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Assange, Mental Health and Assurances in Extradition

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Abstract: Julian Assange is wanted by the United States so that it can prosecute him for espionage and hacking. His extradition had been barred on mental health grounds. That decision has been overturned. The English High Court has accepted US assurances detailing how he will be treated if transferred. Assange is seeking to appeal to the UK Supreme Court. Mental health-related issues have played a central role in his case to-date, and look to continue to do so. The specific timing and effect of assurances are central to the present litigation. The Supreme Court will imminently decide on the next stage in Assange's fight against extradition.

Key words: extradition, mental health, diplomatic assurances

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Assange, Mental Health and Assurances in Extradition

Dr Paul Arnell* and Professor Andrew Forrester**

Julian Assange, founder of the Wikileaks website, remains incarcerated in Belmarsh prison. The Supreme Court is considering an application to leave to appeal in his case. In December 2021 the United States successfully appealed the District Court's decision at the start of the year barring his transfer to the US. Assange faces charges related to obtaining and disclosing national security material. The District Court judge held that it was oppressive to extradite Julian Assange on the basis of his mental health.¹ Assange's case may be far from over.

At the heart of the Assange litigation is his mental health. It has played a role in his case in three ways. First, there was a dispute over certain mental health-related evidence given in Assange's favour at his hearing related to the failure of an expert witness to disclose certain information to the Court. Second, the conclusions on mental health of District Judge Vanessa Baraitser on the evidence given at Assange's hearing were challenged by the US authorities in its appeal. Thirdly and more recently, following the US's successful appeal the assurances given in an attempt to mitigate the District Court's mental health concerns were challenged by Assange.

Expert Evidence

The evidential point relied upon by the US is its appeal related to the fact that the principal psychiatrist called on behalf of Assange failed to disclose certain details in the first expert report he produced. These details concerned the personal relationship Assange developed whilst living in the Ecuadorean Embassy and, specifically, that he had fathered two children with his partner whilst living there. The District Court judge found that the non-disclosure, in part to ensure Assange's partner's privacy, was 'an understandable human response', and did not affect her assessment of his evidence.

The High Court, however, found that the expert failed in his professional duty on this point.² It was not merely an understandable human response. Instead the court suggested that the expert could have disclosed the relationship without naming Assange's partner or sought an application to the High Court under the Criminal Procedure Rules to withhold certain material. Significantly, however, the

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¹ United States v Assange [2021] EWHC 3313 (Admin), the District Court's judgment is United States v Assange, 4 January 2001, cited at <https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf>.

² Supra note 1 at para 87.

High Court found that the weight given to the expert's evidence by the District Court judge was open to her to find, even after recognising that aspects of his first report were misleading. This ground of appeal was rejected.

Risk of Suicide

The second area of dispute was more central to Assange's case. It concerned the application of the law to the evidence, and the District Judge's conclusions on the crucial point that it would be oppressive to extradite Assange for mental health reasons. In its appeal the US argued that the law had been incorrectly applied. The High Court found that the law on oppression and suicide risk was 'well-trodden'. Applying the law on the risk of suicide in extradition the District Judge concluded that the risk was a substantial one. The criteria, set out in the case of *Turner v United States*³, include that suicidal impulses would come from Assange's psychiatric diagnoses not his own voluntary act. She found that his determination, planning, and intellect were such that he would be able to circumvent measures designed to prevent him from dying by suicide.

The High Court found that it was unable to accept the US's suggestion that the District Judge adopted an incorrect approach to the question of oppression under section 91 of the Extradition Act 2003. The District Judge had considered evidence accepting that the facility in which Assange would be imprisoned was well-run and had a 'stellar record' on preventing suicide. Overall, it was held the judge properly considered the seven distinct propositions required by *Turner*. This ground of appeal was also rejected.

Diplomatic Assurances

The third mental health-related aspect of Assange's case centres upon diplomatic assurances. In the extradition context, these are promises made by a requesting state concerning treatment an individual will receive and/ or the length of sentence that may be imposed upon conviction. Treatment-related assurances can include the provision of certain clinical treatments (e.g., the availability of psychiatric or psychological care, or medication), conditions of imprisonment and on occasion the possibility of the individual serving his sentence outside the requesting state. At the time of Assange's extradition hearing in late 2020 no assurances had been sought or given in his case, nor were any issued in the course of it.

Subsequent to the District Judge's decision barring Assange's extradition, the US provided four assurances, which it contended addressed the District Judge's concerns. They related to the non-imposition of a particularly harsh incarceration regime, called, special administrative measures, the possibility of the transfer of Assange's sentence to his native Australia, the availability of clinical and psychological treatment, and the locus of his imprisonment within the US in the event of his conviction (pending a possible sentence transfer).

³ [2012] EWHC 2426 (Admin).

As a consequence of the intervening issuance of assurances the High Court was required to determine whether their timing affected their acceptance. It held that whether at first instance or on appeal a court has the power to receive and consider assurances whenever offered by a requesting state.⁴ In Assange's case, the High Court found that the US had not acted in bad faith. It noted that the District Judge should have given the US the opportunity to make assurances after providing it with a draft of her judgment.

After considering the US assurances in the light of Assange's case the High Court allowed its appeal. The US assurances, it held, excluded the possibility of Assange being subjected to special administrative measures, or detained at the supermax prison in Florence Colorado. They also provided for the possible transfer of his sentence to Australia and the clinical and psychological treatment he could receive.

The High Court found that there was a fundamental assumption that a requesting state was acting in good faith. The US and UK have had extradition relations for over 150 years, it found, and it was not aware of an instance of an assurance being dishonoured.⁵ Assange's case was to be remitted to the District Court to proceed on this basis.

Appeal to the Supreme Court

Subsequent to the High Court decision lawyers for Assange sought leave to appeal to the UK Supreme Court. The High Court has certified a question of general public importance relating to the timing of assurances in extradition. The Supreme Court itself is now tasked with deciding whether to hear Assange's appeal. A decision is imminent.

Mental Health in Extradition

Whilst the law and practice governing mental health in extradition has developed over recent years several issues require clarity and definitive judgment.⁶ These include whether there is, or should be, a distinction between physical and mental illness in extradition, the applicability of various bars to extradition including oppression and the prohibition of inhuman and degrading imprisonment⁷, and the role and nature of assurances in overcoming concerns over the fate of a requested person subsequent to extradition.

The Supreme Court will consider diplomatic assurances in Assange's case if it grants leave to appeal. This is positive. There is, of course, the chance that leave

⁴ Supra note 1 at para 42.

⁵ Supra note 1 at para 55.

⁶ See generally Arnell, P., *Extradition and Mental Health in UK Law*, (2019) 30(3) Criminal Law Forum 339, at <https://doi.org/10.1007/s10609-019-09369-7>.

⁷ See Arnell, P., *The European Human Rights Influence upon United Kingdom Extradition – Myth Debunked*, (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 317, at <https://doi.org/10.1163/15718174-21042032>.

is not granted. More generally and apart from Assange's case specifically, multi-disciplinary research into extradition and mental health is called for. The results of which can inform the development of the law in the area and, if necessary, an amendment to the Extradition Act 2003. There appears to be little doubt that requested persons are increasingly putting forward their mental health in opposition to extradition. High profile cases have included those of Gary McKinnon, Haroon Aswat, Lauri Love and now Julian Assange. These cases are likely the tip of the iceberg, having gained renown for one reason or other. Assange's case is, of course, of the utmost importance to him and his family and supporters. It may be a matter of life and death. His case is also a clarion call for further research into this important area.