and/or conditions of confinement should it have succeeded in its case. It therefore chose, for deliberate and tactical reasons, to adduce evidence and argument to try to persuade the district judge that SAMs and ADX were unobjectionable and unlikely (rather than provide assurances to exclude their application). It persisted in this approach for the 1½ years that the proceedings (thereby) occupied before the Magistrates' Court.

9. In January 2021, the district judge discharged Mr Assange. She held (contrary to the submissions of the USA) that he was at real risk of being exposed to SAMs and/or ADX, and (again contrary to the submissions of the USA) that with his particular mental health issues, such exposure would constitute 'oppression' under s91.

10. That ruling was challenged by the USA on appeal, but upheld by the High Court as correctly decided on the evidence before the district judge (judgment §§62-93).

11. Having run and lost its case in that way, the USA sought to change tack and introduce, on appeal, assurances concerning SAMs and ADX that it ought to have adduced below.

12. Those 'assurances' are still qualified so '*that the United States retains the power to impose SAMs on Mr. Assange*' and 'retains the power *to designate Mr. Assange to ADX*' (i.e. allow oppression as found by the district judge and upheld by the High Court to be practiced upon Mr Assange) in the event that, after entry of the assurance, he was to act in a way that met the test for the imposition of SAMs or designation to ADX, which '*act*' could include speech or behaviour.

13. The High Court (a) admitted the assurances despite the circumstances of their late arrival (judgment §§39-46), and (b) found them to be sufficient in substance to protect Mr Assange against the oppression of SAMs and/or ADX (judgment §48).

14. Mr Assange submits that the High Court's permissive treatment of the assurances belatedly offered to address the serious human rights concerns in his case, is indicative of a wider general problem of public importance in extradition law. The High Court has lost sight of the need for substantive and procedural protections to extradition defendants against weak or empty 'assurances'.

Substantive consideration

15. Assurances are easy to give, easy to circumvent,[1] or ignore,[2] and difficult to monitor. Extradition, once allowed, cannot be unwound (***Seprey-Hozo v Romania*** [2016] 4 WLR 181 at §§20-21).

16. The High Court has, however, set about erecting a system by which assurances are routinely accepted, and substantive examination is minimised. For example:

    (i) Limits set by this Court in order to ensure that assurances are kept within proper bounds have been unilaterally set aside by the High Court. The House of Lords held in ***Armah v Ghana*** [1968] AC 192 that it is '*wrong in principle*' to accept assurances which promise to disapply the national law of the requesting state (per Lord Upjohn at pp262D-263F; per Lord Reid at p235G-236B; per Lord Pearce at pp256E-G). According to the High Court however, these observations were obiter (they were not) and '*extradition law has developed very substantially since the late 1960s*'; such that different principles should now apply (***Shankaran v India*** [2014] EWHC 957 (Admin) at §§57-59).

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1. '*The USA may be expected to apply [only] the strict letter of an assurance which it has given*' (judgment §54). That is a reference to the practice of the US courts by which language in an assurance which is '*conditional, qualified, and aspirational*' is regarded as a positive '*alert [to] the surrendering courts that there was some possibility that Mustafa could be designated to ADX*' (***United States v Mustafa***, 753 Fed Appx 22 (2018) at §23).

2. Cases in which assurances are breached are now unfortunately commonplace (see. e.g. ***Kirchanov v Bulgaria*** [2017] EWHC 827 (Admin)). As are cases where a breached assurance is allowed to be re-taken (***Kirchanov v Bulgaria*** [2017] EWHC 1285 (Admin)). And is then breached again (***Kirchanov v Bulgaria*** [2017] EWHC 2048 (Admin)). And again, and yet extradition is still permitted (***Georgiev v Bulgaria*** [2018] EWHC 359 (Admin)).

(ii) Assurances have been held to carry a presumption of compliance notwithstanding that they are, by definition, offered by a state which engages in practice(s) which violate human rights and where any presumption of compliance stands rebutted (***Jane v Lithuania*** [2018] EWHC 1122 (Admin) at §55).

(iii) The movement of the High Court, towards removing all obstacles to the receipt of assurances, was what led it for example to erect a special artificial and restrictive test of admissibility for evidence of breaches of assurances emanating from third states, which restriction this Court had to strike down in ***Zabolotnyi v Hungary*** [2021] 1 WLR 2569, per Lord Lloyd-Jones at §§36-50. What this Court would not then have been in a position to appreciate was that the High Court's restrictive approach to assurances in that case was, in fact, but one manifestation of a wider problem of general public importance.

17. The High Court's approach to assurances has become dangerously permissive. By contrast, the Strasbourg Court has sought to establish robust criteria against which the substantive content of assurances can be measured (***Othman v United Kingdom*** (2012) 55 EHHR 1, at §§188-189). But the present decision illustrates the extent to which that guidance is currently reflected in practice. Thus §48 of the judgment (*'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'*) represents the entirety of the High Court's substantive consideration of the two pivotal assurances in the present case. This fails to engage with ***Othman*** at all, and itself represents reasoning which flies in the face of settled Article 3 ECHR norms and case law.[3]

Natural justice and procedural fairness

18. Of a piece with the new approach to unbridled receipt of assurances by the High Court, is a corresponding relaxation of the principles and rules which hitherto had ensured that they were only received by appellate courts (more accurately, permitted to lead to the allowing of an appeal[4]) in circumstances of procedural fairness and natural justice.

3. Mr Assange's own activities cannot justify, as a matter of settled law, him being subject to inhuman or degrading treatment contrary to Article 3. This principle is, obviously, particularly important where the Requested Person is suffering from mental disorder, or where the conduct in question includes speech. Protection against the treatment prohibited under Article 3 is absolute and cannot ever be justified by reference to the defendant's own conduct: ***Pocasovschi and Mihaila v Moldova and Russia*** (2018) 67 EHRR 41 at §61; ***NA v Finland*** (2020) 71 EHRR 14 at §59. This is a rule which '*brooks of no exception*' (***Trabelsi v Belgium*** (2015) 60 EHRR 21 at §§116-118 '*it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration*'). For the same principled reasons, no-one can volunteer to forgo of the protections of Article 3 ECHR (***FG v Sweden*** (2016) 41 BHRC 595, GC, at §156).

4. ***Zabolotnyi*** (supra) at §57.

19. Even in the context of civil litigation where the liberty of the individual is not at stake,[5] it is generally regarded as unfair, wrong, and abusive, for a party to elect - for perceived or actual tactical advantage - to conduct litigation in one way and then, when met with an adverse judicial decision on that, to attempt to re-litigate or appeal on a new and different basis. The core reasons why such conduct is not permitted are rooted in concepts of natural justice.

20. Such was the position in law, prior to the new approach to assurances, in extradition law. 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] 4 All ER 808 at §3 and authoritatively stated in ***Hungary v Fenyvesi*** [2009] 4 All ER 324. It is '*incumbent on litigants in first instance courts or tribunals in which evidence is adduced to advance their whole case at first instance and to adduce all the evidence on which they want or need to rely...An appeal court is not generally there to enable a litigant who has lost in the lower court to advance their case upon new and enlarged evidence which they failed to adduce in the lower court. Litigation should normally be conducted and adjudicated on once only. It is generally neither fair nor just that the expense and worry of litigation should be prolonged into an appeal because a party failed to adduce all the evidence they needed at first instance...*' (per Sir Anthony May P at §3).

21. Based on that established '*policy which lies behind authorities and statutes which regulate the admission on an appeal of evidence which one or other of the parties did not adduce at first instance*' (***ibid***, §2), the USA ought to have been required to demonstrate that the fresh issue (i.e. the assurances) is one '*was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence*' have raised (§32).

22. Those principles had been repeatedly approved and applied by the High Court as necessary in the public interest. '*It is, of course, a general rule that any such undertaking affecting a person's human rights in extradition should be provided as early as possible before judicial determination, not only to obviate the legitimate concern that it has been made with reluctance, very much as a 'last throw of the dice', but also to allow proper submissions to be advanced during the general argument on the competing merits of the case*' (***Shankaran*** (supra) at §55). They reflect, in large measure, the rule in principle in ***Henderson v Henderson*** (1843) 3 Hare 100, 67 ER 313.[6] The '*one hearing principle*' exists because introducing new issues and new evidence on appeal for the first time undermines the primacy of the extradition hearing at which all the evidence is

[5] See e.g. this Court's recent decision in ***Generics (UK) Ltd (T/A Mylan) v Warner-Lambert Company LLC*** [2018] UKSC 56, [2018] RPC 21, per Lord Briggs at §§107-120.

[6] Which calls for '*litigants in first instance courts or tribunals, in which evidence is adduced, to advance their whole case at first instance and to adduce all the evidence on which they want or need to rely*'.

heard, and issues resolved, by the specialist decision-maker entrusted by Parliament to do that.[7]

23. ***Fenyvesi*** strikes a balance, well known to the law in contexts such as this, 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.

24. The ***Fenyvesi*** principles were recently reviewed and approved by the Supreme Court in the specific context of assurances in ***Zabolotnyi*** (supra), per Lord Lloyd-Jones at §§56-62.[8]

The High Court's contrary approach

25. The High Court's recent permissive approach to assurances as a panacea in extradition cases has, however, brought with it a corresponding desire to remove assurances from the constraints of the ***Fenyvesi*** principles and subject them to a different, lower, admissibility test.

26. The process of removing assurances from the constraints of ***Fenyvesi*** began in ***Giese (No. 2) v USA*** [2016] 4 WLR 10 at §14, where the High Court held that assurances are not '*evidence*' within the meaning of the 2003 Act (and therefore not governed by the ***Fenyvesi*** principles which govern fresh 'evidence').

27. They gave rise, however, to a '*fresh issue*' (***ibid*** at §§11-15) (the issue of whether the court should accept the assurances offered as removing the risk of oppression) such that the ***Fenyvesi*** principles ought to have continued to apply. However, the High Court had apparently overlooked that the ***Fenyvesi*** principles apply with equal force to a fresh '*issue*', introduced in like circumstances for the first time on appeal.[9] That is particularly so where that issue requires for its determination evidence not before the court below.[10]

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7. The '*one hearing principle*' has parallels with the '*one trial principle*' developed by the Court of Appeal in respect of criminal appeals and enunciated in ***R v Erskine*** [2010] 1 WLR 183 ('*there is one trial, and that trial must address all relevant issues relating to guilt and innocence*').

8. There existed a ***Fenyvesi***-compliant reason for the late arrival of assurances in ***Zabolotnyi***, namely prior judicial statements that the state of Hungarian prisons did not require assurances, which position was only reversed in and by ***Fuzesi v Hungary*** [2018] EWHC 1885 (Admin).

9. ***Khan v USA*** [2010] EWHC 1127 (Admin) at §§43, 54; ***Satkunas v Lithuania*** [2015] EWHC 3962 (Admin) at §§21-22 ('*it is incumbent on the person raising the issue to do so at the stage of the extradition hearing and not later...I respectfully agree with the observations of Thomas LJ in Khan. At least where an issue may depend significantly or determinatively upon evidence it is only in special circumstances that the issue can be raised on appeal*').

10. The only issues that can legitimately 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 (see. e.g. ***Hoholm v Norway*** [2009] EWHC 1513 (Admin) at §19; ***Soltysiak v Poland*** [2011] EWHC 1347 (Admin) at §14 ('*I am also in no doubt that until or unless this issue is resolved authoritatively, possibly by a three judge Divisional*

28. Next, in a series of cases[11] the High Court took ***Giese*** to mean (as no doubt it was intended to mean) that '*the Court may consider undertakings or assurances at various stages of the proceedings, including on appeal*', unconstrained by ***Fenyvesi*** principles altogether.

29. That trend ultimately found fruition in the present case, where the High Court explicitly rejected the submission that ***Fenyvesi*** governs the introduction of assurances for the first time on appeal (judgment §34). The Court did not explain why assurances were no longer even to be regarded as fresh 'issues' when introduced for the first time on appeal. Instead, the Court eschewed the ***Fenyvesi*** principles altogether and set about developing (at judgment §38) alternative criteria which are deliberately permissive, contrary to the ***Fenyvesi*** approach, of the introduction of assurances on appeal which were *'at the disposal of the party wishing to adduce it and which he could...with reasonable diligence have obtained'* at the extradition hearing.

30. It is respectfully submitted that the Supreme Court ought to consider whether this unregulated approach to assurances (as distinct from other 'evidence' or even 'issues')[12] is (a) correct in principle, and (b) correctly balances the public interests in play. 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*** criteria at the evidentiary extradition hearing before the primary decision maker.[13] These issues have never been addressed by the Supreme Court.

31. In short, the categorisation of the provision of an assurance as raising a new '*issue*', rather than new '*evidence*', does not address or resolve the issue of principle raised. Nor does it answer the principled objection to the admission, after the first-instance judgment, of assurances whose relevance was reasonably foreseeable beforehand. Thomas LJ observed in ***Khan v USA*** [2010] EWHC 1127 (Admin) at §54 that '*It is important that all issues are raised and all the evidence called before the District Judge at the extradition hearing. It was the intention of Parliament that the process be expeditious: such expedition cannot be achieved without all the evidence being called as well as all the issues being raised at that hearing*'. The Supreme Court ought to consider whether Parliament '*intended*' a striking departure from these principles with regards to receipt of assurances alone. The High Court might regard the broad position it has adopted as '*settled*', but the issue, raised starkly on this appeal, is whether the importance of

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Court or perhaps by a still higher court, it is the duty of the advocates that this court, when it is sought to raise a point of law not taken below, is made aware of both Hoholm and Khan').

11. Namely ***India v Chawla*** [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 (Admin) at §36

12. Where ***Fenyvesi*** is by contrast '*actively applied*' by the High Court so that '*an explanation fed through counsel, to the effect that 'we did not think of it' or 'we did not consider it necessary then but we have changed our minds now' must and will get short shrift...*' (***Varga v Romania*** [2019] EWHC 890 (Admin) at §51).

13. In ***Othman***, the assurances had been adduced, and fully tested, at a first instance evidential hearing in the Special Immigration Appeals Commission.

assurances to the scheme of extradition is such that it should always take priority over other settled principles of law, designed to achieve finality and fairness.

The present case

32. The result of this departure from the established principles of natural justice so recently approved by this Court can be seen starkly in Mr Assange's case.

33. The key assurances in Mr Assange's case could and should have been adduced before the primary decision-maker assigned by Parliament (the district judge).[14] ***Fenyvesi***, and the public policy it gives effect to, exists for good reason. Withholding the assurances from the district judge (for perceived tactical advantage) meant that there was no opportunity to hear or test evidence in relation to these so-called assurances before the district judge. Nor was the district judge afforded any opportunity to take account of them in reaching her overall value judgments. Mr Assange was, of course, in custody throughout the entire proceedings below, and parachuting this issue into these proceedings, at this remove of time, was fundamentally unfair. That is why it is prohibited by ***Fenyvesi***.

34. The testing of the efficacy and reliability of assurances such as in issue in the present case (against the substantive criteria laid down in ***Othman***), often[15] raises evidential issues which are invariably only capable of being assessed at first instance by the judge who has heard the surrounding evidence in this case. The district judge here was, for example, well versed (because she had heard oral evidence) concerning the circumstances in which someone might become eligible for SAMs and ADX. She was versed in evidence concerning the reality of conditions for those to whom SAMs and/or ADX were applied. She was versed in

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14. The fact that SAMs and ADX assurances could have been relevant was entirely foreseeable throughout the entire course of the proceedings before the district judge. The evidence concerning these points took up 2 weeks of the 4-week hearing. For example. **(i)** Exposure to SAMs was for example squarely in issue right from the start of the process in October 2019 and then in all subsequent prison expert reports. **(ii)** Mr Assange's witnesses repeatedly observed that the conspicuous absence of assurances or 'undertakings' or 'guarantees' was both noteworthy and important. **(iii)** The US Attorney for the Prosecution expressly accepted that the imposition of SAMs was a real possibility. **(iv)** The problem of isolation was raised by defence psychiatrists and addressed by prosecution psychiatrists. **(v)** Oral evidence was given addressing the likelihood that SAMs would be applied and the likely deleterious effects of them (and other forms of isolation) at the extradition by both prison experts and psychiatrists. **(vi)** The evidence suggested that such assurances had been discussed by the USA with at least one of its medical experts (who then discussed them with Mr Assange), and then eschewed. **(vii)** Evidence concerning these points occupied 2 weeks of court time. **(viii)** The likelihood of SAMs and the oppressive effect of them was extensively addressed in closing submissions. **(ix)** There was a lengthy delay while closing submissions were exchanged between September 2020 and judgment in January 2021. In short, there was no conceivable ***Fenyvesi***-compliant explanation for their late arrival only after receipt of an adverse judgment.

15. Some assurances of course, such as an unequivocal assurance that the death penalty will not be applied after extradition, are so simple and unqualified as not to raise further evidential questions.

the evidence concerning the CIA and their desire to subject Mr Assange to illegality and oppression. She was versed in evidence which touched on the trustworthiness of any assurances in this particular case. By their deliberate introduction only after defeat on their preferred case, the USA deprived Mr Assange of a first instance hearing (and the adversarial testing of evidence) before the decision-maker properly knowledgeable about those matters.

35. The district judge was also cognisant of the wealth of evidence adduced at the extradition hearing regarding comparable conditions of extreme isolation in detention regimes *otherwise* than through SAMs or ADX (such as in Administrative Segregation, or in Communication Management Units, or Special Housing Units)[16] and the detailed psychiatric evidence concerning the potential effect of these other isolation regimes on Mr Assange. None of the assurances even purport to protect Mr Assange from these equally oppressive regimes. Yet the deliberate timing of the arrival of the issue of assurances, only after the district judge's involvement had concluded, meant that the High Court was left to speculate about what the district judge (and the psychiatrists) might have decided had SAMs and ADX been excluded from her consideration. Mr Assange was straightforwardly deprived of a fair hearing of that issue.

36. The underlying reasons for a strict requirement that all relevant issues should be raised at the extradition hearing itself are, firstly, the need for finality; and secondly, the need for procedural fairness. The need for finality is engaged because the introduction of new issues on appeal means that the order for discharge is frustrated by the introduction of a new issue and new evidence at the Appellate stage. The overriding need for fairness is engaged because the requested person is then forced to address the assurances without a real opportunity to test their relevance, efficacy and reliability at an evidentiary hearing, before the proper decision-maker. Although this could justify remission in some cases, this was an option that the High Court specifically rejected in this case. As a result, it is impossible to say that the district judge would have reached the same conclusion on oppression if the assurances had been provided at the extradition hearing. And it is impossible to tell what the result would have been if the relevance, efficacy and reliability of the assurances adduced on appeal had been tested at the extradition hearing.

EU practice

37. The High Court justified its permissive approach, in part, by reference to an EU law principle, emanating from ***Aranyosi*** [2016] 3 WLR 807, by which a judge in a Part 1 case ought to call for assurances at the point of ordering discharge, rather than proceeding to order discharge. That is, with respect, to assume the answer to the question posed. Properly understood, the ***Aranyosi*** obligation is, in substance, the same as ***Fenyvesi***. It is one which requires the judge to '*enable the requesting state 'to satisfy the court that the risk can be discounted'* by providing

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16. Which engage the same '*well known risks which solitary confinement poses to the mental health of those subjected to it for prolonged periods*' recently acknowledged by the Supreme Court in ***R (King) v SSHD*** [2016] AC 384 at §§34-40, in precisely the same way as SAMs do.

assurances' and to be afforded a '*reasonable time'* to do so (***Aranyosi*** at §104).[17] Even in a Part 1 case, ***Aranyosi*** does not require an extradition judge to afford a requesting state opportunities it has already had and eschewed (***Romania v Iancu*** [2021] EWHC 1107 (Admin) at §§15-24).

38. The s.91 process here self-evidently '*enabled'* the USA to provide any assurances it wished, and an entirely '*reasonable time'* (1½ years) in which to do it. Whether it ought to have been given a further opportunity (contrary to ***Fenyvesi*** and ***Aranyosi***) to change its case following the first instance judgment, turns on the proper approach to the receipt of assurances, and on resolution of conflicting approaches to fundamental questions of procedural fairness and natural justice. There is no meaningful (and certainly no legal) distinction between an assurance offered for the first time after receipt of the first instance judgment, and one offered during the currency (or as a platform for) an appeal. Both offend ***Fenyvesi*** and the rejection of the ***Fenyvesi*** principles in this case in favour of a different test is an issue of legal principle or policy that ought to be considered by the Supreme Court.

The certified question

39. The High Court has held that, as a matter of legal policy, assurances ought now to be decoupled from established principles (approved by this Court) designed to ensure natural justice.

40. The USA succeeded on its s.91 appeal (and according to the High Court's judgment at §95 also on article 3 ECHR) only by reason of that uncoupling (and the consequent receipt of belated assurances in circumstances which offend established ***Fenyvesi*** principles). The High Court's approach to the receipt of, and application of, those assurances was therefore dispositive of the ultimate result of this case.

41. The legal question underpinning these deliberate inroads made by the High Court into ***Fenyvesi's*** procedural and substantive safeguards which had hitherto surrounded assurances is, as the High Court has certified, one of general public importance:

> *'In what circumstances can an appellate court receive assurances from a requesting state which were not before the court of first instance in extradition proceedings?'*

42. The answer is: in accordance with the principles in ***Fenyvesi*** (as the Supreme Court recognised in ***Zaboltnyi***).

43. The result is: that the High Court's decision on the merits falls to be reversed. Put shortly, had what happened in this case comported with ***Fenyvesi***, the High Court would have had no need to erect a different legal test (nor would it have certified the point of law as one that is '*involved in the decision'* on the facts of this case under s.114(4)(a) of the 2003 Act).

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17. See also ***Georgiev v Bulgaria*** [2018] EWHC 359 (Admin) at §§8(ix) and (x); ***India v Chawla*** [2018] EWHC 1050 (Admin) at §47.

Conclusion

44. Mr Assange respectfully submits that, in all the circumstances, this Court's guidance is required upon the broad approach to assurances now adopted by the High Court, and that leave to appeal should be granted.

Thursday, 03 February 2022

Edward Fitzgerald QC
Doughty Street Chambers

Mark Summers QC
Florence Iveson
Matrix