IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2528 (Admin)

No. CO/150/2021

Royal Courts of Justice

Wednesday, 11 August 2021

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE FARBEY

B E T W E E N :

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA — Appellant

- and -

JULIAN PAUL ASSANGE — Respondent

MS C. DOBBIN QC (instructed by Crown Prosecution Service) appeared on behalf of the Appellant.

MR E. FITZGERALD QC and MS F. IVESON (instructed by Birnberg Peirce & Partners) appeared on behalf of the Respondent.

J U D G M E N T
(approved)

LORD JUSTICE HOLROYDE:

1 The United States of America ("the appellant") have requested the extradition of Mr Julian Assange ("the respondent") to stand trial on charges of conspiracy to obtain, receive, and disclose national defence information, conspiracy to commit computer intrusion, and unauthorised obtaining and disclosure of national defence information. Those charges have been brought against the respondent pursuant to the relevant provisions of the US Criminal Code. The extradition proceedings are governed by the provisions of the Extradition Act 2003 ("the 2003 Act").

2 The respondent resisted extradition on a number of grounds under the 2003 Act and the Human Rights Act 1998. District Judge Baraitser ("the DJ") heard the extradition proceedings, which were protracted, and on 4 January 2021 handed down her judgment. The judgment is lengthy and detailed. For present purposes it suffices to say that, in summary, the DJ rejected the majority of the submissions made on behalf of the respondent. She found, however, that the respondent's mental condition is such that it would be oppressive to extradite him to the United States. She therefore ordered his discharge pursuant to s.91 of the 2003 Act.

3 The appellant applied for leave to appeal against the DJ's decision. Five grounds of appeal were put forward. The application was considered on the papers by Swift J. By his order dated 5 July 2021, he granted leave to appeal on three of the grounds, but refused leave on the remaining two. The appellant has now renewed its application for leave on those two grounds.

4 The grounds upon which leave to appeal was granted by Swift J are:

> Ground 1: The DJ made errors of law in her application of the test under s.91 of the 2003 Act. Had she applied the test correctly she would not have discharged the respondent.
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> Ground 2: Having decided that the threshold for discharge under s.91 was met, the DJ ought to have notified the appellant of her provisional view so as to afford the appellant the opportunity of offering assurances to the court.
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> Ground 5: The United States have provided the United Kingdom with a package of assurances which are responsive to the DJ's specific findings, including in particular an assurance relating to the conditions under which the respondent will be detained if extradited, and an assurance that the United States will consent to the respondent being transferred to Australia to serve there any custodial sentence imposed upon him.

5 The grounds upon which leave was refused, and in respect of which this renewed application is made, are:

> Ground 3: Having concluded that Professor Kopelman had misled her, the DJ ought to have ruled that his evidence was inadmissible. Alternatively, if it could be said that his lack of independence went to weight rather than admissibility, the DJ ought to have attributed no, or far less, weight than she did to his opinions as to the severity of the respondent's mental condition (*a fortiori* when two additional and wholly independent experts were of a different opinion). Had she not admitted that

evidence, or had she attributed appropriate weight to it, the DJ would not have discharged the respondent pursuant to s.91.

Ground 4: The DJ erred in her overall assessment of the evidence going to the risk of suicide.

6 It is important to emphasise that, because leave to appeal has already been granted on the three grounds which I have mentioned, there will in any event be an appeal hearing at which those grounds will be fully argued. The principal issue for the court today is whether the appellant should also be permitted to argue either or both of grounds 3 and 4 at that hearing. The test to be applied is whether either or both of those grounds are reasonably arguable: see rule 50.17(4)(b) of the Criminal Procedure Rules. This court will not today make any final decision as to the success or failure of any ground of appeal for which the appellant has been granted, or is today granted, leave: that will be a decision for the constitution of the court which hears the appeal in due course. For that reason, this judgment will be comparatively short and will not contain a detailed analysis of all the evidence.

7 In making her decision in relation to the bar to extradition pursuant to s.91 of the 2003 Act, the DJ considered a body of expert evidence called by each party as to the respondent's mental health and as to the risk that he may commit suicide if an order for his extradition is made. Of particular relevance for present purposes is her assessment of the evidence of Professor Kopelman, an Emeritus Professor of neuropsychiatry and honorary consultant neuropsychiatrist, whose written and oral evidence was adduced by the respondent. It is necessary to give a very brief summary of the particular issue which is raised in relation to his evidence. It is not necessary for present purposes to make any wider analysis of the expert evidence generally.

8 Professor Kopelman provided reports dated 17 December 2019 and 30 August 2020, which were considered by the DJ. His original notes of his meetings with the respondent were disclosed shortly before the extradition hearing, and were used by Mr Lewis QC, representing the appellant, when he cross-examined Professor Kopelman.

9 When writing those reports, Professor Kopelman knew the respondent had a current relationship with a Ms Moris, formed whilst the respondent was living in the Ecuadorian Embassy, and that they were the parents of two young children, both of whom had been conceived whilst the respondent was living in the Embassy.

10 In his report dated 17 December 2019, Professor Kopelman gave a detailed account of the respondent's personal and family history, including references to the respondent's three children by previous relationships. He gave a detailed account of the conditions under which the respondent had lived at the Ecuadorian Embassy. The respondent told him that after March 2018 he was "effectively in solitary confinement for 60 hours a week" in the Embassy. Professor Kopelman referred to an incident when the respondent was aged 10, which Professor Kopelman felt had given rise to a post-traumatic stress disorder, and in this context he referred to the respondent having suffered a form of "re-traumatisation" since being isolated in the Embassy and in custody. He did not, however, name Ms Moris as the respondent's current partner, and did not say anything about the ages of the two children, or about the fact that they were conceived at the Embassy. Instead, he made the following references:

At p.8 of his report, having referred to the respondent's former partner, he said the respondent had subsequently commenced a close relationship with another woman,

> which was of continuing huge importance and support to him. He said that this woman "has two children". He said nothing more about her identity.
> At p.16 he referred to the respondent's mood in August 2019, and said that "an obligation to his children" was one of only two things which the respondent said had stopped him from committing suicide. By October 2019, Professor Kopelman reported, the respondent "no longer thought that feelings for his children would prevent him from committing suicide."
> At p.22 Professor Kopelman referred to his meeting with Ms Moris, whom he said had been employed by the respondent in February 2011. He recorded that Ms Moris had twice met the respondent's adult son. He made no reference to her current relationship with the respondent, or her children by him. He recorded her belief that the respondent would commit suicide if he were to lose the case.

11 On 24 March 2020, at a time when the respondent was preparing to make a bail application, Ms Moris disclosed her relationship with the respondent to the court in a witness statement. She subsequently disclosed that relationship publicly in the newspapers.

12 In his report dated 13 August 2020, Professor Kopelman referred to the fact that the respondent was receiving a number of visits each week from his partner and their children. He referred to Ms Moris' disclosure to the media. He did not, however, mention that he himself had been aware of the identity of the respondent's partner, and of their children, when he wrote his first report.

13 In cross-examination, Mr Lewis inquired into those omissions. He suggested that Professor Kopelman had deliberately concealed what he had been told about the respondent's relationship with Ms Moris and about their children. Mr Lewis also challenged Professor Kopelman's reliability as an expert witness on a number of other grounds. In relation to the relationship between the respondent and Ms Moris, and the fact that they had two children together, Professor Kopelman said at one point, in answer to Mr Lewis' question:

> "Well, maybe I did not perform my duty to the court there, but I was trying to be diplomatic and respect her privacy."

He was asked whether the fact that Ms Moris, who was also the respondent's partner, was relevant to her independence, and the weight of what she said. Professor Kopelman conceded that that might be the case, and that she would naturally wish to say things helpful to Mr Assange. Professor Kopelman also accepted that the court should be aware of that when assessing the veracity of Ms Moris' account to Professor Kopelman.

14 After the evidence had been concluded, and after the appellant had submitted its final written submissions, both Professor Kopelman and the respondent's solicitor made statements explaining why Professor Kopelman's first report had been drafted in the terms to which I have referred. They said, in summary, that they had been aware of Ms Moris' strongly expressed concerns for the safety of herself and her family. They had discussed the consequences of her being named in Professor Kopelman's first report, and whether it was necessary for him to name her. They concluded that it would be appropriate to defer naming Ms Moris until detailed legal advice could be obtained from counsel, and that to do so would not affect the conclusions in the report, or the basis for those conclusions. In the event, there were a number of delays to the proceedings, and consequential amendments to the timetable of relevant directions. By the time Professor Kopelman's second report was served, Ms Moris had made her disclosure to the media.

15 Both Professor Kopelman and the respondent's solicitor emphasised in their statements that there was never any intention that Professor Kopelman would withhold relevant information from the court.

16 The DJ in her judgment referred to the cross-examination of Professor Kopelman, but did not accept that he had failed in his duty to the court when he did not disclose the relationship between the respondent and Ms Moris. At para. 329 of her judgment she quoted two of the passages in the report dated 17 December 2019 to which I have referred. She found them to be misleading, and she noted that Professor Kopelman was aware that the respondent's children were a significant factor in the assessment of the risk of suicide. She went on, however, in para. 330, 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's 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."

17 The DJ rejected the other submissions made on behalf of the appellant to the effect that Professor Kopelman lacked impartiality. She found his opinion to be impartial and dispassionate. She accepted Professor Kopelman's medical opinion as to the respondent's mental condition. She also accepted the evidence of another witness called on behalf of the respondent, Dr Deeley, and held that she preferred the evidence of Professor Kopelman and Dr Deeley to that of the appellant's expert witness, Dr Blackwood. She considered the case of *Turner v Government of the USA* [2012] EWHC 2426 (Admin) and found that the risk that the respondent would commit suicide if an extradition order were made is substantial; that the respondent's suicidal impulses would come from his psychiatric condition rather than from his own voluntary act; and that if certain conditions of detention were imposed on the respondent following extradition, his mental health will deteriorate to the point where he will commit suicide.

18 With that necessarily brief summary, I turn to the grounds of appeal. Again, I will summarise the submissions very briefly.

19 As to ground 3, Ms Dobbin QC, for the appellant, submits that the DJ was wrong in law not to treat Professor Kopelman's evidence as incapable of being relied upon because of his deceit. She submits that it is extraordinary that in this case it has been established by Professor Kopelman's admission that he deliberately misled the court on the most important question to which his evidence went, namely the risk of suicide. She also points out that what prompted Professor Kopelman to disclose, in his subsequent report, the relationship between the respondent and Ms Moris, and their two children, was that they had gone public with that information, not that he had changed his mind about discharging his duty to the court. Ms Dobbin argues that, in this case, it was particularly important that any expert opinion should be founded on a dispassionate and independent assessment. She submits that Professor Kopelman's first report was important to the DJ's decision because it provided a basis for predictions as to how the respondent's mental health may deteriorate if he is held under restrictive conditions. She submits that Professor Kopelman deliberately supressed in his report a factor which was highly relevant to the likelihood of suicide, and put his partiality towards the defendant above his duty to the court. She argues that the court should

not be placed in a position of being asked to rely on the opinion of an expert witness whose report was admittedly misleading in material respects. She further submits that it was not open to the DJ, having rightly found that aspects of the first report were knowingly misleading, to find nonetheless that Professor Kopelman had not failed in his duty as an expert witness. The later emergence of the truth did not reduce the need to investigate why Professor Kopelman had been willing in the first place to abandon his duty to the court. Ms Dobbin submits that the DJ should have held Professor Kopelman's evidence to be inadmissible or, alternatively, should have given it little or no weight.

20 For the respondent, Mr Fitzgerald QC submits that the judge made a most careful analysis of the totality of the psychiatric evidence, gave detailed reasons for her assessment, and was entitled to reach the conclusion she did. She was well aware of the criticisms made of Professor Kopelman's first report, and indeed accepted some of them, but was nonetheless entitled to look at those deficiencies in the context of the evidence as a whole. Mr Fitzgerald argues forcefully that it cannot be correct that deficiencies of that kind should automatically lead either to the evidence being ruled inadmissible, or to its being given no weight at all. He submits that the case of *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597 relied on by the appellant does not, in fact, support the appellant's case in this regard. Mr Fitzgerald realistically accepts that, to the extent that Professor Kopelman failed to disclose everything of which he was aware, he failed in his duty as an expert witness. Mr Fitzgerald argues, however, that there could never have been any realistic suggestion that the true position would not be clear at trial, and that the first report was clearly no more than a provisional report, to be expanded upon at a later stage. The DJ, he submits, considered all relevant matters and rightly asked herself the essential question whether Professor Kopelman was impartial and objective. She was entitled to make the clear and favourable findings which she did in answer to that question.

21 As to ground 4, the appellant submits that leave having been granted on ground 1, it should also be granted on this ground: if the DJ was in error as to how she applied s.91, this court should be able to reconsider her assessment of the competing psychiatric evidence.

22 The respondent submits that there is no arguable basis on which the DJ's carefully-reasoned and comprehensive assessment of the evidence relating to the risk of suicide could be overturned. It is submitted that the DJ was in the best position to determine the cogency of Professor Kopelman's evidence and that she gave sound reasons for her conclusions. Moreover, it is submitted, Dr Deeley's evidence supported the conclusion which the DJ reached.

23 I am grateful to all counsel for their written and oral submissions. Although it has been sufficient for present purposes for me to summarise them very briefly, I have considered all the submissions in reaching my conclusions.

24 In considering ground 3, I bear very much in mind that the DJ saw and heard all the expert witnesses and made her assessment of Professor Kopelman with that advantage, which an appellate court cannot share. I accept that, in general, this court rightly takes a cautious approach when considering challenges to findings of fact, including factual assessments, made by the judge below. It is, however, very unusual for an appellate court to have to consider the position of an expert witness whose written evidence has been found to be misleading in material respects, but whose opinion has nonetheless been accepted by the court below. The general approach does not operate as a complete bar to this court finding that the judge below was wrong in her assessment of the evidence. I have come to the conclusion that it is here at least arguable that the present case is one in which such a finding might properly be made.

25 The particular considerations which have led me to that conclusion are these. First, it is an important feature that Professor Kopelman gave his evidence as an expert witness and was, therefore, subject to the duties of such a witness. In accordance with rule 19.4(j) of the Criminal Procedure Rules he included in his statement of 17 December 2019 a declaration in the form required by Criminal Practice Direction 19B.1. That declaration included the following:

> "(i) I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.
>
> . . .
>
> (vii) I have exercised reasonable care and skill 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.
>
> (ix) I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.
>
> . . .
>
> (xi) I understand that:
>
> a. my report will form the evidence to be given under oath or affirmation; . . ."

Professor Kopelman should have been aware that rule 19.9 of the Criminal Procedure Rules permits an application to be made to the court if a party has grounds to exclude information from an expert report. No such application was made. By choosing instead to omit stating what he knew of the respondent's recent and current relationship with Ms Moris and their children, when expressing his opinion on matters such as the effects of "solitary confinement" in the Embassy and the risk of suicide, it is in my view arguable that Professor Kopelman did not act in accordance with his declaration, and that the DJ erred in not taking that into account in her assessment of his reliability.

26 Secondly, I think it is arguable that the DJ adopted an incorrect approach when she held at para. 330 that Professor Kopelman's decision to conceal the relationship between the respondent and Ms Moris, though "misleading and inappropriate in the context of his obligations to the court", could in effect be excused or overlooked because it was "an understandable human response to Ms Moris' predicament." Given the importance to the administration of justice of a court being able to rely upon the impartiality of an expert witness, it is in my view arguable that more detailed and critical consideration should have

been given to the reasons why that "understandable human response" resulted in the serving of a report which contained misleading statements and from which there were significant omissions. To my mind, this goes more to the weight to be given to the evidence than to its admissibility. The appellant is, however, entitled in my view to argue both aspects at the appeal hearing.

27 For those reasons, respectfully disagreeing with Swift J, I would grant leave to appeal on ground 3. It will be for the court at the appeal hearing to determine the admissibility of the additional evidence on which the appellant seeks to rely in support of that ground.

28 I can deal with ground 4 briefly. If it stood alone, I would agree with the respondent's submission that it should be rejected as an unjustified challenge of the DJ's assessment of the evidence. That, I think, was the basis on which Swift J refused leave. It seems to me, however, that this ground has to be seen in the context of Swift J's grant of leave to appeal on ground 1, and my own view that leave should also be granted on ground 3. If the appeal is successful on either or both of those grounds it would, in my view, follow that the appellant should be able to make submissions as to the overall assessment of the expert evidence. Whether ground 4 adds much may be doubted; but in my view it is arguable, and I would grant leave accordingly.

29 If my Lady agrees, I would accordingly grant leave on both grounds 3 and 4.

30 I will give the following directions for the appeal hearing.

31 I agree with the written submissions of Mr Summers QC, on behalf of the respondent, that the appeal hearing must be limited to the appellant's appeal under s.105 of the 2003 Act. Whether there is ever any appeal by the respondent under s.103 of the Act depends on the outcome of this appeal. Neither the 2003 Act, nor the Rules, make any provision for a cross-appeal to be heard in respect of the points which the DJ decided against the respondent, but which did not result in his case being sent to the Secretary of State and which therefore cannot be the subject of an appeal at this stage. The effect of the statutory provisions is that an element of duplication of proceedings seems to be unavoidable if the present appeal succeeds.

32 I will direct that the appeal will be heard on 27 and 28 October 2021, with an estimate of two days.

33 I will direct that any evidence on which the respondent wishes to rely in order to address the assurances offered by the appellant must be served no later than four weeks before the hearing. Any evidence in reply must be served by the respondent no later than one week before the hearing.

34 Next I will direct that skeleton arguments be filed by the appellant two weeks before the hearing and by the respondent one week before the hearing. Those skeleton arguments should not exceed 30 pages in length.

35 Further, I will direct that hard copies and electronic copies of the appeal bundle and authorities bundle must be lodged not later than three days before the hearing.

36 Finally, I will direct that the hearing will be in person, subject to any request by any person to attend remotely. The respondent is not required to attend but may do so by video link or by CVP if he wishes.

MRS JUSTICE FARBEY:

37 I agree.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.