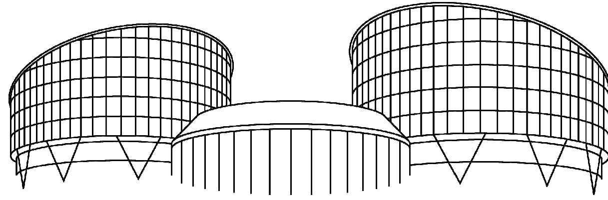

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application nos. 24027/07, 11949/08 and 36742/08
by Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan
and Mustafa Kamal Mustafa (Abu Hamza)
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 6 July 2010 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar*,

Having regard to the above applications lodged on 10 June 2007, 5 March 2008 and 1 August 2008,

Having regard to the interim measures indicated under Rule 39 of the Rules of Court,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The present decision relates to three applications, nos. 24027/07, 11949/08 and 36742/08.

The first application was lodged on 10 June 2007 by two British nationals, Mr Babar Ahmad (“the first applicant”) and Mr Haroon Rashid Aswat (“the second applicant”). They were both born in 1974.

The second application was lodged on 5 March 2008 by Mr Syed Tahla Ahsan (“the third applicant”), who is also a British national. He was born in 1979.

The third application was lodged on 1 August 2008 by Mr Mustafa Kamal Mustafa, known more commonly as Abu Hamza (“the fourth applicant”). He was born in 1958. His nationality is in dispute. He contends that he was deprived of his Egyptian nationality in the 1980s; the United Kingdom Government maintain that he still has Egyptian nationality. The Government have decided to deprive him of his British citizenship and he is currently appealing against that decision. The Government anticipate that a full hearing of that appeal will take place at the end of 2010.

2. The first, second and third applicants are represented by Ms G. Peirce, a lawyer practising in London with Birnberg Pierce and Partners, Solicitors, assisted by Mr E. Fitzgerald Q.C. and Mr B. Cooper, counsel. The fourth applicant is represented by Ms M. Arani, a lawyer practising in Middlesex. The Government are represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office.

3. The first and third applicants are currently detained at HMP Long Lartin. The second applicant is currently detained at Broadmoor Hospital and the fourth is currently detained at HMP Belmarsh.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. The United States' indictments

4. The applicants have been indicted on various charges of terrorism in the United States of America. They are the subject of two separate sets of criminal proceedings. The first set concerns the first applicant, Mr Ahmad, and the third applicant, Mr Ahsan, who were indicted by Federal Grand Juries sitting in Connecticut. The second set of proceedings concerns the second applicant, Mr Aswat, and the fourth applicant, Abu Hamza, who were indicted by Federal Grand Juries sitting in the Southern District of New York. The details of each indictment are set out below. On the basis of each indictment, the United States Government requested each applicant's

extradition from the United Kingdom. Each applicant then contested his proposed extradition in separate proceedings in the English courts.

a. The indictment concerning the first and third applicants

5. The indictment against the first applicant was returned on 6 October 2004. It alleges the commission of four felonies between 1997 and August 2004: conspiracy to provide material support to terrorists; providing material support to terrorists; conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country; and money laundering. On 28 June 2006, a similar indictment was returned against the third applicant, save that the charge of money laundering was not included. For both indictments, the material support is alleged to have been provided through a series of websites whose servers were based in Connecticut. The charge of conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country is based on an allegation that the first and third applicants were in possession of classified US Navy plans relating to a US naval battle group operating in the Straits of Hormuz in the Persian Gulf and discussed its vulnerability to terrorist attack.

b. The indictment concerning the second and fourth applicants

6. The indictment against the fourth applicant was returned on 19 April 2004. It charges him with eleven different counts of criminal conduct. These cover three sets of facts.

7. The first group of charges relate to the taking of sixteen hostages in Yemen in December 1998, four of whom died during a rescue mission conducted by Yemeni forces. The indictment charges the fourth applicant with conspiracy to take hostages and hostage taking and relates principally to his contact with the leader of the hostage takers, Abu Al-Hassan, before and during the events in question. Several of the hostage-takers were tried and convicted in Yemen in May 1999. Abu Al-Hassan and two others were sentenced to death and a fourth to twenty years' imprisonment. The execution of Abu Al-Hassan took place on 17 October 1999. In 1999 investigations also took place simultaneously in the United Kingdom and the United States. In the course of the British investigation, the fourth applicant was arrested and interviewed between 15 and 18 March 1999. Officers from the Metropolitan Police flew to Yemen to conduct inquiries. One of the hostages, Mary Quinn, was also interviewed by the Federal Bureau of Investigations and detectives from Scotland Yard. The British investigation then concluded that, while links between the applicant and the hostage takers were established, evidentially the links proved inconclusive and relied heavily on information gathered from Yemeni sources which would not ordinarily be admissible during a British trial. It also appears that no further action was taken in the American investigation at this time. Then on 22 October 2000, Ms Quinn recorded an interview with the

applicant in London and, when this became available to the FBI in 2003, the American investigation recommenced, leading to the applicant's indictment.

8. The second group of charges relates to the conduct of violent *jihad* in Afghanistan in 2001. The indictment alleges that the fourth applicant provided material and financial assistance to his followers and arranged for them to meet Taliban commanders in Afghanistan. In this respect, four counts of the indictment charge him with providing and concealing material support and resources to terrorists and a foreign terrorist organisation and conspiracy thereto. A further count charges him with conspiracy to supply goods and services to the Taliban.

9. The third group of charges relates to a conspiracy to establish a *jihad* training camp in Bly, Oregon between June 2000 and December 2001. Two counts charge the fourth applicant with providing and concealing material support and resources to terrorists and providing material support and resources to a foreign terrorist organisation (Al Qaeda); a further two counts charge him with conspiracy to the main two counts. On 12 September 2005, a superseding indictment was returned which named and indicted the second applicant as the fourth applicant's alleged co-conspirator in respect of the Bly, Oregon charges. On 6 February 2006 a second superseding indictment was returned, which indicted a third man, Oussama Abdullah Kassir, as a co-conspirator in respect of the Bly, Oregon charges.

10. A principal prosecution witness in relation to the Bly, Oregon and Afghanistan charges is Mr James Ujaama, a United States national, who was originally indicted as a co-conspirator in respect of those charges. It is alleged by the United States Government that the fourth applicant arranged for Mr Ujaama to travel to Afghanistan with another original co-conspirator, Feroz Abassi, and to meet a Taliban commander with the purpose of participating in violent *jihad*. Mr Abassi was captured in Afghanistan, detained there and then transferred to the United States' naval base at Guantánamo Bay, Cuba. He was later returned to the United Kingdom. Mr Ujaama subsequently entered into a plea agreement. It is alleged by the second and fourth applicants that Mr Ujaama was coerced into providing evidence by the threat of being sent to the United States' detention facility at North Carolina brig. In addition, it appears that, subject to the plea agreement, the United States Government agreed to lift the “special administrative measures” (or SAMs) to which Mr Ujaama had been subjected. These are additional security measures which can be imposed on persons detained in federal prisons. The measures include, but are not limited to, housing the defendant in administrative detention and restricting the defendant's correspondence, visiting rights, contacts with the media, or telephone use. Although reviewable annually they can be continued indefinitely. It further appears that in the plea agreement, the United States agreed to forego any right it has to detain Mr Ujaama as an enemy

combatant. Mr Ujaama was previously sentenced to two years' imprisonment. He later left the United States in violation of his parole terms and was re-arrested. According to information provided by the United States Government, he is due to be resentenced in spring 2010

11. Mr Kassir, a Swedish national, was extradited to the United States from the Czech Republic in September 2007. His trial began in the Federal District Court for the Southern District of New York on 13 April 2009. In an affidavit of 22 October 2009, the Assistant United States Attorney responsible for the case, Mr Eric Bruce, stated that, before the commencement of the trial, one week had been spent on jury selection to ensure each juror would be fair and impartial. During the trial, Mr Ujaama gave evidence and, according to Mr Bruce, had been cross-examined vigorously by defence counsel but not a single question had been asked regarding ill-treatment or coercion by the United States Government. On 12 May 2009, Mr Kassir was convicted on five counts relating to the Bly, Oregon *jihad* camp conspiracy. He was also convicted of a further six counts relating to the operation of terrorist websites. On 15 September 2009, after submissions from Mr Kassir and his defence counsel, the trial judge sentenced Mr Kassir to the maximum permissible sentence on each count. Mr Bruce further stated that, because a life sentence was the maximum permissible sentence on two of the counts, Mr Kassir had effectively been sentenced to a term of life imprisonment.

12. In the course of the fourth applicant's extradition proceedings in the United Kingdom, one of the fourth applicant's original co-conspirators in respect of the Afghanistan charges was identified as Ibn Al-Shaykh Al-Libi. It is alleged by the fourth applicant that Mr Al-Libi had been arrested in Afghanistan sometime after 11 September 2001 and also transferred to Guantánamo Bay whence he was subjected to extraordinary rendition to Libya and Egypt. According to various newspaper reports, Mr Al-Libi was later sentenced to life imprisonment in Libya; on 10 May 2009, the Libyan media reported that he had committed suicide in prison.

2. The applicants' extradition proceedings in the United Kingdom

a. Extradition proceedings against the first applicant

13. The first applicant was arrested in London on 5 August 2004 on the basis of an arrest warrant issued under section 73 of the Extradition Act 2003 (see paragraph 54 below).

14. On 23 March 2005, the United States Embassy in London issued Diplomatic Note No. 25. Where relevant, the note provides:

> "Pursuant to Article IV of the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States hereby assures the Government of the United Kingdom that the United States will neither seek the death penalty

against, nor will the death penalty be carried out, against Babar Ahmad upon his extradition to the United States.

The Government of the United States further assures the Government of the United Kingdom that upon extradition to the United States, Babar Ahmad will be prosecuted before a Federal Court in accordance with the full panoply of rights and protections that would otherwise be provided to a defendant facing similar charges.

Pursuant to his extradition, Babar Ahmad will not be prosecuted before a military commission, as specified in the President's Military Order of November 13, 2001; nor will he be criminally prosecuted in any tribunal or court other than a United States Federal Court; nor will he be treated or designated as an enemy combatant...”

15. At the extradition hearing before the Senior District Judge, the first applicant argued, *inter alia*, that the risk of the death penalty being imposed remained since he could be tried on a superseding indictment. He further argued that he remained at risk of being designated as an “enemy combatant” pursuant to United States Military Order No. 1 (see paragraph 67 below) and that he remained at risk of extraordinary rendition to a third country. He also argued that there was a substantial risk that he would be subjected to special administrative measures whilst in pre-trial detention in a federal prison. He argued that these measures could involve solitary confinement and restrictions on communication with his legal representatives in violation of Articles 3 and 6 of the Convention.

16. In a decision given on 17 May 2005, the Senior District Judge ruled that the extradition could proceed and that, *inter alia*, the first applicant's extradition would not be incompatible with his rights under the Convention. In respect of the first applicant's argument concerning the risk of the death penalty being imposed, the Senior District Judge held as follows:

“As far as the Civilian Courts are concerned, I have the assurance of the Prosecutor that there is no intention to prefer a superseding indictment or amend the charges to include matters which would render the defendant liable to the death penalty. I have also been provided with Diplomatic Note 25 which gives a categorical assurance that the death penalty will not be carried out. I have reached the conclusion that the risk of this being imposed by a Civilian Court is negligible and the court is entitled to rely on the Prosecutor's undertaking and the Diplomatic Note.”

17. As to the first applicant's arguments in respect of the risk of designation as an enemy combatant and the risk of extraordinary rendition, the Senior District Judge held:

“I am satisfied that the defendant meets the criteria which would permit the President of the United States of America to personally make an order designating the defendant as an enemy combatant who could then be detained and tried by a military tribunal. If such an order were made there is a substantial risk that the defendant would be detained at Guantanamo Bay or subjected to rendition to another country...I have had to consider the status of [the] Diplomatic Note. I am satisfied whilst it does not provide any personal protection to this defendant; the Diplomatic Note does bind the American Government, which includes the President of the United States. As such I am satisfied that the risk of an order being made under Military Order No. 1 is almost entirely removed. Although I have received evidence of

extraordinary rendition to another State, the [United States] Government denies that such action takes place. If such steps do take place I am satisfied that in this case, in light of the undertaking not to invoke Military Order No. 1, the risk of extraordinary rendition is negligible."

18. In considering the first applicant's arguments relating to the risk of special administrative measures, the Senior District Judge noted that the United States Government had not attempted to deny that special administrative measures could be applied but had argued that there was judicial control to see that communication passing between the defendant and his lawyers, although monitored, did not reach the prosecution. The Senior District Judge found the application of special administrative measures to be the greatest ground for concern but concluded that a trial could still be properly and fairly conducted without a violation of Article 6.

19. The Senior District Judge concluded as follows:

"This is a difficult and troubling case. The [first applicant] is a British subject who is alleged to have committed offences which, if the evidence were available, could have been prosecuted in this country. Nevertheless the Government of the United States are entitled to seek his extradition under the terms of the Treaty and I am satisfied that none of the statutory bars [to extradition] apply."

Accordingly, he sent the case to the Secretary of State for his decision as to whether the first applicant should be extradited.

20. On 15 November 2005, the Secretary of State (Mr Clarke) ordered the first applicant's extradition. The first applicant appealed to the High Court (see paragraphs 25 *et seq.* below).

b. Extradition proceedings against the second applicant

21. On 7 August 2005 the second applicant was arrested in the United Kingdom, also on the basis of an arrest warrant issued under section 73 of the Extradition Act 2003, following a request for his provisional arrest by the United States.

22. On 20 December 2005, in the course of the second applicant's extradition hearing, the United States Embassy issued Diplomatic Note No. 114 which provided identical assurances to those provided in respect of the first applicant, save that no assurance was provided in respect of the death penalty.

23. The Senior District Judge gave his decision on 5 January 2006. Referring to his findings in the case of the first applicant, he found that the risk of an order being made under Military Order No. 1 was removed by the Diplomatic Note. He also found that, despite the risk of special administrative measures, the second applicant's trial could be properly and fairly conducted without a breach of his Article 6 rights. As to the second applicant's submission that the use of evidence from Mr Ujaama would breach his right to a fair trial, the District Judge concluded:

> “In the absence of evidence from Mr Ujaama himself as to his state of mind when he entered this plea agreement it is impossible to say whether his continuing cooperation was obtained by threat of either Special Administrative Measures or indefinite detention as an enemy combatant. There is, however, clearly an issue which would have to be resolved at any trial in the United States as to whether the evidence was admissible or whether it should be excluded on the basis of duress. That must be the responsibility of the trial court. It may be that this evidence would not be admitted but the evidence which goes before a jury in the United States must be an issue for the trial court and not for this court. I am satisfied that the evidence of Mr Ujaama would not in itself violate Mr Aswat's rights under Article 6 of the European Convention.”

Having concluded that none of the bars to extradition applied, the Senior District Judge sent the case to the Secretary of State for his decision as to whether the second applicant should be extradited.

24. On 1 March 2006, the Secretary of State ordered his extradition. The second applicant appealed to the High Court.

c. The first and second applicants' appeals to the High Court

25. The first and second applicants' appeals were heard together. In its judgment of 30 November 2006, the High Court rejected their appeals.

26. They had argued that it was inevitable that evidence obtained by torture or inhuman treatment would be used against them in the course of any trial in the United States. For example, it was common in conspiracy trials for FBI agents to give evidence of the general nature of the conspiracy. This evidence could have been obtained by torture of detainees at Guantánamo Bay and other detention sites. The High Court found that it could not know what precisely the evidence would be and thus it could not know in what particular circumstances it might have been obtained. In the absence of such information it was not prepared to hold that it would be distinctly obtained by torture, so that the process against the applicants would be tainted in violation of Article 6 of the Convention. The High Court also distinguished between torture and other forms of ill-treatment and concluded as follows:

> “[While] it is common ground that the law of evidence in federal criminal cases in the United States does not generally contemplate the exclusion of testimony on the basis that it has a tainted source, we may reasonably suppose that the court would arrive at a proper decision upon any submission made to it that particular evidence should be excluded by force of Article 15 of the Torture Convention.... the court would no doubt be amenable to argument that the weight to be accorded to any particular evidence was greatly lessened, perhaps extinguished, by virtue of its having been obtained by other forms of ill-treatment.”

In respect of the second applicant's submission regarding the possible use of evidence from Mr Ujaama, the High Court held that, even if Mr Ujaama had been threatened with special administrative measures and indefinite detention, this fell short of a finding that he had in fact been subjected to cruel, inhuman or degrading treatment.

27. On the alleged risk that the applicants would be designated as enemy combatants under Military Order No. 1, the High Court held the Diplomatic Notes bound the United States Government and could be relied upon. The first and second applicants had relied on the fact that two men, Jose Padilla and Ali al-Marri, who were to be tried in the United States Federal Courts, had, on the eve of proceedings, been designated as enemy combatants and moved to military custody. The High Court distinguished these cases on the ground that neither man had been extradited and there had been no undertakings "given on the international plane to another sovereign State". On the alleged risk of extraordinary rendition, the High Court found no evidence that any person extradited to the United States from the United Kingdom or anywhere else had been subsequently subjected to extraordinary rendition.

28. As to the scope of the notes, the High Court found that the specialty rule, by which an extradited person could only be tried in the requesting state for the crime or crimes for which he had been extradited, provided adequate safeguards against such a designation. This was contained in Article XII of the 1972 UK – USA Extradition Treaty (see paragraph 53 below) and it was to be presumed that the United States would be loyal to its treaty obligations.

29. Further evidence was also before the High Court on the extent of special administrative measures. The evidence included an affidavit from Ms Maureen Killion, of the Office of Enforcement Operations within the United States Department of Justice. That office was responsible for reviewing the imposition of such measures by the Federal Bureau of Prisons. In the affidavit, Ms Killion stated that, initially, all applications for the imposition of special administrative measures had to be approved by the Attorney-General. In rare cases, persons held under special administrative measures might be subjected to monitoring of their attorney-client conversations but only where the Attorney-General had made a specific determination that it was likely that attorney-client communications would be used to convey improper messages and that the information might reasonably lead to acts of violence or terrorism. The relevant regulations required the Government to employ specific safeguards to protect attorney-client privilege and to ensure the Government's investigation was not compromised by exposure to privileged material. There had only been one instance of monitoring of attorney-client communications and only then after specific evidence of the misuse of the attorney-client privilege had been obtained. Ms Killion also denied that only Muslims had been subjected to special administrative measures; they applied also to non-Muslims in national security and terrorism cases and non-Muslims who had made non-terrorist threats of violence.

30. The High Court found that, according to the case-law of this Court, solitary confinement did not in itself constitute inhuman or degrading

treatment. Applying that approach, the evidence did not “begin to establish a concrete case under Article 3”. On the conformity of the measures with Article 6 of the Convention, it found that the imposition of such measures was subject to judicial scrutiny and that the rights of the accused guaranteed by the Sixth Amendment to the Constitution of the United States provided sufficient safeguards to protect lawyer-client privilege. The Sixth Amendment was “strikingly similar” to Article 6. The High Court criticised the United States Government for failing to comply with repeated requests from the first and second applicants' representatives to provide statistics on the number of non-Muslims who were subject to special administrative measures. However, on the basis of Ms Killion's affidavit, it concluded that there was no evidence that special administrative measures were applied only to Muslims or that the United States authorities deliberately flouted the relevant regulations so as to punish Muslim defendants for their religion.

31. The first and second applicants applied for permission to appeal to the House of Lords. This was refused by the House of Lords on 6 June 2007.

d. Extradition proceedings against the third applicant

32. The United States formally requested the extradition of the third applicant on 15 September 2006. The extradition hearing started on 20 November 2006 at which date the Senior District Judge determined that the third applicant was accused of offences for which he could be extradited. The case was then adjourned for evidence and argument, *inter alia* as to whether the third applicant's extradition would be compatible with his Convention rights. The hearing resumed on 19 March 2007. By now bound by the High Court's judgment in respect of the first and second applicants, the Senior District Judge found that the third applicant's extradition would be compatible with the Convention. He accordingly sent the case to the Secretary of State for his decision as to whether the third applicant should be extradited.

33. On 15 May 2007, while the Secretary of State was considering the case, the United States Embassy in London issued Diplomatic Note No. 020, which was substantially the same as that provided in respect of the first applicant.

34. On 14 June 2007, the Secretary of State (Dr Reid) ordered that the extradition could proceed. The third applicant appealed against this decision to the High Court and also sought judicial review of the alleged failure of the Director of Public Prosecutions for England and Wales (“the DPP”) to consider whether he should instead be tried in the United Kingdom. He relied on guidance agreed between the Attorney General of the United States and his United Kingdom counterparts for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States (see relevant domestic and international law, paragraph 63 below).

35. On 10 April 2008 the High Court dismissed the third applicant's human rights appeal, relying on its ruling in respect of the first and second applicants. In the same judgment, it also dismissed his application for judicial review, finding that the guidance had no application to the third applicant's case. The guidance only applied to cases where there had been an investigation of the case in the United Kingdom and the DPP had been seized of the case as prosecutor.

36. On 14 May 2008 the High Court refused to certify a point of law of general public importance which ought to be considered by the House of Lords and also refused leave to appeal to the House of Lords.

d. Extradition proceedings against the fourth applicant

37. The United States requested the fourth applicant's extradition on 21 May 2004. He was arrested in London on 5 August 2004. On 20 July 2004, the United States Embassy in London issued Diplomatic Note No. 57, which assured the United Kingdom Government that the United States would neither seek the death penalty against, nor would the death penalty be carried out against, the fourth applicant.

38. The extradition proceedings were adjourned when he was convicted of offences in the United Kingdom and sentenced to seven years' imprisonment; they resumed when the criminal appeals process was concluded. The United States Embassy then issued a further diplomatic note (no. 017) dated 9 May 2007. This gave assurances, in terms similar to those given in respect of the first three applicants, that the fourth applicant would be prosecuted before a federal court rather than a military commission and that he would not be treated as an enemy combatant.

i. The District Court proceedings

39. When the case came before the Senior District Judge for his decision as to whether the extradition could proceed, the fourth applicant requested that further enquiries be made of the Government of the United States, submitting that the extradition request was based on evidence directly or indirectly obtained through torture. He advanced three grounds for the request. First, in respect of the Yemen charges, he maintained that several of the hostage-takers who had been arrested and tried in Yemen might have been subjected to torture or ill-treatment. Second, the fourth applicant relied on the fact that Mr Abassi had been detained in Afghanistan and taken to Guantanamo Bay, Cuba, where, it was alleged, he had been tortured and ill-treated. He produced an affidavit from Mr Abassi dated 11 May 2007 in which Mr Abassi set out these allegations. Third, in respect of the Afghanistan charges, the fourth applicant relied on the fact that the prosecution's case centred on the allegations that the fourth applicant had arranged for Mr Abassi and Mr Ujaama to meet Mr Al-Libi in Afghanistan and carry out violent *jihad* there. He relied on the allegations, set out at

paragraph 12 above, that Mr Al-Libi had been subjected to extraordinary rendition.

40. In an affidavit sworn on 4 May 2007, Mr Bruce addressed, among other matters, the treatment of Mr Abassi. Mr Bruce stated:

> "34. Ferroz Abbasi [sic] was initially apprehended in Afghanistan in December 2001, fighting with al Qaeda and the Taliban. After he was apprehended, Abbasi was interviewed by two FBI agents while still in Afghanistan. Abbasi was properly read his Miranda rights by the FBI Agents, waived those rights in writing, and agreed to be interviewed by the FBI agents on two occasions in Afghanistan. A small amount of information obtained during those two consensual interviews in Afghanistan was relied upon in the original extradition request by the U.S., dated May 12, 2004, in this matter.
>
> 35. After Abbasi was initially detained in Afghanistan, he was later transferred to Guantanamo Bay, Cuba. None of the information obtained from Abbasi while detained in Guantanamo Bay was utilized in the original extradition request by the United States. Thus, ABU HAMZA's unsubstantiated allegations concerning the treatment of prisoners in Guantanamo Bay, Cuba, are wholly irrelevant to these proceedings.
>
> 36. Moreover, solely in order to simplify and expedite the proceedings in this matter, I am identifying the small amount of information from Abbasi's consensual interviews with the FBI in Afghanistan, after being read and waiving his Miranda rights, that was relied upon in the original extradition request in this matter. Because this information is not necessary to the extradition request, I ask that this information be considered withdrawn from the original extradition package. In addition, assuming a trial solely of defendant ABU HAMZA, the United States Government would not seek to introduce as evidence any prior statements or confessions of Abbasi. Indeed, in a trial against only ABU HAMZA, such statements of Abbasi would be inadmissible as hearsay (footnotes omitted)."

The affidavit then set out the information attributable to Mr Abassi and stated that it provided details of events in Afghanistan from the time Mr Ujaama parted company with Mr Abassi to the time of Mr Abassi's capture. Mr Bruce then stated that, even without the withdrawn information, there remained ample evidence that the fourth applicant had arranged for and facilitated jihad training and fighting in Afghanistan for his followers, including the testimony of Mr Ujaama and others.

41. In his preliminary ruling on the application for disclosure of 29 October 2007, the Senior District Judge found that there was no conduct alleged within the extradition proceedings which was founded upon or was tainted by evidence obtained by torture. For the Yemen charges, the Senior District Judge found no evidence or information contained in the United States' extradition request which could have come solely from those tried in Yemen. The material upon which the request was based was made up of admissions by the applicant, evidence given by the hostages, and real and documentary evidence of the provision of a satellite telephone by the fourth applicant to the hostage takers. There was no reason to think that any of that evidence had been obtained by torture or tainted by it. For Mr Abassi, the

fact that he was detained in Afghanistan and taken to Guantanamo Bay may well have been sufficient to raise concerns but the United States Government had expressly informed the court that all references to evidence and information given by Mr Abassi had been removed from the request. For Mr Al-Libi, the matter of his rendition would justify investigation if the extradition proceedings were based on evidence provided by him or information derived from him could have been the result of torture, but the United States Government regarded him as a co-conspirator not a witness and there was nothing in the extradition request which could plausibly be information or evidence obtained from him either directly or indirectly through torture.

42. At the full extradition hearing before the Senior District Judge the fourth applicant argued, *inter alia*, that his extradition should not proceed due to the delay in seeking it and the fact that certain defence witnesses were no longer available, such as Abu Al-Hassan, the defendant in the Yemeni proceedings who had been executed. He also argued that his extradition would be a disproportionate interference with his private and family life guaranteed by Article 8 of the Convention. He further argued that extradition would give rise to a real risk of a violation of Article 3 of the Convention since he would be likely to be detained in a "supermax" detention facility such as the United States Penitentiary, Administrative Maximum, Florence, Colorado ("ADX Florence"). In this connection, he also relied on his poor health, specifically his type-two diabetes, his high blood pressure, the loss of sight in his right eye and poor vision in his left and the amputation of both his forearms. A violation of Article 3, he claimed, would also result from the imposition of special administrative measures. Finally in respect of Article 3, he argued that he was at risk of re-extradition or deportation to a third country where he would be subject to ill-treatment contrary to that Article.

43. The Senior District Judge, in his ruling of 15 November 2007, rejected all these submissions. There had been no obvious or culpable delay by the United States and the unavailability of certain witnesses and evidence for the defence would not render any trial unjust. In respect of detention at ADX Florence the Senior District Judge found that the fourth applicant's poor health and disabilities would be considered and, at worst, he would only be detained there for a relatively short period of time. The Senior District Judge was also not satisfied that special administrative measures would be applied to the fourth applicant but even if they were, he was bound by the ruling of the High Court in respect of the first and second applicants. For Article 8, the gravity and seriousness of the allegations outweighed the inevitable interference with the applicant's family life. Finally, there was no real risk of re-extradition. Having concluded that none of the bars to extradition applied, the Senior District Judge sent the case to the Secretary of State (Ms Smith) for her decision as to whether the fourth

applicant should be extradited. She ordered his extradition on 7 February 2008. The fourth applicant appealed to the High Court against the Secretary of State's decision and against the decision of the Senior District Judge.

ii. The High Court proceedings

44. Before the High Court, the fourth applicant advanced three main arguments against his extradition. First, he again argued that it would be an abuse of process to extradite him to the United States since the case against him was founded in whole or in part on evidence obtained directly or indirectly by torture or ill-treatment. Second, he argued that the extradition would be incompatible with Articles 3, 6 and 8 of the Convention and third, he argued that the passage of time since the alleged offences meant that the extradition would be unjust and oppressive.

45. The High Court gave its judgment on 20 June 2008 in which it dismissed the fourth applicant's appeal. In respect of the contention that the evidence against the fourth applicant was tainted by torture or ill-treatment, the High Court found that the terms of Mr Ujaama's plea bargain constituted pressure on him to give evidence but did not remotely come within the realms of ill-treatment or torture. For Mr Abassi, it found that while there were reasonable grounds to suspect that he might have been tortured, it was unnecessary to carry out further investigations in order to ascertain whether he had been. His evidence was no longer relied upon and would constitute inadmissible hearsay in the United States. For Mr Al-Libi, it also found that, whatever the truth of the allegations as to his rendition and torture, his involvement in the proceedings would be as a co-conspirator and not as a witness against the applicant. On the basis of these findings, the High Court concluded that:

> "[T]he stark reality is that when the possible use of *direct* 'torture' is addressed, it emerges that none of the victims of alleged torture provide evidence against the appellant. None of those allegedly ill-treated by the authorities anywhere in the world provide or will provide evidence against him either in relation to the extradition request or to any trial which may take place in the United States."

46. The High Court then turned to the fourth applicant's argument that there were substantial grounds for believing that the extradition request and the evidence at any subsequent trial were founded at least in part on evidence obtained indirectly by torture ("the fruits of the poisoned tree"). The fourth applicant had argued that there were three possible ways in which such evidence tainted the extradition request and the future trial: expert evidence from the co-lead investigator of the allegations, FBI Special Agent Butsch, whose expertise on Al-Qaeda and its training camps in Afghanistan, it was alleged, was derived from interrogations where torture had been used; the evidence of Mr Ujaama, which could have been founded on material which became available after Mr Abassi's capture; and the

affidavit in support of the extradition request sworn by Mr Bruce who had referred to the complexity of the case and the fact that extensive additional evidence had been gathered from all over the world. The fourth applicant also argued that in the United States, evidence obtained by torture was admissible and the fact that torture was involved went merely to the weight to be attached to that evidence. The High Court rejected these contentions. The claims made in relation to Mr Butsch and Mr Bruce were general and unparticularised. There was nothing to suggest that Mr Ujaama's allegations in relation to Bly Oregon and Afghanistan derived from anything said by Mr Abassi under torture. Any allegations of improper coercion could be explored in cross-examination of Mr Ujaama. There was no material difference between the rules of evidence in the United States and the United Kingdom in respect of evidence obtained indirectly by torture. Moreover, this Court's judgments in *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-... and *Harutyunyan v. Armenia*, no. 36549/03, ECHR 2007-... did not assist the fourth applicant. A distinction had to be drawn between evidence obtained by torture and evidence obtained by ill-treatment falling short of torture, a distinction which was supported by the different wording in Articles 15 and 16 of the United Nations Convention Against Torture (see paragraph 75 below). *Jalloh* had left open the general question whether the use of evidence obtained by ill-treatment in breach of Article 3 falling short of torture automatically rendered a trial unfair for the purposes of Article 6. In considering *Harutyunyan* the High Court stated that:

> “...the court concluded, at paragraph 63, that:
>
> 'Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violent [sic] or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value'.
>
> Although the court did not have to decide whether the treatment inflicted on the appellant and two witnesses amounted to torture within Article 3, it clearly had regard to the findings of the domestic court as to the severity of the ill-treatment which had 'the attributes of torture' when reaching its conclusion that there had been a violation of the right to a fair hearing under Article 6. This decision does not assist the appellant in the present case. There is no suggestion here that evidence obtained by violence or brutality will be used as proof of the guilt of the victim of such violence or brutality.”

47. In respect of the fourth applicant's arguments against extradition which were based on Article 3 of the Convention, the High Court first considered the validity of the assurance provided by the United States through the Diplomatic Notes. It considered an Amnesty International Report of 10 March 2008 entitled “United States of America: to be taken on trust?” (see paragraph 78 below) which questioned the strength of such assurances but found the report to be based on very little evidence. The High Court concluded:

> “In our judgment, if we need to look for a guarantee that the USA will honour its diplomatic assurances, the history of unswerving compliance with them provides a sure guide. We are satisfied that these diplomatic assurances will be honoured.”

48. In relation to the conditions of detention the fourth applicant would face in the United States, the High Court found that, if convicted, the fourth applicant would be sentenced to very lengthy terms of imprisonment and that, in all likelihood, a whole life tariff would be imposed. It found that, of itself, this would not constitute a breach of Article 3. On the question of the compatibility of detention at ADX Florence with Article 3, the High Court relied in particular on the understanding of the prison warden, Mr Robert Wiley, to the effect that if, after a full medical evaluation, it was determined that the fourth applicant could not manage his activities of daily living, it would be highly unlikely that he would be placed at ADX Florence rather than at a medical centre. The High Court concluded:

> “First, the constitution of the United States of America guarantees not only 'due process', but it also prohibits 'cruel and unusual punishment'. As part of the judicial process prisoners, including those incarcerated in Supermax prisons, are entitled to challenge the conditions in which they are confined, and these challenges have, on occasions, met with success. Second, although Mr Wiley's evidence does not constitute the kind of assurance provided by a Diplomatic Note, we shall proceed on the basis that, if the issue of confinement in ADX Florence arose for consideration, a full and objective medical evaluation of the appellant's condition, and the effect of his disabilities on ordinary daily living and his limited ability to cope with conditions at ADX Florence would indeed be carried out. This would take place as soon as practicable after the issue arises for consideration, so that the long delay which appears to have applied to another high profile convicted international terrorist, who is now kept at an FOB [Federal Bureau of Prisons] medical centre because of his ailments would be avoided.”

49. Finally in respect of the Convention, the High Court rejected the applicant's argument that the extradition would be a disproportionate interference with his rights under Article 8 of the Convention.

50. In respect of the passage of time argument against extradition, the High Court accepted that the United States was the proper forum for any trial and that the prosecution's case had not been viable until the evidence of Ms Quinn and Mr Ujaama became available in 2003. For all three groups of charges, the fourth applicant had been unable to identify any witnesses who would have been available and who would have assisted his defence had the prosecution been brought sooner. The High Court was also not persuaded that it was more appropriate for the fourth applicant to be tried in the United Kingdom. The fourth applicant had argued that such a trial would have the added advantage of ensuring that his Article 6 rights would be preserved. However, in the High Court's view, there was no connection between the United Kingdom and the Bly, Oregon and Afghanistan offences. The absence of such a connection would eventually reinforce the argument, which would inevitably be made by the fourth applicant during any trial in the United Kingdom, that such a trial would be an abuse of process.

51. Having rejected each of the fourth applicant's arguments against extradition, the High Court accordingly dismissed his appeal. The fourth applicant then applied to the High Court for a certificate of points of law of general public importance under section 114 of the Extradition Act 2003 and for leave to appeal to the House of Lords. On 23 July 2008, the High Court refused both applications.

3. The possibility of the fourth applicant's readmission to the United Kingdom

52. On 8 February 2008, another Diplomatic Note was issued (no. 005) by the United States Embassy, which stated:

> "The Government of the United States assures the Government of the United Kingdom that if Mustafa Kamel Mustafa, aka Abu Hamza is acquitted or has completed any sentence imposed or if the prosecution against him is discontinued, not pursued or ceases for whatever reason, United States authorities will return Mustafa Kamel Mustafa, aka Abu Hamza to the United Kingdom, if he so requests."

On 31 July 2008, in a response to a request for clarification by the fourth applicant's solicitors, the United Kingdom Government stated that the undertaking should not be taken necessarily as a guarantee of readmission: any application would be considered in accordance with the legislation in force at the material time.

B. Relevant domestic and international law

1. Extradition treaty between the United Kingdom and the United States

53. At the material time, the applicable bilateral treaty on extradition was the 1972 UK – USA Extradition Treaty (now superseded by a 2003 treaty).

Article IV of the 1972 treaty provided:

> "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out."

Article XII of the 1972 treaty guaranteed compliance with the specialty rule by providing as follows:

> "(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State –
>
> (a) until after he has returned to the territory of the requested Party; or
>
> (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition."

2. The United Kingdom Extradition Act 2003

54. Part II of the Extradition Act 2003 regulates the extradition of individuals to "category 2" territories which, by designation of the Secretary of State, includes the United States. Pursuant to sections 71(4), 73(5), 84(7) and 86(7) of the Act, the Secretary of State has the power to designate certain States are not being required to provide *prima facie* evidence in support of their requests for extradition. By Article 3 of the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (Statutory Instrument 2003 No. 3334) this includes, *inter alia*, the United States. Article 2 of the same order designates the United States as a category 2 territory.

Section 87 requires the judge at the extradition hearing to decide whether a person's extradition would be compatible with Convention rights within the meaning of the Human Rights Act 1998. If the extradition would be compatible, the judge must send the case to the Secretary of State for his decision whether the person is to be extradited (section 87(3)).

Section 93 provides that once a case is sent for his decision, the Secretary of State must decide whether he is prohibited from ordering the extradition. He must not order a person's extradition if he could be, will be or has been sentenced to death (section 94); or there are no speciality arrangements with the category 2 territory which requests the extradition (section 95).

Sections 103 and 108 provide for the right of appeal to the High Court against the decisions of the judge and against an order for extradition made by the Secretary of State. Section 114 provides for a further appeal to the House of Lords from the High Court. Under section 114(3) an appeal requires the leave of the High Court or the House of Lords. Under section 114(4) leave to appeal 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 House of Lords.

4. Relevant United Kingdom case-law on Article 3 and extradition

a. ***R (Wellington) v. Secretary of State for the Home Department*** **[2008] UKHL 72**

55. The United States requested the extradition of Ralston Wellington from the United Kingdom to stand trial in Missouri on two counts of murder in the first degree. In his appeal against extradition, Mr Wellington argued that his surrender would violate Article 3 of the Convention, on the basis that there was a real risk that he would be subjected to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.

56. The appeal was heard by the House of Lords and dismissed on 10 December 2008. Although all five Law Lords agreed that the appeal should be dismissed, they gave different reasons for this conclusion. Lord Hoffmann, Baroness Hale and Lord Carswell found that, on the basis of *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161, Article 3, insofar as it applied to inhuman and degrading treatment and not to torture, was applicable only in attenuated form to extradition cases.

57. Lord Hoffmann, giving the lead speech, considered the Court's judgment *Chahal v. the United Kingdom*, 15 November 1996, § 81, *Reports of Judgments and Decisions* 1996-V. There, the Court stated that it should not be inferred from its remarks in *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161 that there was "any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged." Lord Hoffmann stated:

> "In the context of *Chahal*, I read this remark as affirming that there can be no room for a balancing of risk against reasons for expulsion when it comes to subjecting someone to the risk of torture. I do not however think that the Court was intending to depart from the relativist approach to what counted as inhuman and degrading treatment which was laid down in *Soering* and which is paralleled in the cases on other articles of the Convention in a foreign context. If such a radical departure from precedent had been intended, I am sure that the Court would have said so."

58. Lord Scott and Lord Brown, on the other hand, considered that the extradition context was irrelevant to the determination of whether a whole life sentence amounted to inhuman and degrading treatment. They found no basis in the text of Article 3 for such a distinction. Lord Brown also considered that the Court, in *Chahal* and *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008-..., had departed from the previous, relativist approach to inhuman and degrading treatment that it had taken in *Soering*. There was no room in the case-law of this Court for a concept such as the risk of a flagrant violation of Article 3's prohibition against inhuman or degrading treatment or punishment, particularly given the caution the Court exercises in finding a violation of Article 3 on this ground. Thus if a mandatory life sentence violated Article 3 in a domestic case, the risk of such a sentence would preclude extradition to another country.

59. However, none of the Law Lords found that the sentence likely to be imposed on Mr Wellington would be irreducible; having regard to the powers of the Governor of Missouri, it would be just as reducible as the sentence at issue in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-....

60. All five Law Lords also noted that the Court in *Kafkaris* had only said that the imposition of an irreducible life sentence may raise an issue under Article 3. They found that the imposition of a whole life sentence would not constitute inhuman and degrading treatment in violation of Article 3 *per se*, unless it were disproportionate.

61. Mr Wellington lodged an application with this Court on 16 December 2008 (no. 60682/08) and, on 19 December 2008, the President of the Chamber to which the application was allocated decided to apply Rule 39 of the Rules of Court and to indicate to the Government of the United Kingdom that he should not be extradited until further notice.

b. *R (Bary and Al-Fawwaz) v. the Secretary of State for the Home Department* [2009]EWHC 2068 (Admin)

62. Mr Bary and Mr Al-Fawwaz were to be extradited to the United States to stand trial on terrorism charges. They challenged their extradition in the High Court, *inter alia*, on the basis that, if convicted, they would be detained at ADX Florence. In rejecting that contention, Lord Justice Scott Baker, delivering the judgment of the court, found:

> "Although near to the borderline the prison conditions at ADX Florence, although very harsh do not amount to inhuman or degrading treatment either on their own or in combination with SAMs [special administrative measures] and in the context of a whole life sentence.
>
> ... Whether the high article 3 threshold for inhuman or degrading treatment is crossed depends on the facts of the particular case. There is no common standard for what does or does not amount to inhuman or degrading treatment throughout the many different countries in the world. The importance of maintaining extradition in a case where the fugitive would not otherwise be tried is an important factor in identifying the threshold in the present case.
>
> Had the claimants persuaded me that there was no prospect that they would ever enter the step down procedure whatever the circumstances then in my view the article 3 threshold would be crossed. But that is not the case. The evidence satisfies me that the authorities will faithfully apply the criteria described by warden Wiley [see paragraph 88 below] and that the stringency of the conditions it imposes will continue to be linked to the risk the prisoner presents. Further, there is access to the US courts in the event that the [Federal Bureau of Prisons] acts unlawfully."

Mr Bary and Mr Al-Fawwaz have since lodged applications with this Court and, on 23 December 2009, the President of the Chamber to which applications were allocated also decided to apply Rule 39 of the Rules of Court and to indicate to the Government of the United Kingdom that the applicants should not be extradited until further notice. Those applications have been adjourned pending the Court's consideration of the present applications.

5. Guidance for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States of America

63. The above guidance was signed on 18 January 2007 by the Attorney General of the United States of America, Her Majesty's Attorney General and also, for its application to Scotland, by the Lord Advocate. It sets out a series of measures that prosecutors in each State should take to exchange information and consult each other in such cases and to determine issues

which arise from concurrent jurisdiction. A case with concurrent jurisdiction is defined as one which has the potential to be prosecuted in both the United Kingdom and the United States.

6. Relevant law and practice of the United States of America

a. the Constitution of the United States

64. The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

65. The Eighth Amendment provides, *inter alia*, that cruel and unusual punishments shall not be inflicted. In *Sattar v. Gonzales* and *Ajaj v. United States*, the United States District Court for the District of Colorado heard challenges to conditions of detention at ADX Florence and to the imposition of special administrative measures. In dismissing both challenges it followed the case-law of the United States Supreme Court that "only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation" (*Wilson v. Seiter* 501 U.S. 294, 304 (1991); *Rhodes v. Chapman* 452 U.S. 337, 347 (1981)). The plaintiff in *Sattar* had limited contact with his family and attorneys and so the "severe limitations of ADX confinement" did not amount to such a deprivation. The plaintiff in *Ajaj* similarly failed to demonstrate an Eighth Amendment violation. The United States Court of Appeals for the Tenth Circuit reached a similar conclusion in *Hill v. Pugh* 75 Fed. Appx. 715. It rejected the claim that ADX conditions were cruel and unusual where the plaintiff was isolated in his cell twenty-three hours a day for five days a week and twenty-four hours the remaining two days. His minimal physical requirements of food, shelter, clothing and warmth had been met and so the conditions showed neither an "unquestioned and serious deprivation of basic human needs" nor "intolerable or shocking conditions".

66. The Fourteenth Amendment protects against deprivation of life, liberty or property without due process of law. The extraction of evidence by means which shocked the conscience was found to be in violation of the Fourteenth Amendment by the United States Supreme Court in *Rochin v. California* 342 US 165 (1952) (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 49 and 50, ECHR 2006-IX). In *Portelli v. LaVallee* 469 F.2d 1239, the United States Court of Appeals for the Second Circuit considered the admissibility of evidence obtained from a witness by police torture, which was used at Portelli's trial. The court distinguished between a

confession which had been coerced from a defendant, which would be excluded as a matter of law, and the testimony of a witness forced to make a pre-trial statement who had subsequently asserted that his testimony at trial was true. In the latter case the evidence was admissible, and it was for the jury to consider whether it was true. A different result was reached by the United States Court of Appeals for the First Circuit in *Lafrance v. Bohlinger* 499 F.2d 29 where it was found that a trial court was under a duty to exclude the evidence of a third party if, after conducting its own inquiry, it found evidence to have been unconstitutionally coerced. In *Samuel v. Frank* 525 F.3d 566 the Seventh Circuit acknowledged that different approaches had been taken and concluded that, as a general rule, evidence obtained by coercion of the defendant had to be excluded. However, evidence obtained by coercion of a witness need only be excluded if it were completely unreliable.

b. Military Order No. 1

67. On 13 November 2001 the President of the United States of America issued Military Order No. 1 on the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”. The Military Order applies to non-citizens of the US with respect to whom there is reason to believe that they are members of Al-Qaeda or have aided and abetted acts of international terrorism (section 2 of the Order, referred to as designation as enemy combatants). Any individual subject to the Order shall be detained at an appropriate location designated by the Secretary of Defence outside or within the United States (section 3 of the Order). They shall, when tried, be tried by military commission for any and all offences triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death (section 4 of the Order). Military tribunals shall have exclusive jurisdiction with respect to offences committed by such persons, who shall not be privileged to seek any remedy in any court of the United States, any court of any foreign nation, or any international tribunal (section 7 of the Order).

c. The President's executive orders of 22 January 2009

68. Shortly after his inauguration, President Obama promulgated a series of executive orders in respect of detainees at Guantánamo Bay and elsewhere. The first, entitled “Review and disposition of individuals detained at Guantánamo Bay Naval Base and closure of detention facilities” provided for an immediate review of the detainees' detention and the possibility of their transfer and prosecution. It also provided for the humane standard of treatment of detainees, including respect for Common Article 3 of the Geneva Conventions, and, pending the review, the suspension of proceedings before military commissions. A second executive order

provided for a review of "detention policy options" in respect of other individuals captured or apprehended in connection with armed conflicts and counter-terrorism operations. A third executive order entitled "Ensuring lawful interrogations" made rules for the humane treatment and interrogation of individuals detained in armed conflict, including that Common Article 3 should apply as a "minimum baseline" to such detainees.

d. The applicants' possible sentences, the federal sentencing system and presidential pardons

69. In a letter to the United Kingdom Government of 19 November 2007, the Director of International Affairs at the United States Department of Justice set out the maximum sentences the first applicant would face if convicted on the four counts with which he is charged. The first count, conspiracy to provide material support to terrorists, carries a maximum sentence of fifteen years in prison. The second count, providing material support to terrorists, carries the same maximum sentence. The third count, conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country, carries a maximum sentence of life in prison. The sentence for the final count, money laundering, is a maximum of twenty years. As, the third applicant is charged with the same offences (save for the money laundering charge) the possible sentences would be the same.

70. An affidavit of Mr Bruce, sworn on 9 December 2005, set out the maximum sentences that apply to the second applicant in respect of the four counts with which he is charged. These sentences were confirmed by the Department of Justice in a letter dated 23 March 2010. The maximum sentence on the first count, conspiracy to provide and conceal material support and resources to terrorists, is five years' imprisonment. The second count, providing and concealing material support and resources to terrorists, carries a maximum sentence of fifteen years' imprisonment. The remaining two counts, providing material support and resources to a foreign terrorist organisation and conspiracy thereto, each carry a maximum sentence of five years' imprisonment. If convicted on all four counts, and if sentenced to the maximum term of imprisonment on each count with the sentences to be served consecutively, the maximum total sentence of imprisonment would therefore be one of fifty years' imprisonment. By letter of 28 January 2010, the Department of Justice also emphasised that none of the offences required that the statutory maximum (or even a statutory minimum) term of imprisonment.

71. A fourth letter, dated 11 November 2008, set out the maximum sentences for the offences with which the fourth applicant is charged. For the Yemen hostage-taking counts, the relevant statute provides that, if the death of a person results, the maximum sentences are the death penalty or life imprisonment. For the Bly, Oregon charges, the maximum sentence are the same as those which would apply to the second applicant. For the

Afghanistan charges, the maximum sentences are fifteen years' imprisonment for each count.

72. The 19 November 2007 letter from the United States Department of Justice also set out the applicable law on federal sentencing. Trial judges had broad sentencing discretion but were obliged to consider the sentencing guidelines promulgated by the United States Sentencing Commission, a judicial body. Where a defendant was sentenced to life imprisonment there were four ways for his sentence to be reduced. First, it could be reduced by the sentencing court upon the motion of the Director of the Bureau of Prisons upon a finding that "extraordinary and compelling reasons warrant such a reduction". This generally involved inmates with terminal illnesses. Second, if a defendant provided substantial assistance in the investigation of a third party, the Government could move within one year of sentencing for a reduction in the sentence. Third, if the defendant had been sentenced on the basis of sentencing guidelines which were subsequently lowered by the Sentencing Commission (the judicial body responsible for promulgating the guidelines) then the sentencing court could reduce the term of imprisonment. Fourth, the defendant could request commutation by the President. Other reductions were available to those sentenced to less than life imprisonment. Fifty-four days' credit was available each year for exemplary compliance with institutional disciplinary regulations; this allowed for release after 85% of the sentence had been served.

Additionally, any defendant had a statutory right of appeal against sentence to a federal court of appeals and, though rare, to the United States Supreme Court. He could also seek review of the sentencing by the trial judge within one year of the sentence being passed.

73. According to information obtained from the Department of Justice website and submitted by the applicants, 734 pardons had been granted by Presidents George Bush, Bill Clinton and George W. Bush. The majority had been granted in respect of drugs and financial offences. There had been one commutation from a sentence of death to one of life imprisonment without the possibility of parole in a murder case and no pardons in terrorism cases.

7. Relevant international texts

a. The International Covenant on Civil and Political Rights (the ICCPR)

74. The United Kingdom and United States are both signatories to the ICCPR. Article 7 where relevant provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 10 § 1 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

b. The United Nations Convention Against Torture

75. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by General Assembly Resolution 39/46 of 10 December 1984 and entered into force 26 June 1987. The United Kingdom and the United States have both ratified the Convention. The Convention provides as follows:

> “Article 1
>
> 1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> Article 3
>
> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
>
> Article 15
>
> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.
>
> Article 16
>
> 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
>
> 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.”

b. The European Prison Rules 2006

76. The European Prison Rules are recommendations of the Committee of Ministers to Member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided in legislation and policies by those rules and to ensure wide dissemination of

the Rules to their judicial authorities as well as to prison staff and inmates (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 31, ECHR 2007-XIII. The latest version of the rules was adopted by the Committee of Ministers in Recommendation (2006)2. Rule 23 (on legal advice), where relevant, provides:

> “23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.
>
> ...
>
> 23.4 Consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential.
>
> 23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.”

Rule 24 (on contact with the outside world), where relevant, provides:

> “24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.
>
> 24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.
>
> ...
>
> 24.10 Prisoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to and reading newspapers, periodicals and other publications and by listening to radio or television transmissions unless there is a specific prohibition for a specified period by a judicial authority in an individual case.
>
> ...
>
> 24.12 Prisoners shall be allowed to communicate with the media unless there are compelling reasons to forbid this for the maintenance of safety and security, in the public interest or in order to protect the integrity of victims, other prisoners or staff.”

Rule 53 (on special high security or safety measures) provides:

> “53.1 Special high security or safety measures shall only be applied in exceptional circumstances.
>
> 53.2 There shall be clear procedures to be followed when such measures are to be applied to any prisoner.
>
> 53.3 The nature of any such measures, their duration and the grounds on which they may be applied shall be determined by national law.
>
> 53.4 The application of the measures in each case shall be approved by the competent authority for a specified period of time.
>
> 53.5 Any decision to extend the approved period of time shall be subject to a new approval by the competent authority.

53.6 Such measures shall be applied to individuals and not to groups of prisoners.

53.7 Any prisoner subjected to such measures shall have a right of complaint in the terms set out in Rule 70.”

c. Recommendation 2003(23)

77. Recommendation 2003(23) of the Committee of Ministers (on the management by prison administrations of life sentence and other long-term prisoners) where relevant provides:

“20. a. Maximum security units should be used only as a last resort and allocation to such units should be regularly reviewed.

b. Within maximum security units, regimes should distinguish between the handling of prisoners who pose an exceptional risk of escape or danger should they succeed, and the handling of those posing risks to other prisoners and/or to those working in or visiting the prison.

c. With due regard to prisoner behaviour and security requirements, regimes in maximum security units should aim to have a relaxed atmosphere, allow association between prisoners, freedom of movement within the unit and offer a range of activities...”

D. Relevant objective information

1. Diplomatic assurances

78. On 30 March 2008 Amnesty International published a report entitled “To be taken on trust? Extraditions and diplomatic assurances in the 'war on terror'”. The report set out the organisation's concerns that the United States Government, in its efforts to counter terrorism, had given broad discretionary powers to the President. It had also failed to observe its international human rights commitments, notably through the torture and ill-treatment of terrorist suspects, the practice of “extraordinary rendition”, and the detention of enemy combatants at Guantánamo Bay without trial or access to a lawyer and without any capacity to challenge that detention through the US courts. For detention at Guantánamo Bay, the report alleged that a number of governments had sought assurances of lawful and humane treatment of detainees (and the United States had given such assurances); nonetheless, ill-treatment had in fact occurred there.

The report also referred to the fact that two “rendition flights” had passed through the United Kingdom territory of Diego Garcia, contrary to earlier assurances provided by the United States Government. On this basis, the report stated that with regard to the Diplomatic Notes issued in respect of the first and second applicants in the present case:

“Amnesty International has no evidence to suggest that the diplomatic assurances themselves have not been issued in good faith, or to suggest that the US authorities are planning to remove either Babar Ahmad or Haroon Aswat from the criminal justice system after extradition, and it does not intend to call into question the independence

of the federal prosecutors involved in this case. Nevertheless, the organization stresses that the administration has shown a tendency in the 'war on terror' to improvise measures relating to detentions, under broad notions of presidential authority. Indeed, until Jose Padilla and Ali al-Marri were designated as "enemy combatants" by presidential order, there were no public indications whatsoever that they would be taken out of the normal criminal justice system, and even their legal representatives were not forewarned. Thus, Amnesty International considers that the fact that Babar Ahmad and Haroon Aswat would be in that same system after their extradition is not in itself a guarantee that they would remain so.

...

Amnesty International is not in a position to assess the likelihood of Babar Ahmad or Haroon Aswat being designated as 'enemy combatants' in the event that they are extradited to the USA. Nevertheless, the organization considers that while the USA's global 'war' paradigm remains in place, this remains a possible outcome, despite the diplomatic assurances provided by the US Embassy in London. If at any point, perhaps after receiving new information from interrogations or other intelligence-gathering methods, or even in the event of an acquittal, the administration considered that either man constituted a particular risk to national security or a potential source of intelligence, it could decide to extract him from the criminal justice system and deposit him into its 'enemy combatant' regime. This would fit a pattern in which the US authorities have treated hundreds of individuals it has taken into its custody as potential sources of intelligence or risks to security rather than agents with criminal liability, even as it has accused them publicly of involvement in terrorism.

The UK government continues to point to the case of Mohammed Al Hasan al-Moayad, a Yemeni national who was extradited to the USA from Germany in November 2003, tried in US federal court in 2005 on charges of conspiring to provide material support for terrorism and sentenced to 75 years in prison. He was extradited following a diplomatic assurance given to the German authorities by the US Embassy in Germany that he would not be subjected to trial by military commission. The UK government suggested in its October 2007 brief to the European Court of Human Rights that the al-Moayad example is 'important', and the UK High Court stated that the al-Moayad case 'lent some support' to the assertion that the diplomatic notes in the Ahmad and Aswat cases would be honoured. However, Amnesty International considers that, just as prior prosecutions in the federal courts did not stop the subsequent designation as 'enemy combatants' of Jose Padilla and Ali al-Marri and their extraction from those same courts on the basis of presidential orders, the extradition and conviction of Mohammed al-Moayad does not obviate the risk faced by Babar Ahmad or Haroon Aswat. If the circumstances were deemed by the US authorities to so warrant, there is a real risk that they might in the future be removed from the normal criminal justice system and designated as 'enemy combatants' in the name of national security."

Amnesty concluded that the assurances lacked a clear legal basis or mechanism by which the persons concerned could enforce them.

2. Rendition

79. The above report also set out a number of cases of rendition by the United States to other States and concluded that:

"Amnesty International deeply regrets that the US government indeed turned to the rendition of detainees – rendition to interrogation and indefinite detention without

> charge, rather than to trial – as part of its regime of secret and other unlawful detentions operated in the 'war on terror'. The USA's decision to create and continue to operate this detention regime has negative consequences for international cooperation on law enforcement.”

80. In Resolution 1433, (on the lawfulness of detentions by the United States in Guantánamo Bay), adopted on 26 April 2005, the Parliamentary Assembly of the Council of Europe called on the United States to cease the practice of rendition and called on member states to respect their obligation under Article 15 of the Torture Convention. Subsequently, the Committee on Legal Affair and Human Rights of the Parliamentary Assembly prepared two reports on rendition after extensive enquiries by its Rapporteur, Mr Dick Marty. The first, of 12 June 2006, documented a “global network of rendition”, which the United States used to transfer terrorist suspects between countries for interrogation. The second, of 11 June 2007, found that the rendition programme was operated in conjunction with secret places of detention, which in turn formed part of the United States' “High Value Detainees” programme. The report concluded that the implementation of that programme had given rise to repeated serious breaches of human rights.

81. The United Kingdom Intelligence and Security Committee examines the policy, administration and expenditure of the United Kingdom intelligence and security services. Its members are drawn from both Houses of Parliament. In its special report on rendition (published in July 2007) it examined *inter alia* the rendition of two British residents, Bisher al-Rawi and Jamil el-Banna, from The Gambia to Afghanistan and then to Guantánamo Bay by the United States Government, a case which it defined as “rendition to detention” rather than “extraordinary rendition”. (The Committee understood the former term to mean extra-judicial transfer of persons from one jurisdiction or state to another, for the purposes of detention and interrogation outside the normal legal system; it understood the latter term to mean the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.) The men had come to the attention of the United States as a result of intelligence passed to it by the United Kingdom Security Service. At paragraphs V and Y of its conclusions, the Committee expressed the view that:

> “This case shows a lack of regard, on the part of the U.S., for UK concerns. Despite the [United Kingdom] Security Service prohibiting any action being taken as a result of its intelligence, the U.S. nonetheless planned to render the men to Guantánamo Bay. They then ignored the subsequent protests of both the Security Service and the Government. This has serious implications for the working of the relationship between the U.S. and UK intelligence and security agencies.
>
> ...

> What the rendition programme has shown is that in what it refers to as 'the war on terror' the U.S. will take whatever action it deems necessary, within U.S. law, to protect its national security from those it considers to pose a serious threat. Although the U.S. may take note of UK protests and concerns, this does not appear materially to affect its strategy on rendition."

82. The Eminent Jurists Panel of the International Commission of Jurists, published a report dated 4 May 2009 entitled "Assessing Damage, Urging Action" on terrorism, counter-terrorism and human rights. In it, the Panel expressed its "deep concern" at the extent to which responses to the events of 11 September 2001 had "changed the legal landscape in countries around the world". It found that "the international legal order based on respect for human rights, built up painstakingly during the second half of the last century, is in jeopardy." The report also drew attention to:

> "the cloak of secrecy that surrounds detention and interrogation to gather intelligence; to methods used for that purpose including torture and cruel, inhuman or degrading treatment; and to the impunity allowed to those who engage in these practices."

3. Mohammed Al-Moayad

83. In a letter dated 26 January 2008 to the present applicants' representatives, Mr Robert Boyle, an attorney representing Mohammed Al-Moayad provided further information on his case and conditions of detention since this Court's decision (see *Al-Moayad v. Germany* (dec.), no. 35865/03, 20 February 2007). The letter stated that Mr Al-Moayad was subjected to special administrative measures before, during and after his trial He was held in isolation pre-trial and subjected to a total restriction on access to others save for his attorneys and representatives of the Yemeni consulate. The latter were permitted monthly visits in the presence of FBI officials and there were restrictions on what could be discussing during those visits. After his conviction, Mr Al-Moayad was moved to ADX Florence, Colorado. He remained under special administrative measures until mid-2007 when the restrictions on communication were relaxed. Mr Boyle also stated that he had observed a continuing deterioration in Mr Al-Moayad's mental and physical health as a result of his solitary confinement at ADX Florence. In a supplementary letter of 5 June 2009, provided in the context of the present proceedings, Mr Boyle stated that Mr Al-Moayad's conviction had been overturned by the United States Court of Appeals for the Second Circuit. Mr Al-Moayad remained at ADX Florence until May 2009. He was transferred to the Metropolitan Correctional Center (MCC) in New York City to await re-trial. At the MCC, though not subjected to special administrative measures he remained in solitary confinement, with no access to television, radio or radio material.

84. According to various newspaper reports, in August 2009 Mr Al-Moayad pleaded guilty to one charge of aiding Hamas and was sentenced to time served. He was then deported to Yemen.

4. Special Administrative Measures

85. In the context of proceedings before this Court, the applicants produced six statements from American attorneys on special administrative measures. The first, from Mr Thomas Loflin, stated that it was "virtually certain" that special administrative measures would be imposed on the applicants from the moment they entered US custody until they completed any sentences they received.

The second statement was provided by Mr Joshua Dratel, a New York attorney with extensive experience as defence counsel in federal terrorism trials, who stated that:

> "The deleterious effects of the S.A.M's [sic] on a defendant's capacity to prepare adequately for trial, to assist in his own defense, and to maintain a semblance of mental stability and physical health are addressed in my article ['Ethical issues in defending a terrorism case: how secrecy and security impair the defense of a terrorism case' (2003) 2 *Cardozo Public Law, Policy and Ethics Journal* 81]...It is my opinion that the S.A.M.'s interfere irreparably with a defendant's right to a fair trial and the right to prepare and assist in the defense, and constitute inhuman or degrading treatment however those terms are defined. The S.A.M.'s often present the single most difficult obstacle to preparing a case for trial, and in keeping the defendant's attention on substantive issues."

In the journal article (at pages 84-85) Mr Dratel elaborated:

> "The mental and physical deterioration of the client is palpable after only a short period of time. The complete isolation, lack of exercise and emotional and mental stimulation, all manifest themselves clearly, steadily, and increasingly over time. The client has difficulty concentrating, becomes irritable, listless, demanding, and uncooperative, progressively loses appetite, which further impairs his health, and frequently develops physical and somatic symptoms of the pervasive stress under which he suffers".

The article also sets out the difficulties caused to the defence. In Mr Dratel's view, defendants became preoccupied with their conditions of confinement and unable to focus on the charges against them. Increased paranoia on the part of a defendant subjected to special administrative measures made him unlikely to provide his lawyers with proper factual accounts. These measures also inhibited the attorney's ability to investigate the case adequately since they severely limited contributions from the defendant with respect to contacting sources, obtaining full disclosure of the prosecution case and reviewing evidence at the place of detention.

The third, fourth and fifth statements were provided by Mr Sean Maher. The third and fourth statements were provided to the representatives of the first three applicants; the fifth statement was provided via email to the fourth applicant's solicitor. Mr Maher represented Mr Syed Hashmi who, in

May 2007, had been extradited from the United Kingdom to the United States to stand trial on terrorism charges in the Southern District of New York. In the three statements, Mr Maher stated that Mr Hashmi had been subjected to special administrative measures, including solitary confinement for nearly twenty-four hours per day. He was prohibited from contacting other inmates. His communications and visits had been severely restricted: only his mother and father had been cleared to visit him and only one visit by one family member was permitted every two weeks. He was entitled to a minimum of one telephone call per month with a member of his immediate family. The trial judge in the case had rejected a challenge to the imposition of those measures. Mr Maher expressed his concern about his client's ability to prepare for trial and for his health and well-being; the potential lifelong infliction of sensory deprivation and solitary confinement "shock[ed] the conscience" and ought to be considered cruel and unusual punishment. A copy of the full terms of special administrative measures applied to Mr Hashmi was also provided by the fourth applicant's solicitor. The United States Department of Justice indicated that Mr Hashmi's trial date was set for 28 April 2010.

The fifth statement was provided by Mr Edgardo Ramos who had defended Mr Kassir. Mr Ramos said that Mr Kassir had spent one and half years at the Metropolitan Correctional Center where he was held continuously in a cell with no natural light. His only human contact was with his lawyers, Swedish consulate officials and prison staff. Telephone and postal contact with his family was allowed but had been suspended for lengthy periods for minor infractions of the special administrative measures. He was not allowed access to television or radio and limited to five books in his cell at any one time. His only exercise facility was the provision of a cell identical to his own. As a result Mr Kassir had gone on hunger strike and had to be force-fed. Mr Ramos also spoke of the difficulties in preparing for trial that the special administrative measures caused. When administrative appeals against the measures failed, motions were filed with the trial judge. However, the motions were refused.

5. The length of any pre-trial detention

86. The United States Department of Justice has also provided information on how long the applicants would spend in pre-trial detention. If extradited, the United States Government would request that the applicants be detained pending trial but it would be for a judge to grant or refuse that request. The Sixth Amendment (paragraph 64 above) guaranteed a speedy trial. The Speedy Trial Act 18 U.S.C. § 3161 generally required trials to start within seventy days of a defendant's first appearance in court. A court could exclude certain periods of time from the calculation of the seventy-day period, most typically to allow it to consider pre-trial motions and to allow the defendant to prepare for trial. Periods of delay resulting

from a continuance granted by the trial judge were also excluded from that seventy day period but a continuance could not be granted because of "general congestion in the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government" (§ 3161(h)(7)(c)).

6. "Supermax" detention

87. The parties have provided a great deal of evidence in respect of "supermax" detention, including conditions of detention at ADX Florence, and its effects on prisoners.

88. The Government submitted two statements from Mr Wiley. He stated ADX Florence was the only federal "supermax" prison. It was a 490-bed facility with single occupancy cells, which opened in 1994. The decision to place an inmate at ADX Florence relied on a classification system based on the risk posed by a prisoner; no individual was housed there based on the nature of his conviction alone and not all convicted terrorists in the custody of the Federal Bureau of Prisons were detained there. There were procedures for the initial classification of a prisoner, review of his conditions and regular progress reports, in which he participated. There were nine housing units of various levels of security, which allowed the Bureau of Prisons to employ a phased privilege system where prisoners who demonstrated progress could move through the various housing units and eventually be transferred to less secure institutions ("the step-down programme"). It would take a minimum of thirty-six months to work through this system but this period was often extended in order that staff could satisfy themselves that a prisoner's compliant behaviour was not simply a result of the heightened controls and security procedures at ADX Florence. The move from one stage to the next was based on objective factors, including evidence of progress and good conduct and, most critically, whether the original reasons for placement at ADX Florence had been "sufficiently mitigated". There were five prisoners who had been convicted of international terrorism offences who were at various stages of the step-down programme. In the General Population Unit – the medium level of security – each cell was eighty-seven square feet (eight metres squared) and included shower and bathroom facilities. Prisoners received a minimum of eleven hours solitary exercise out of their cell each week. Prisoners were visited daily by staff. They consumed their meals in their cells but could communicate with other prisoners by shouting or by speaking through the ventilation system. They received one monthly telephone call and up to five social visits. They could send and receive correspondence. Cells had black and white televisions with sixty channels and additional closed-circuit, institutional programming. This provided religious, educational and recreational activities. There was a law and leisure reading library. There was mental, dental and psychological care.

Prisoners who were subjected to special administrative measures were housed in the special security unit (H-Unit) where the conditions were substantially the same as in general population units except that for each cell was approximately 75.5 square feet (seven metres squared) and prisoners received five hours exercise per week.

89. Further information was provided in a letter of 9 April 2007 from the Assistant Director/General Counsel of the Bureau of Prisons to Human Rights Watch. At the time there were over forty prisoners with terrorism convictions at ADX, most of whom were housed in either general population units or H unit; the longest period of detention in general population units was over eleven years. In the total prison population, there were twenty-five prisoners who were subjected to special administrative measures.

90. The applicants relied on a series of newspaper articles on ADX Florence, including a *Time* magazine article of 5 November 2006 which described spartan cells and almost no contact between prisoners and other people, since food, mail and laundry were passed through a slot in the cell door. Prisoners were strip-searched before they were allowed to exercise. There were also staff shortages which caused irregular meal times, reduced telephone calls and exercise time. A television interview with a former warden also described frequent force-feeding as a result of hunger strikes by prisoners in protest at their conditions.

91. The applicants also provided a report by a psychiatrist, Dr Terry Kupers, which had been prepared specifically for the present proceedings. He considered that a supermax prison regime did not amount to sensory deprivation but there was an almost total lack of meaningful human communication. This tended to induce a range of psychological symptoms ranging from panic to psychosis and emotional breakdown. All studies into the effects of supermax detention had found such symptoms after sixty days' detention. Once such symptoms presented, it was not sufficient to return someone to normal prison conditions in order to remedy them. If supermax detention were imposed for an indeterminate period it also led to chronic despair. Approximately half of suicides in prison involved the 6-8% of prisoners held in such conditions. The effects of supermax conditions were worse for someone with pre-existing mental health problems. Dr Kuper's conclusions were supported by a number of journal articles by psychologists and criminologists, which the applicants provided.[1]

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1. C. Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49:1 *Crime and Delinquency* 124; L. Kurki and N. Morris “The Purposes, Practice, and Problems of Supermax Prisons” (2001) 28 *Crime and Justice*, 385; J. Pizarro and V.M.K. Stenius, “Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates” (2004) 84:2 *Prison Journal* 248; S. Grassian, “Psychiatric Effects of Solitary Confinement” (2006) 22 *Journal of Law and Policy* 353.

92. The applicants also provided a copy of the Istanbul statement on the use and effects of solitary confinement, which was adopted at the International Psychological Trauma Symposium in December 2007. Its participants included the United Nations Special Rapporteur on Torture. The statement included the following on the effects of solitary confinement:

> "It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.
>
> Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well being.
>
> The use of solitary confinement in remand prisons carries with it another harmful dimension since the detrimental effects will often create a de facto situation of psychological pressure which can influence the pretrial detainees to plead guilty. When the element of psychological pressure is used on purpose as part of isolation regimes such practices become coercive and can amount to torture."

93. The applicants also submitted a report from the Civil Rights Clinic at the University of Denver, which had acted for a number of prisoners at ADX Florence. The report noted that conditions were even more severe for those prisoners who were subjected to special administrative measures. For example, such prisoners could only communicate with his "attorney of record". This made it impossible to contact an attorney to request representation to challenge special administrative measures. Requests made directly to the court to have an attorney appointed were denied. There had been no successful challenges to designation to ADX Florence and challenges could only succeed where confinement in supermax affected the prisoner's date of release or where he was severely mentally ill. The report accepted that the step-down programme could take a minimum of three years but prisoners could be removed from it and returned to "general population" if they were found guilty of misconduct or for "administrative reasons". The report highlighted the cases of several Muslim prisoners who had fulfilled all of the criteria for admission to the step-down programme except for the requirement that the original reasons for placement at ADX Florence be "sufficiently mitigated". However, several prisoners had only been transferred from lower security prisons to ADX Florence after 11 September 2001 (despite no evidence of their involvement in the attacks) and thus it was difficult for them to demonstrate that the reason for their

placement had been mitigated. Two Muslim clients of the Civil Rights Center had spent respectively five and ten years in general population units but had not been admitted to the step-down programme. Another had spent five years in a general population unit and had only been admitted after retaining the Center in a lawsuit.

94. Both the applicant and Government made reference to a letter dated 2 May 2007 from Human Rights Watch to the Director of the Federal Bureau of Prisons which followed a tour the organisation had been given of ADX Florence. The letter expressed concerns that a number of prisoners convicted of terrorism offences had been sent to the prison based on the nature of their crimes and, despite good conduct since their arrival, had remained in general population units and thus outside the step-down programme for up to nine years. The letter made suggestions for improvement in respect of recreation, mail, telephone use, the library. It also noted that progress was to be made on better meeting prisoners' religious needs, such as the provision of a full-time imam and commended the educational programmes available through the prison's television system. The letter urged the prison authorities to investigate reports of retaliation against prisoners who were on hunger strike in the form of transfer to harsher cells. The letter also said that Human Rights Watch was extremely concerned about the effects of long-term isolation and highly limited exercise on the mental health of prisoners and criticised reports of rushed consultations between prisoners and psychologists, as well as the fact that evaluations were carried out via closed circuit television.

95. The applicants obtained a second letter from Human Rights Watch, dated 21 August 2008, which stated that Human Rights Watch considered conditions at ADX violated the United States' treaty obligations under the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. It was unremarkable that "minor adjustments" had been made to the regime but it remained in essence one of "long-term and indefinite incarceration in conditions of extreme social isolation and sensory deprivation".

96. Human Rights Watch's second letter also provided extracts from two United Nations reports from 2006 on supermax detention. In the first, the United Nations Human Rights Committee stated:

> "The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers

> of severely mentally ill persons in these prisons, as well as in regular in [sic] U.S. jails.
>
> The State party should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners."

97. The second report was from the United Nations Committee Against Torture, which stated:

> "The Committee remains concerned about the extremely harsh regime imposed on detainees in 'supermaximum prisons'. The Committee is concerned about the prolonged isolation periods detainees are subjected to, the effect such treatment has on their mental health, and that its purpose may be retribution, in which case it would constitute cruel, inhuman or degrading treatment or punishment (art. 16).
>
> The State party should review the regime imposed on detainees in 'supermaximum prisons', in particular the practice of prolonged isolation."

COMPLAINTS

98. The applicants complained that there would be violations of Articles 2, 3, 5, 6, 8 and 14 of the Convention if they were extradited to the United States.

First, the applicants alleged that the diplomatic assurances provided by the United States were not sufficient to remove the risk of their being designated as enemy combatants at the conclusion of the criminal proceedings pending against them in violation of Articles 3, 5, 6 and 8 of the Convention. Second, invoking the same Articles of the Convention, they alleged that those assurances were also insufficient to prevent their being subjected to extraordinary rendition. Third, the first and third applicants alleged that designation as enemy combatants would place them at real risk of being subjected to the death penalty in violation of Articles 2 and 3. Fourth, all four applicants complained that there was a real risk that they would be subjected to "special administrative measures" in violation of Articles 3, 6, 8 and 14. Fifth, relying on the same Articles, they complained that there was a real risk they would be detained in a "supermax" prison such as ADX Florence. Sixth, the applicants alleged that, if extradited, they would face sentences of life imprisonment without parole and/or extremely long sentences of determinate length in violation of Articles 3 and 8.

Seventh, in respect of Article 6, the applicants alleged that there was a real risk of a flagrant denial of justice in violation of Article 6 § 1 of the Convention due to the possible use at their trials of evidence obtained by treatment or threat of treatment of third parties, contrary to Article 3 of the Convention. Eighth, the first three applicants alleged that there would be a further violation of Article 6 § 1 because the extensive publicity which the

United States Government's counter-terrorism efforts had attracted would prejudice any jury, particularly when they were to stand trial in New York. Ninth, the fourth applicant alleged that any jury in his case would be prejudiced by the fact that he had been identified as an international terrorist by the United States Government. Tenth, the first three applicants alleged that a violation of Article 6 would occur because the threat of a long sentence by United States prosecutors would lead to coercive plea bargaining amounting to a flagrant denial of justice.

Eleventh, under Article 8 the fourth applicant alleged that there would be a disproportionate interference with his private and family life in the United Kingdom if he were to be extradited.

Twelfth, and more generally, the third applicant alleged that the failure of the Director of Public Prosecution to consider whether to prosecute him in the United Kingdom in accordance with the guidance on concurrent jurisdiction was of relevance to his complaints, in particular the proportionality of any interference with his Convention rights that would be caused by his extradition to the United States. His submission that the United Kingdom was the natural forum for prosecution was adopted by the first and second applicants.

Finally, the first and second applicants alleged that their detention by the United Kingdom authorities pending their extradition was in violation of Article 5 of the Convention as there was no requirement that the United States Government demonstrate a *prima facie* case against them in its extradition request.

THE LAW

99. The relevant Articles of the Convention are as follows. Article 2, where relevant, provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law...

Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5, where relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 6, where relevant, provides:

"1. In the determination ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.."

Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Finally, Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Designation as enemy combatants

1. The parties' submissions

100. The Government first noted that the domestic courts had proceeded on the premise that the applicants met the criteria for designation as enemy combatants and that, if such a designation were made, there would be a real risk of a violation of Articles 3, 5 and 6 of the Convention. Without commenting on the correctness of that premise, the Government stated that they were content to proceed on the same basis. The critical issue was, therefore, the meaning and likely effect of the Diplomatic Notes provided by the United States. While the Government accepted that the existence of assurances did not absolve a Contracting State from its obligation to consider their practical application (*Saadi v. Italy* [GC], no. 37201/06, § 148, ECHR 2008-...), there was a presumption of good faith in considering such assurances. The Court's decision in *Al-Moayad*, cited above, where it had accepted that the diplomatic assurances given by the United States to Germany were sufficient to prevent violations of Articles 3 and 6, was directly applicable to the present cases. Indeed, in the present cases, the assurances given in the Diplomatic Notes were more comprehensive than those given in *Al-Moayad*. The applicants' argument was, in essence, a serious allegation of bad faith on the part of the United States Government. The applicants had not been able to provide the powerful evidence such an allegation required. Instead, it was to be noted that in one hundred and fifty years of extradition arrangements between the United Kingdom and United States there had not been a single example of a failure to honour a diplomatic undertaking. This had not changed since the events of 11 September 2001: by the *Al-Moayad* case, the United States had shown its willingness to give and abide by assurances in terrorist cases; the United States was no doubt acutely aware of the extensive international interest in the present proceedings and therefore was fully appraised of the long-term strategic significance of honouring its assurances. The Diplomatic Notes were not *ultra vires*. They were not issued in defiance of a binding rule of United States law; the application of Military Order No. 1 was not mandatory under United States law. Assurances were specifically contemplated by Article IV of the 1972 Extradition Treaty and were commonly given by way of Diplomatic Notes.

There was no risk created by an alleged lack of clarity in the language used in the Notes. No significance was to be attached to the use of “upon extradition” and “pursuant to his extradition” in each Note: each Government understood these terms to have the same effect in the Notes, namely that the applicants would not be designated as enemy combatants under Military Order No 1 but would rather be subject to normal United States criminal procedures. It was also of some relevance that the particular applicants' cases and the Diplomatic Notes themselves had been the subject

of detailed and careful consideration in the domestic courts, whose reasons the Government adopted. In respect of the concerns of Amnesty International in its report of 10 March 2008 (summarised at paragraph 78 above), the Government observed that the report recognised there was no evidence to suggest that the assurances had not been issued in good faith, or to suggest that the United States authorities were planning to remove the first and second applicants from the criminal justice system. As the High Court had found in the fourth applicant's case, the comments made in the report were based on very little evidence. Regarding the report's reference to a clear breach of an assurance by the United States Government as to rendition flights passing through Diego Garcia, it was the United States authorities who had discovered that their assurance had been incorrect and who, on their motion, had informed their British counterparts that the assurance had arisen from an unintentional error. This demonstrated that the United States could be relied upon to act in good faith.

101. The applicants contended that the question whether there was a real risk of designation as enemy combatants could only be assessed in the light of evidence of the United States' approach towards individuals suspected of possessing information on terrorism. The applicants were of potential, ongoing interest as subjects for interrogation to obtain such information. The applicants relied on the Amnesty International report, which they argued corroborated the evidence they had put before the domestic courts. They also submitted an affidavit from an American lawyer who specialised in terrorism cases, Mr Clive Stafford Smith, in which he stated that the reference to “federal court” in the Diplomatic Notes did not guarantee a trial in the civilian courts but would allow for trial in any court created by the federal government. The applicants also argued that the real risk of designation as enemy combatants did not even require a finding of bad faith; the ambivalent language of the Diplomatic Notes allowed for transfer to Guantánamo Bay after trial or even designation as an enemy combatant in the event of an acquittal. They relied on the fact that, in one of the first trials at Guantánamo Bay, the defendant, Salim Ahmed Hamdan, had been acquitted of the most serious charge against him but the United States Department of Defense had announced that he would not be released but rather detained indefinitely as an enemy combatant. Moreover, the breadth of the counter-terrorism powers of the President of the United States meant the assurances could not be regarded as binding on him. There was the real possibility that he could rely on a change in circumstances after extradition to justify invoking Military Order No. 1. It was not sufficient to rely on the history of extradition arrangements with the United States, as the Government had done: the attitude of the United States Government had changed fundamentally as a result of the events of 11 September 2001. Moreover, when a country regularly practiced a particular form of a

violation of the Convention, its assurances in respect of an individual could not remove the risk to that individual.

In the applicants' opinion, the Court's decision in *Al-Moayad* was of limited assistance. Al-Moayad had made narrow claims to the Court on the basis of his possible designation as an enemy combatant; in the present case, the applicants submitted that they had provided a fuller picture, particularly on the ill-treatment of terrorist suspects held within the United States. Al-Moayad had also failed to refer to the possibility of his designation as an enemy combatant post-trial or provided any evidence of the United States' failure to observe its domestic and international obligations, including assurances. Against the background of wide executive discretion enjoyed by the President of the United States, the single case of Al-Moayad did not permit the conclusion that the risk of designation had been completely removed for all time.

102. The fourth applicant also submitted that he was at greater risk of designation since senior United States officials had stated that they considered him to be a significant national security threat. In respect of the Amnesty International report, he argued that the High Court in his case had been wrong to ignore the careful analysis contained therein. The High Court's reliance on a "history of unswerving compliance" with diplomatic assurances was inadequate when the United States considered itself not to be bound by the rule of law in its "war on terror". In support of this submission he relied on the report of the Eminent Jurists Panel, summarised at paragraph 82 above.

103. In their final reply to the observations of the first and second applicants, the Government submitted that there was a distinction between these applicants and Salim Ahmed Hamdan. The latter had initially been detained by the Department of Defense who designated him as an enemy combatant before he was sent for trial. By contrast, the first and second applicants would never be in the custody of the Department of Defense but, upon surrender to the United States, would be held by the Department of Justice, stand trial and then if acquitted, or on the expiry of their sentence, returned to the United Kingdom.

2. The Court's assessment

104. The Court notes the Government's observation that the domestic courts proceeded on the premise that the applicants met the criteria for designation as enemy combatants and that, if such a designation were made, there would be a real risk of a violation of Articles 3, 5 and 6 of the Convention. It also notes the Government were content to proceed on that premise and the Court will do the same. It therefore agrees with the Government that the critical issue is the meaning and likely effect of the Diplomatic Notes provided by the United States and whether they are

sufficient to remove any real risk of the violations of which the applicants complain.

105. The Court recognises that, in extradition matters, Diplomatic Notes are a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition. It also recognises that, in international relations, Diplomatic Notes carry a presumption of good faith. The Court considers that, in extradition cases, it is appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States. Consequently, the Court considers that it was appropriate for the High Court, in its judgment concerning the first and second applicants, to accord a presumption of good faith to the United States Government.

106. However, as the Government have observed, the existence of assurances does not absolve a Contracting State from its obligation to consider their practical application. In determining whether this obligation has been met in the present cases, the Court considers that some importance must be attached to the fact that, as in the case of *Al-Moayad*, the meaning and likely effect of the assurances provided by the United States Government were carefully considered by the domestic courts in the light of a substantial body of material concerning the current situation in the United States of America (see *Al-Moayad*, cited above, § 68). The domestic courts were able to do so because the United States Government were a party to those proceedings and were able to adduce evidence such as to assist the those courts with any doubts as to the meaning and effect of the assurances that had been given.

107. In further assessing the practical application of the assurances which have been given by the United States Government, the Court must also attach some importance to the fact that the applicants have been unable to point to a breach of an assurance by the United States Government that has been given to the United Kingdom Government (or indeed any other Contracting State) in the context of an extradition request, before or after the events of 11 September 2001. While the applicants and Amnesty International have relied on the alleged breach of assurances given in respect of Diego Garcia, on the basis of the United Kingdom Government's observations, the Court is satisfied that those assurances were given in error and corrected by the United States Government. In any event, the assurances given in the present cases are materially different: they are specific to the applicants and are unequivocal. There is no suggestion that they have been given in error.

108. It is true that these assurances have been given by the United States Government to the United Kingdom Government and not to the applicants. On this basis, Amnesty International has observed in its report that there is no mechanism by which the applicants could enforce the assurances which

have been given. However, in the Court's view that would only be relevant if it were established that there was a real risk of a breach of those assurances. It is the President of the United States who would be responsible for any designation as enemy combatants and it has not been alleged that those responsible for the prosecution of the applicants would wish to breach (or indeed be capable of breaching) the assurances by another means. Consequently, the only question is whether the President would breach the assurances which the United States Government have given. Whatever the breadth of the executive discretion enjoyed by the President in the prosecution of the United States Government's counter-terrorism efforts, the Court is unable to accept that he, or any of his successors, would commit such a serious breach of his Government's assurances to a extradition partner such as the United Kingdom; the United States' long-term interest in honouring its extradition commitments alone would provide sufficient dissuasion from doing so. While the Amnesty International report relied on by the applicants has highlighted the plight of Jose Padilla and Ali Massir who were taken out of the civilian justice system by way of designation as enemy combatants, the Court agrees with the High Court that these cases must be distinguished from the present cases: neither individual was extradited to the United States, still less designated an enemy combatant in breach of an assurance to the contrary. It is, in the Court's view, of greater significance that both Mohammed Al-Moayad and Oussama Kassir (the latter the co-accused of the second applicant) have been extradited from Contracting States, prosecuted in federal district courts and served terms of imprisonment in federal prisons. Their prosecution provides sufficient assurance that, despite the affidavit provided by Mr Stafford Smith, there is no risk that the present applicants will be tried in anything other than an ordinary federal court.

109. Finally, with regard to the risk of designation as enemy combatants at the conclusion of any trial, the Court is not persuaded by the applicants' contention that this could be done compatibly with the assurances provided in the Diplomatic Notes. The Diplomatic Notes do not place any temporal limitation on the assurance that there will be no such designation. The Court is also assured by the United Kingdom Government's submission that they and the United States Government do not understand there to be any difference between the terms “upon” and “pursuant to” extradition in the Diplomatic Notes.

110. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Extraordinary rendition

1. The parties' submissions

111. The Government submitted that there was no risk of the applicants being subjected to rendition (extraordinary or otherwise) for four reasons. First, as the High Court had found, this would be in violation of Article XII of the 1972 Treaty and a gross breach of the trust subsisting between the United States and the United Kingdom. Second, there was no evidence that any person extradited to the United States, from the United Kingdom or anywhere else, had been subsequently subjected to rendition. Third, they referred to the executive orders signed by the President of the United States on 22 January 2009 (see paragraph 68 above), which foresaw the eventual closure of the camp at Guantánamo Bay and initiated a review of detention policy for those captured or apprehended. Fourth, for the fourth applicant, the Government relied on Diplomatic Note 005, of 8 February 2008 (see paragraph 52 above), which demonstrated the United States' commitment to return him to the United Kingdom in the circumstances set out in the Note. The fourth applicant was not stateless; he remained a British citizen. The allegations made by the fourth applicant in respect of Mr Al-Libi (see below and paragraph 12 above) had no bearing whatever on his case.

112. The applicants submitted that there had been no undertaking by the United States Government not to expose them to rendition, particularly after trial. Referring to the reports set out at paragraphs 79–81 above, they argued that there was overwhelming evidence that the United States had resorted to rendition for the purposes of torture in other States. The Government's contention that there was evidence of rendition after extradition had to be examined and analysed in the context of the United States' counter-terrorism efforts after 11 September 2001, which supported the conclusion that it would take whatever steps were necessary to protect its national security, regardless of the concerns of allies such as the United Kingdom. The fourth applicant further argued that Diplomatic Note 005 was insufficient to remove the risk of rendition: there was nothing in the Diplomatic Note that would prevent the United States sending him to Egypt. He also relied on his claim to have been deprived of his Egyptian nationality and his claim to be effectively stateless. The United Kingdom Government's refusal to give any guarantee of readmission to the United Kingdom (see paragraph 52 above) lent support to that contention. The risk that he would be subjected to rendition was also supported by the fact that this had happened to one of the original co-conspirators in his case, Mr Al-Libi.

2. The Court's assessment

113. For the purposes of its examination of this complaint the Court will adopt the definitions of rendition and extraordinary rendition used by the United Kingdom Intelligence and Security Committee in its special report on rendition (see paragraph 81 above). It therefore takes "rendition to detention" to mean extra-judicial transfer of persons from one jurisdiction or state to another, for the purposes of detention and interrogation outside the normal legal system and "extraordinary rendition" to mean the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.

114. In assessing whether there is a real risk to the applicants, the Court begins by observing that extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention. It would be incompatible with a Contracting State's obligations under the Convention if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition. To do so would be to collude in the violation of the most basic rights guaranteed by the Convention. However, for substantially the same reasons for its findings in respect of the risk of designation as enemy combatants, the Court is satisfied that none of the applicants is at risk of rendition, whether extraordinary or otherwise. The Diplomatic Notes do not give any express assurances in respect of rendition but it would hardly be compatible with the assurance that the applicants will be tried before federal courts with the "full panoply of rights and protections that would otherwise be provided to a defendant" if the United States Government were to decide not to try the applicants and instead subject them to rendition. The same considerations would apply to any attempt to subject the applicants to rendition after their conviction or acquittal because the Court considers that, as with Oussama Kassir and Mohammed Al-Moayad, it is the clear intention of the United States Government that, if convicted, the applicants will serve any custodial sentence in a federal prison. If they are acquitted, it is equally clear that they will be returned to the United Kingdom.

115. For the fourth applicant, the Court does not accept that Diplomatic Note 005 would allow rendition to Egypt: on the contrary, it provides the clearest possible statement that the United States Government have no intention of sending him anywhere but back to the United Kingdom. The United Kingdom Government have not guaranteed that they will allow re-admission. However, as they have stated, the applicant is a British citizen and will remain so until his appeal against their decision to deprive him of British citizenship is determined. Therefore, the Court considers that a risk of removal to Egypt would only materialise if the applicant lost his appeal,

was deprived of his British citizenship, and, upon acquittal or expiry of any sentence imposed upon him in the United States, the United Kingdom Government refused to allow him entry to the United Kingdom, despite the clear wish of the United States Government to do so. In the Court's view, the mere possibility of this chain of events does not create a real risk of ill-treatment in Egypt.

116. For these reasons, this part of the applications also must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention..

C. The death penalty

1. The parties' submissions

117. The parties were asked for their observations on whether there was a real risk of the first or third applicants being subjected to the death penalty if charged on a superseding indictment or as a consequence of a trial before a Military Commission. The Government submitted that any complaint made by the first and third applicants in respect of the death penalty added nothing to their complaints that the Diplomatic Notes could not be relied upon. The Diplomatic Notes stated that the death penalty would not be sought or imposed and that the applicants would not be tried before Military Commissions. Article XII of the 1972 Treaty provided protection against superseding indictments and the United States authorities had provided an affidavit for the High Court from one of the federal prosecutors responsible for the prosecution of the first applicant, Mr Robert Appleton, which contained the specific assurance that there would be no risk of a superseding indictment.

118. The first applicant submitted that, pursuant to the doctrine of conspiracy in federal criminal law, if it were proved that one of his alleged co-conspirators had murdered a United States citizen this would render the first applicant liable to a capital charge. It had been found by the English courts that the risk of a superseding capital indictment was negligible on the basis of the relevant Diplomatic Note and the assurance provided by Mr Appleton. However, the former was ineffective as an assurance, for the same reason that it was ineffective as an assurance against designation as an enemy combatant. For the latter, this assurance was also ineffective because it suspended the normal law on conspiracy and, in any event, the final decision on whether to seek the death penalty was one for the Attorney-General, not Mr Appleton. The third applicant adopted these submissions.

2. The Court's assessment

119. For the same reasons that it has found there is no real risk that the applicants would be designated as enemy combatants or subjected to extraordinary rendition, the Court considers that there is no real risk that they would be subjected to the death penalty either as a result of a superseding indictment or trial by a Military Commission. It may well be that, as the first applicant has argued, the doctrine of conspiracy would support a capital charge against him. However, the United States prosecutors have already set out the charges which he would face upon extradition and made clear that the death penalty is not sought in respect of any of them. To the extent that, in federal cases, the final decision on whether to seek the death penalty rests with the Attorney-General and not the attorney responsible for the prosecution, there is no reason to suggest that the Attorney-General is any more likely to breach the terms of the United States' assurances than the President (see paragraph 108 above). In so far as the first and third applicants submit that the death penalty could be imposed by a Military Commission, the Court notes first, that trials by Military Commissions are currently suspended pending a review of that practice (see the executive order set out at paragraph 68 above) and second, that such a trial could take place only if the applicants were designated as enemy combatants, of which the Court has found there is no real risk. Finally, the Court can find no grounds that would suggest the assurances in respect of the death penalty only apply to the indictments which are pending against the first and third applicants and not to any superseding indictments. Even if this were the case, for the reasons given by the High Court and relied upon by the United Kingdom Government, the Court is satisfied that there is no real risk of superseding indictments being returned against the applicants. Although it has not been raised in respect of their trial, the same considerations would apply to the second and fourth applicants. For these reasons, this part of the applications also must be rejected as manifestly ill-founded.

D. Pre-trial detention: special administrative measures

1. The parties' submissions

a. The Government

120. The Government accepted that there was a real risk that special administrative measures would be imposed on the applicants. As to whether those measures would violate Article 3, they relied on the High Court's conclusion that the evidence before it did not “begin to establish a concrete case under Article 3” (see paragraph 30 above). Similarly, they relied on the High Court's conclusion that the imposition of special administrative

measures would not result in any prejudice at their trial, still less that a flagrant denial of justice would occur.

b. The first three applicants

121. The first three applicants submitted that, in rejecting their Article 3 claim, the domestic courts had failed to take into account the full severity of special administrative measures. Those measures involved a drastic reduction in contact with others for a prolonged period of time. This, they contended, had to be characterised as amounting to solitary confinement. In respect of Article 6, the applicants considered that the domestic courts had failed to address the allegation that the United States prosecutors regularly used the imposition of special administrative measures in order to coerce defendants into plea bargains. The only way out of detention under special administrative measures was by co-operation with the authorities. The domestic courts had also erred in their assessment of the effect of such measures on the trial process. The ability of the authorities to review attorney-client communications would significantly impair the applicants' ability properly to prepare their defence. The effect of solitary confinement on their mental health would further impair their preparation. Relying on Article 14, the applicants also stated that they knew of no case where special administrative measures had been imposed on a non-Muslim. It was notable that the High Court had criticised the United States Government for failing to answer repeated requests for statistics on the imposition of special administrative measures which, the applicants alleged, would demonstrate that they were only imposed on Muslim defendants. These submissions on Articles 3, 6 and 14 were, in their view, clearly supported by the statements of Mr Dratel, Mr Loflin, Mr Maher and Mr Ramos summarised at paragraph 85 above, which demonstrated the deleterious effects of special administrative measures on defendants in terrorism cases.

122. In respect of Articles 3 and 6, the third applicant also emphasised the fact that he had bipolar disorder and had been diagnosed in June 2009 with Asperger syndrome. He produced two reports from consultant psychiatrists to that effect. The first report predicted a serious risk of suicide if the third applicant were placed in solitary confinement for a long period. The report also stated that, if he became severely depressed before trial, the third applicant would be unable to do justice to himself at trial, to give instructions to his lawyers and actively participate in his defence. The second report stated that the third applicant was suffering from a severe episode of depressive disorder, including persistent thoughts of self-harm and suicide. This had been adversely affected by his detention pending extradition in conditions of high security at HMP Long Lartin and was forecast to deteriorate further. The report concluded that, by virtue of his Asperger syndrome and depressive disorder, the third applicant was an extremely vulnerable individual who would be more appropriately placed in

a specialist service for adults with autistic disorders. The third applicant argued that his conditions of detention at HMP Long Lartin were relatively benign compared with the severity of a regime of special administrative measures and so, if he were extradited, there would be a greater risk of suicide or deterioration in his mental health.

123. The first and second applicants made no submission on the effect special administrative measures would have on them in light of the state of their mental health. However, in their final observations in respect of the compatibility of their likely sentences with Article 3, the applicants' representatives drew the Court's attention to the fact that the first applicant had been diagnosed with post-traumatic stress disorder and this had been exacerbated by his conditions of detention at HMP Long Lartin. They further informed the Court that the second applicant had been diagnosed with schizophrenia and a deterioration in his condition had necessitated his transfer to Broadmoor Hospital, a high-security psychiatric hospital, where he remained under the care of a consultant psychiatrist.

c. The fourth applicant

124. The fourth applicant considered that, given his high security profile, he was likely to be subjected to special administrative measures that were similar to those imposed upon Mr Hashmi. The Court had emphasised that prolonged periods of solitary confinement were undesirable, particular when a prisoner was on remand. Mr Hashmi had experienced greater restriction on his contact with the outside world than the applicant in *Ramirez Sanchez v. France* [GC], no. 59450/00, ECHR 2006-IX, admittedly for a shorter period of time. His conditions of detention were comparable to those found to have violated Article 3 of the Convention in *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

2. The Court's assessment

125. The Court notes that it is not in dispute that, if extradited, special administrative measures would be imposed on the applicants: the only question is whether such measures would be in violation of Articles 3, 6 and 14 of the Convention. The Court also notes that the applicants could be subjected to special administrative measures for the entire time that they were in United States' custody, that is, before and after trial. After trial, if convicted and given custodial sentences, special administrative measures could be imposed in conjunction with detention at a “supermax” detention facility. Therefore the Court considers that it should examine the imposition of special administrative measures in two stages: first, in the pre-trial phase and second, in the post-trial phase of detention, where it is most appropriately examined in section E below, that is, in conjunction with the applicants' complaints in respect of post-trial detention at a supermax detention facility such as ADX Florence.

a. Article 3

126. The Court considers that the circumstances in which solitary confinement will violate Article 3 are now well-established in its case-law. It has previously observed that complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment (see *Messina v. Italy (no. 2)* (dec.), no. 25498/94, ECHR 1999-V, quoted with approval by the Grand Chamber in *Ramirez Sanchez v. France*, cited above, § 123). Thus while prolonged removal from association with others is undesirable, the assessment whether the minimum level of severity has been met will depend on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (*Rohde v. Denmark*, no. 69332/01, § 93, 21 July 2005). Finally, the Court recalls the Grand Chamber's ruling in *Ramirez Sanchez*, cited above, § 139 that:

> "...in order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended. The decision should thus make it possible to establish that the authorities have carried out a reassessment that takes into account any changes in the prisoner's circumstances, situation or behaviour. The statement of reasons will need to be increasingly detailed and compelling the more time goes by.
>
> Furthermore, such measures, which are a form of 'imprisonment within the prison', should be resorted to only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the Prison Rules adopted by the Committee of Ministers on 11 January 2006 [see paragraph 76 above]. A system of regular monitoring of the prisoner's physical and mental condition should also be set up in order to ensure its compatibility with continued solitary confinement."

127. In considering each of these criteria in turn, the Court notes first that, apart from references in the statements of the American attorneys to the absence of natural light in certain cells at the Metropolitan Correctional Center, the applicants do not submit that their physical conditions of pre-trial detention (for example, the size of their cells, the provision of food and medical care, the quality of sanitary facilities and so on) would be in violation of Article 3 (see, by contrast, *Mathew v. the Netherlands*, no. 24919/03, ECHR 2005-IX; *Ilaşcu and Others*, cited above, §§ 438 and 439).

128. In respect of the stringency of special administrative measures, the Court considers that the experiences of Mr Al-Moayad, Mr Hashmi and Mr Kassir are instructive. While the Court sees no reason to doubt the testimony of the three men's attorneys that the imposition of special administrative measures has had an adverse effect on their well-being, it is also of some relevance that none of the three men was deprived of all

human contact during their detention at the Metropolitan Correctional Center. Whilst subjected to special administrative measures, they enjoyed regular access to their attorneys. Communications with family members were restricted but not completely prohibited. Mr Al-Moayad and Mr Kassir were also allowed visits from consular officials. In *Ramirez Sanchez*, cited above, §§ 131–135, the Grand Chamber considered that twice-weekly visits from a doctor, a monthly visit from a priest and frequent visits from the applicant's lawyers were sufficient for it to conclude that the applicant had not been in complete sensory isolation or total social isolation and that his isolation was "partial and relative". Previously, in *Öcalan v. Turkey* [GC], no. 46221/99, § 194, ECHR 2005-IV, where the applicant's lawyer and family members were able to visit once a week, the applicant was able to communicate with the outside world by letter and had books, newspapers and a radio at his disposal, the Grand Chamber considered that the applicant had not been kept in sensory isolation. The Court reached a similar conclusion in respect of the special prison regime laid down in section 41 *bis* of the Italian Prison Administration Act, where prisoners were not allowed to make calls, were limited to a one-hour visit per month and were prohibited from contact with prisoners under a different prison regime (*Argenti v. Italy*, no. 56317/00, § 22, 10 November 2005; *Bastone v. Italy* (dec.), no. 59638/00, ECHR 2005-II (extracts); *Messina v. Italy* (dec.), no. 25498/94, 8 June 1999). The Court considers that the limitations on contact which were imposed on Mr Al-Moayad, Mr Hashmi and Mr Kassir are analogous to these cases and it finds no reason to suppose that the present applicants would be subject to more stringent limitations on contact.

129. In respect of the duration of the special administrative measures, the Court also finds that no issue would arise under Article 3. It appears that Mr Hashmi has not yet been tried and thus has been subjected to special administrative measures pre-trial for nearly three years. However, Mr Al-Moayad spent one year and ten months in detention from the time of his extradition to the date of his sentencing (see *Al-Moayad*, cited above, §§ 24–28). For Mr Kassir the equivalent period was approximately two years (paragraph 1111 above). These periods of detention are considerably shorter than the periods of confinement at issue in *Ramirez Sanchez* (eight years and two months), *Öcalan* (five years) and the Italian cases cited above, where the periods in question ranged from four years and six months in *Messina* to ten years and five months in *Bastone*. Moreover, as the information provided by the United States Department of Justice shows, there are clear constitutional and statutory guarantees of a speedy trial. The general rule is that a trial must take place within seventy days. Continuances can only be granted by the trial judge, principally in order to allow more time for the preparation of the defence. This would also have the effect of ensuring that the imposition of special administrative measures at the pre-trial stage was not unduly long.

130. As to the objective pursued by special administrative measures, the Court readily understands, particularly in terrorist cases, that prison authorities will find it necessary to impose extraordinary security measures (see *Ramirez Sanchez*, cited above, § 125; *Öcalan*, cited above, § 192). In the present case, the United States authorities are best placed to assess the need for such measures and there is no evidence they do so lightly or capriciously. There is also no risk of arbitrariness in the decision to impose special administrative measures. The decision is made with reference to established criteria. It is one that must be made by the Attorney-General personally. He must make specific findings and give reasons for his decision. The decision is subject to annual review and judicial challenge.

131. Finally, the third applicant has provided evidence that his mental health would be adversely affected if he were to be subjected to special administrative measures. The first and second applicants have also relied on their mental health conditions, albeit only in respect of the length of the possible sentences. The Court has frequently found that Article 3 is relative and depends on all the circumstances of a case (see, for example, *Keenan v. the United Kingdom*, no. 27229/95, §§ 108 and 115, ECHR 2001-III). It is prepared to accept, therefore, that the imposition of special administrative measures would have a greater effect on all three applicants than detainees who were in good mental health. However, it is not convinced that any adverse effect would automatically mean that the very imposition of such measures would entail a violation of Article 3. It has not been suggested that, prior to extradition, the United Kingdom authorities would not advise their United States counterparts of the applicants' mental health conditions or that, upon extradition, the United States authorities would fail to provide appropriate psychiatric care to them. It has also not been argued that psychiatric care in United States federal prisons is substantially different to that provided at HMP Long Lartin and there is also no reason to suggest that the United States authorities would ignore any changes in the applicants' conditions or that, if they did present any suicidal tendencies or symptoms of self-harm, they would refuse to alter the conditions of their detention to alleviate any risk to them. For the second applicant, who is no longer at HMP Long Lartin but is being cared for at Broadmoor Hospital, the Court does not doubt that the United States authorities would allow transfer to an equivalent high security hospital should that need arise after extradition.

For the foregoing reasons, the Court finds that the imposition of special administrative measures on the applicants before the trial would not violate Article 3 of the Convention.

b. Article 6

132. In *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 90 and 91, ECHR 2005-I, the Grand Chamber confirmed the principle first laid down in *Soering v. the United Kingdom*, 7 July 1989,

§ 113, Series A no. 161, that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of a fair trial in the requesting country.

133. The applicants' case is that this test is satisfied for three reasons: special administrative measures will coerce them into plea bargaining; their attorney-client privilege will not be respected; and the conditions of their detention will affect their mental health and, consequently, their ability to prepare for their trials. For the first, the Court finds there is no evidence to support the contention that special administrative measures are coercive. For example, neither Mr Al-Moayad nor Mr Kassir decided to plead guilty to the charges against him, despite being subjected to such measures. It is also highly unlikely that a United States District Court would accept a guilty plea where there was evidence of coercion. For the second, an accused's right to communicate with his legal representatives out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention (*Öcalan*, cited above, § 133). But, as the High Court observed, Article 6 and the Eighth Amendment to the Constitution of the United States are strikingly similar. There is every reason to believe that the trial judges in the applicants' trials would ensure proper respect for their rights under the Eighth Amendment. Moreover, it is clear from the affidavit of Ms Killion (see paragraph 29 above) that, even in the unique context of special administrative measures in terrorism cases, there has only been one case of monitoring of attorney-client conversations and for wholly exceptional reasons. There are, as Ms Killion averred, regulations in place to ensure that, even if monitoring does prove necessary, any privileged material does not reach the prosecution. For the third submission made by the applicants, the Court has already noted that there would be some adverse affect on their well-being if they were to be subjected to special administrative measures pre-trial. However, it does not find it established that this would impair significantly the preparation of their defence in the sense that it would render them unable to provide any kind of instructions to their lawyers. For example, those instructions could be provided at the earliest possible stage after each applicants' extradition. If, during the preparation of their defence or in the course of the trial, the applicants' lawyers felt that there was a significant impairment of their work, it would be open to them to bring their concerns to the attention of the trial judge. There would be the possibility of an appeal against any ruling the trial judge made. The Court also finds that the same considerations must apply in respect of the third applicant's submission that, if his mental health worsened as a result of special administrative measures, he would be unable to do justice to himself at trial.

The Court therefore considers that none of the applicants' heads of claim, taken either individually or cumulatively, points to a flagrant denial of

justice. Consequently, the imposition of special administrative measures before trial would not violate Article 6.

c. Articles 8 and 14

134. The applicants have stated that the imposition of special administrative measures would violate their rights under Article 8 of the Convention. The Court considers that no separate issue arises under this Article. Finally, the Court notes that the applicants maintain their assertion, which they made before the domestic courts, that special administrative measures are applied only to Muslims. However, no further evidence has been provided to this Court that would allow it to reach a different conclusion from the domestic courts. It is plain from Ms Killion's affidavit that, even if no statistics or examples have been provided, special administrative measure may apply to non-Muslims in terrorism cases and Muslims in non-terrorism cases. There is no evidence of a difference in treatment and so no issue arises under Article 14.

d. Conclusion

135. For the foregoing reasons, the applicant's complaints in respect of the imposition of special administrative measures before trial must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

E. Post-trial detention: "supermax" conditions of detention at ADX Florence and the continuation of special administrative measures

1. The Government's preliminary objection as to non-exhaustion

136. The Government considered that the first three applicants had failed to exhaust domestic remedies since they had only raised the question of their pre-trial detention in the domestic proceedings and had first raised the question of post-trial detention before the Court. The Extradition Act 2003 provided every opportunity to raise the point in the domestic courts. The applicants replied that, in the course of the domestic proceedings, the only available information about their conditions of detention had been that of the likelihood of special administrative measures. It had only emerged that there was a risk of post-trial detention at ADX Florence in the course of Abu Hamza's domestic proceedings challenging his extradition.

137. The Court recalls that the burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999,

§ 55). The Court agrees with the Government that proceedings under the Extradition Act 2003 provided an opportunity to raise domestically all relevant Convention arguments. However, that does not mean that it is satisfied that, had the applicants raised the question of post-trial detention at ADX Florence, it would have had a reasonable prospect of success. The applicants' submissions in respect of ADX Florence are indistinguishable from those advanced by Mr Bary and Mr Al-Fawwaz (see paragraph 62 above). Mr Bary and Mr Al-Fawwaz failed to persuade the High Court that conditions at ADX Florence amounted to ill-treatment within the meaning of Article 3. There is no indication that the point would have been decided any differently in the applicants' cases. For this reason, the Court considers that the Government's preliminary objection as to non-exhaustion must be dismissed.

2. The parties' submissions

138. The Government distinguished between the fourth applicant and the other three applicants. For the former, as the High Court had found, his medical condition would mean that, at most, he would only spend a short period of time at ADX Florence. As the fourth applicant's complaint had been based on long-term social isolation arising from detention there, no issue arose under Article 3.

139. However, the Government accepted that there was a real risk that the first three applicants would be detained at ADX Florence if convicted. The Government submitted that the consensus among respected commentators was that detention at ADX Florence would not *per se* violate Article 3. Hence, the only issue for the Court was whether there was a real risk that: (i) conditions at ADX Florence could develop such that they became incompatible with Article 3; and (ii) this would occur in circumstances where there would be no practical and effective remedy available within the United States. The Government submitted that, as the High Court found in *Bary and Al-Fawwaz*, neither limb of this test could be satisfied.

140. For the first limb, as a factual matter, the Government considered that a distinction had to be drawn between conditions at ADX Florence, a federal facility, and other "supermax" prisons run by certain American States. The reports produced by the applicants on the effects of other forms of supermax confinement were of limited assistance. The Government instead relied on the declaration of Mr Wiley, as summarised at paragraph 88 above as providing the most accurate picture of conditions there. The physical conditions of ADX Florence were satisfactory; they had to be contrasted with the Court's findings in *Ilaşcu and others*, cited above, §§ 240–245, and *Mathew*, cited above, § 217 where unsanitary conditions had been a factor in the findings of violations of Article 3. The Government also considered that the conditions at ADX Florence were significantly less

harsh that those which were found not to violate Article 3 in *Ramirez Sanchez*. The mental and social needs of prisoners at ADX Florence were adequately catered for. There was no sensory isolation or deprivation. There was out-of-cell exercise, between one and four telephone calls per month, at least five social visits per month, television and educational opportunities. Admission to ADX Florence was not arbitrary but based on objective criteria and not simply on the type of crime of which a prisoner had been convicted. The stringency of conditions imposed was linked to the risk a prisoner presented. A prisoner was not detained indefinitely in conditions of solitary confinement and could work his way through the layered system in thirty-six months. In phase three of the step-down programme prisoners were allowed to eat in groups and share common space. It was impossible to predict that the applicants would not enjoy a timely transition to less restrictive conditions. As noted in the Human Rights Watch report, the Bureau of Prisons had proved willing to make changes to conditions at ADX Florence, such as employing a full-time imam and providing approved Arabic books. In respect of the third applicant, the Government relied on the evidence of Mr Wiley that there was extensive medical and psychological care available at ADX Florence and added that the evidence showed the graver a prisoner's condition the less likely it was that he would remain within ADX Florence.

141. For the second limb, the Government submitted that prisoners in the United States enjoyed the protection of Article 7 of the ICCPR, Article 26 of the UN Convention Against Torture and the Eighth Amendment to the United States Constitution. Prisoners were able successfully to challenge their detention. In particular, in *Ajaj* (see paragraph 65 above), the District Court had found there was an obligation to provide an inmate with meaningful notice of the reasons why he had not been admitted to the step-down programme.

142. In the submission of the first three applicants, the Government could not assert that “there was a consensus among respected commentators” that ADX Florence was compatible with Article 3, particularly when the Government had not indicated who these respected commentators were. Instead, the evidence they had provided (summarised at paragraphs 87 to 97 above) clearly showed the deterioration in mental health that prolonged confinement in supermax prisons caused. They further submitted that conditions at ADX Florence were not compatible with international standards or with Article 3 of the Convention. This was demonstrated by the comments of the United Nations Human Rights Committee and the United Nations Committee Against Torture (see paragraphs 96 and 97 above). The applicants focussed on the stringency of conditions at ADX Florence, the regime of virtual solitary confinement and the significant periods of time that prisoners were required to spend in their cells. They also emphasised that, given the sentences they faced if convicted, there was a risk they would

spend the rest of their lives in such conditions. The conditions were analogous to, if not worse than, those found to be in violation of Article 3 in *G.B. v. Bulgaria*, no. 42346/98, 11 March 2004 and *Peers v. Greece*, no. 28524/95, ECHR 2001-III. For instance, in *G.B.*, the applicant was subjected to a stringent custodial regime for more than eight years, which involved twenty-three hours in his cell where he had to take all his meals; in *Peers*, despite the conditions of his cell, the applicant had at least been allowed to have his cell door open during the day. In respect of the requirement at ADX Florence for a prisoner to be strip-searched every time he went for recreation, the applicants observed that similar searches had been found to be in violation of Article 3 in *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II and *Lorsé and Others v. the Netherlands*, no. 52750/99, 4 February 2003. The applicants also relied on the fact that, in *Ramirez Sanchez*, cited above, § 145, the Grand Chamber had stated that solitary confinement, even in cases entailing only relative isolation, could not be imposed on a prisoner indefinitely. This was in clear contrast to the possibility of indefinite detention at ADX Florence. The Grand Chamber had also emphasised the need for review by an independent judicial authority of the merits of and reasons for prolonged solitary confinement; there was no such possibility in respect of ADX Florence.

143. The fourth applicant added that the High Court in his case had placed significant weight on Mr Wiley's understanding that, if it were determined he could not manage the activities of daily living, it was highly unlikely he would be placed at ADX Florence but rather at a medical centre. The fourth applicant invited the Court to approach Mr Wiley's statement with considerable caution as the rest of his evidence described a prison regime which was wholly at odds with the objective evidence and, as the statement was based on second-hand information, it was speculative. It did not exclude that the Bureau of Prisons would weigh the fourth applicant's medical needs against security considerations. There was no evidence of the standard the Bureau would apply in determining whether he was able to manage the activities of daily living and no evidence regarding conditions of detention at a medical centre. The “other high profile convicted terrorist” referred to in the High Court's judgment (quoted at paragraph 48 above) was Omar Abdel Rahman. He had spent six years at ADX Florence, despite suffering from medical problems that were equal to, if not worse than, those suffered by the fourth applicant. Mr Wiley had failed to explain why the fourth applicant would be treated any differently from Mr Rahman. In his final observations on this complaint, the fourth applicant argued that he would be detained at ADX Florence solely on the basis that the United States Government considered him to be a global terrorist, a designation that only applied to foreigners. This breached Article 14 of the Convention.

3. The Court's assessment

144. It is appropriate to consider first the case of the fourth applicant. The merits of his complaint turn entirely on whether he is at real risk of detention at ADX Florence. The Court sees no reason to question the conclusions of the Senior District Judge and the High Court that, at most, he would only spend a short period of time at ADX Florence. It is apparent that Mr Wiley's characterisation of conditions of detention at ADX Florence is different from the conclusions reached in other reports but his statement that a full medical examination would be carried out on the fourth applicant has not been contradicted. Therefore, there are no objective grounds for treating this statement with caution on this point, as the fourth applicant argued. There is also no evidence that the Bureau of Prisons, in carrying out the medical examination, would apply an inappropriate standard or that conditions at a medical centre would be incompatible with Article 3. Similarly, the fourth applicant has not provided any evidence capable of casting doubt on the High Court's conclusion that the medical examination would take place as soon as practicable and the delays which arose in Mr Rahman's case would avoided.

145. Lastly, if an issue arises under Article 3 in respect of ADX Florence it is on the basis of the prolonged periods of isolation that detainees experience and not their physical conditions of detention *per se*. In fact, the fourth applicant has not argued that a short period of detention at ADX Florence would be incompatible with Article 3. Even examining that issue *proprio motu*, the Court finds no issue would arise. The assessment of whether the minimum level of severity for Article 3 has been met is relative; it depends on all the circumstances of the case, including, where applicable, the state of health of the victim. For example, in *Price v. the United Kingdom*, no. 33394/96, ECHR 2001-VII a four-limb-deficient thalidomide victim with numerous heath problems was detained for three nights and four days. The Court considered that to detain the applicant in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3 of the Convention. It was also noted that no steps had been taken before committing the applicant to immediate imprisonment to ascertain where she would be detained or to ensure that it would be possible to provide facilities adequate to cope with her severe level of disability (§ 25 of the judgment). The fourth applicant's disabilities, while serious, do not reach the level of disability of the applicant in *Price*. Consequently, the problems encountered by the applicant in *Price* would be unlikely to arise in the fourth applicant's case for the short period of time he might spent at ADX Florence until a medical examination could be carried out; indeed it is precisely that medical examination which would provide the safeguard against ill-treatment that was so absent in *Price*.

The Court considers that these conclusions make it unnecessary to consider the fourth applicant's reliance on Article 14 but it is also clear from the objective evidence that there is no difference in treatment between nationals and non-nationals: both can be detained at ADX Florence. For these reasons, the Court finds that the fourth applicant's complaint in respect of detention at ADX Florence must be rejected as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

146. Turning to the first three applicants, who are at real risk of detention at ADX Florence, the Court considers that these complaints raise serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. They cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court therefore declares admissible the applicants' complaints based on Article 3 in respect of their possible detention at ADX Florence.

147. To the extent that their conditions of detention may be made stricter by the imposition of special administrative measures, it considers that this aspect of the complaint must also be declared admissible.

148. The Court also notes that the first three applicants relied on Articles 6 and 8 in respect of ADX Florence, as they had in respect of special administrative measures during pre-trial detention. However, there is no evidence that detention at ADX Florence would prevent the applicants from properly instructing their legal representatives, provided those representatives were on record as representing them. The Court also finds that no separate issue arises under Article 8 which cannot be considered under Article 3. The Court considers, therefore, that the applicants' complaints based on Articles 6 and 8 in respect of detention at ADX Florence should be declared inadmissible as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

F. The length of the applicants' possible sentences

1. The Government's preliminary objection as to non-exhaustion

149. The Government considered that the first three applicants had also failed to exhaust domestic remedies in respect of this complaint. Again, the Extradition Act 2003 provided every opportunity to raise the point in the domestic courts. The applicants replied that, in the course of the domestic proceedings, the issue had been raised in their arguments before the High Court and they had submitted affidavits to that court as to their likely sentences.

150. The Court considers that this preliminary objection must be rejected on similar grounds to those on which it has rejected the Government's preliminary objection in respect of detention at ADX Florence.

The applicants' submissions in respect of their possible sentences are indistinguishable from those advanced by Mr Wellington. Since Mr Wellington's appeal was rejected by the House of Lords, not just on the facts of his case but on the basis that Article 3 applied only in attenuated circumstances in the extradition context (see paragraphs 55–61 above), there is no indication that the point would have been decided any differently in the first three applicants' cases. For this reason, the Court considers that the Government's preliminary objection as to non-exhaustion must be dismissed.

2. The parties' submissions

151. The Government relied on the Grand Chamber's ruling in *Kafkaris*, cited above, and the House of Lords' ruling in *Wellington*. As the Department of Justice's letter of 19 November 2007 demonstrated, the United States criminal justice system clearly provided a broader range of procedures by which an individual sentenced to life imprisonment could have his sentence reduced than the system found not to violate Article 3 in *Kafkaris*. Accordingly, any life sentences which were imposed would both be *de jure* and *de facto* reducible. Moreover, none of the offences with which the applicants were charged carried mandatory life sentences. A trial judge in a United States federal court enjoyed a broad discretion in sentencing: the United States sentencing guidelines were not binding and a trial judge was free to impose any reasonable sentence within the range prescribed by statute. In respect of Mr Aswat, the Government relied on the 28 January 2010 letter (see paragraph 70 above) which reiterated that none of the offences with which he had been charged required a statutory maximum (or even a statutory minimum) term of imprisonment.

152. The applicants argued that there was a real risk that, if convicted of the charges against them, they would be given either life sentences or consecutive sentences approaching the seventy-five year sentence originally given to Al-Moayad (see *Al-Moayad*, cited above, § 28). For the first and third applicants, this was apparent from the offences with which they were charged. For Mr Aswat, the possibility of a life sentence had been made clear by the United States prosecutors when they interviewed him in the United Kingdom in April 2006. Such sentences presented a distinction without a difference from a life sentence without parole. They accepted that *Kafkaris* was authority for the proposition that the imposition of a life sentence would not in itself violate Article 3 provided it was reducible. However, none of the four ways a sentence could be reduced in the United States met that test. The first, release by the Bureau of Prisons, only really applied to those with terminal illnesses and could not reduce the sentences of the applicants who were in good health. The second, reduction within one year of sentence, required substantial assistance to the Government, which the applicants were unable to provide. For the third, the United States had

not suggested there was the remotest possibility of the sentencing guidelines being reduced. This argument was little different from suggesting that a sentence of imprisonment was potentially reducible because the law might change at some unspecified point in the future. As for commutation by the President, the evidence showed there had never been a commutation in respect of terrorism offences. Finally, the Court in *Kafkaris* had not been required to consider whether serving such a sentence in conditions such as ADX Florence was in violation of Article 3. In their final observations on this complaint, the first and second applicants also argued that, given the first applicant's post-traumatic stress disorder and the second applicant's schizophrenia, the imposition of a whole life sentence would have an aggravated impact on them.

3. The Court's assessment

153. The Court considers that, in respect of the first, third and fourth applicants, there is a possibility that life sentences will be imposed if they are convicted. In light of its case-law, particularly *Kafkaris*, the Court considers that this part of each application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. They cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It therefore declares these complaints admissible.

154. For the second applicant, the Court notes his submission that United States prosecutors told him in April 2006 that he risked a life sentence if convicted. Whatever may have been said, the Court prefers the evidence of the United States prosecutor, Mr Bruce, whose affidavit of 9 December 2005 (confirmed by the Department of Justice's letter of 23 March 2010) makes clear that the maximum sentence the second applicant faces is one of fifty years' imprisonment (see paragraph 70 above). The Court notes that the second applicant is thirty-five years of age. If a sentence of fifty years' imprisonment were imposed, even with the 15% reduction which is available for compliance with institutional disciplinary regulations (see paragraph 72 above), the applicant would be nearly seventy-eight years of age before he became eligible for release. In those circumstances, at this stage the Court is prepared to accept that, while he is at no real risk of a life sentence, the sentence the second applicant faces also raises an issue under Article 3. Consequently, the Court considers that this part of his application also raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. It therefore also declares this complaint admissible.

G. The use of evidence allegedly obtained in breach of Article 3

1. The parties' submissions

a. The Government

155. The Government relied on the findings of the High Court. In the case of the second and fourth applicants, Mr Ujaama had been represented by two experienced attorneys. He had expressly acknowledged that he was entering a plea agreement because he was in fact guilty and did so voluntarily. Specific enquiries had been made by the sentencing judge as to whether this was the case and whether any threats had been made. The fact that no such threats had been made was confirmed by one of Mr Ujaama's attorneys, Mr Robert Mahler. In any event, all such issues could be properly determined by the United States courts, including cross-examination of Mr Ujaama by the second and fourth applicants. In respect of the fourth applicant's allegation that, in respect of the Afghanistan and Yemen charges, torture evidence would be used against him, the Government relied on the finding of the High Court that this was not the case. In respect of his reliance on the case of Binyam Mohamed (see paragraph 157 below) the Government submitted that the fourth applicant had not demonstrated that this had any relevance to his case.

Alternatively, the Government considered that *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX had left open the question whether the use of evidence obtained by inhuman or degrading treatment automatically renders a trial unfair. They submitted that there should be no automatic rule to that effect, nor should there be an automatic rule that the possible admission of such evidence by a foreign court would be sufficient to establish a flagrant denial of justice.

b. The first three applicants

156. The first two applicants maintained their submission, which they had made before the High Court, that there was a real risk that evidence obtained from secret detention sites would be indirectly admitted in evidence against them because it was common in conspiracy trials for FBI agents to give evidence of the general nature of the conspiracy. In his reply to the Government's observations the first applicant submitted that a further violation of Article 6 § 1 would arise in his case. His cousin, Mr Noor Khan, had been detained in Pakistan and he produced a witness statement from a third man, Mr Iqbal, who had also been detained there, in which Mr Iqbal stated that Mr Khan had been tortured and asked questions about Mr Ahmad.

In respect of the plea agreement of Mr Ujaama, the second applicant maintained that this agreement had been obtained subject to guarantees that special administrative measures would be lifted and he would not be

designated as an enemy combatant; it would have been obvious to Mr Ujaama that, if he had not entered into the plea agreement, he would be subjected to special administrative measures and at risk of designation as an enemy combatant. This was supported by the evidence of Mr Loflin, who testified in the domestic proceedings as to his conversations with Mr Mahler on the process by which the plea agreement had been obtained. Hence, Mr Ujaama's plea agreement, and the evidence he would give against the second applicant, had been obtained by threat of ill-treatment. This would breach the second applicant's right to a fair trial regardless of whether that ill-treatment was characterised as torture or a lesser form of ill-treatment. He relied on his observations as to the incompatibility of special administrative measures with Article 3. Moreover, it had not been sufficient for the domestic courts to conclude that this was a matter for the United States courts because there was no procedure by which a trial court in the United States could exclude *in limine* the evidence of Mr Ujaama or indeed the evidence of any FBI agents who testified. A further statement of 20 August 2008 from Mr Loflin was relied upon, in which he stated that any trial court would be bound by the decision of the United States Court of Appeals for the Second Circuit in *Portelli* (see paragraph 66 above) as this was the Court of Appeals in whose jurisdiction the second applicant's trial would take place.

In respect of the Government's alternative submission, the first three applicants considered that there was no rigid dichotomy between torture and other forms of ill-treatment. Hence, it would be inconsistent with Article 3 to maintain a rigid exclusionary rule that applied to torture but not other forms of ill-treatment: the rationale for an exclusionary rule was the same in each case.

c. The fourth applicant

157. The fourth applicant considered that the response of the Government ignored the difficulties he had in proving his case to the required standard. The United States Government had not been required to produce the evidence against him in the extradition proceedings but only provide a narrative of the alleged criminal conduct. Nonetheless, there were reasonable grounds for suspicion that the case against him derived directly or indirectly from evidence obtained by torture or ill-treatment and, therefore, there had been a failure of the United Kingdom courts properly to enquire of the United States Government. This meant it was inappropriate to rely on the factual findings made by the United Kingdom courts.

As evidence of his reasonable grounds for suspicion, he relied on the case of Binyam Mohamed, an Ethiopian national and resident of the United Kingdom who was tortured after his arrest in Pakistan and his subsequent removal to Morocco, Afghanistan, and finally to Guantánamo Bay. He also produced expert witness statements that demonstrated there was no

automatic prohibition on the use of torture evidence by United States courts, including one from Mr Bruce Maloy who stated that the fourth applicant would be unable to rely on Article 15 of the United Nations Convention Against Torture before the United States courts. The High Court had found that there was no material distinction between the approach taken by the United Kingdom and United States courts to the admissibility of such evidence, but the fourth applicant submitted that this was immaterial: it would normally be in breach of Article 6 to rely on evidence which was the indirect product of torture. The same applied to evidence obtained by ill-treatment. He too accepted that the Court had left this question open in *Jalloh* but submitted that the correct position was that taken by Judge Bratza in his concurring opinion that the fairness of the judicial process was irreparably damaged in any case where evidence was admitted which had been obtained by the authorities of the State concerned in violation of the prohibition in Article 3.

2. The Court's assessment

158. The Court begins by noting that the first applicant now complains that there is a real risk of evidence obtained by torture of Mr Noor Khan being used against him. It does not appear that this complaint has ever been put before the domestic authorities. In any event, the Court does not consider it necessary to examine whether there has been a failure to exhaust domestic remedies since this complaint, the complaint made in respect of the testimony of FBI agents, the complaint made in respect of Mr Ujaama's plea agreement, and the fourth applicants' general complaints about the use of torture evidence are inadmissible for the following reasons.

159. It is true that in *Jalloh*, cited above, the Grand Chamber left open the question whether the use of evidence obtained by inhuman or degrading treatment automatically renders a trial unfair (see *Gäfgen v. Germany* [GC], no. 22978/05, § 167, ECHR 2010-....). However, the Court does not consider it necessary to decide that question in the present case. As it has reiterated, in extradition cases an issue will only arise under Article 6 when there is a real risk of a flagrant denial of justice in the requesting State. As the Court has found, there is no reason to question the United States Government's assurances that the applicants will be tried in federal courts and enjoy the full panoply of rights and protections that are provided to defendants in those courts. Any issues as to the admissibility of the evidence of Mr Ujaama, FBI agents or others are capable of being addressed in those courts. Moreover, the trial judge in each case, rather than this Court, is best placed to consider factual disputes between the defence and prosecution, including the dispute between Mr Loflin and Mr Mahler as to the circumstances in which Mr Ujaama entered his plea agreement. In respect of Mr Ujaama's evidence, and indeed in respect of any other oral evidence which is declared admissible, the applicants will be able to conduct full

cross-examination of those giving evidence. Further protection is provided by the right of appeal the applicants would have if convicted. Although various United States Courts of Appeal have taken slightly different approaches to the exclusion of evidence obtained by coercion of third parties, this is demonstrative of the anxious consideration which the United States federal courts give to the issue. None of the authorities relied upon by the applicants and summarised at paragraph 66 above applies a standard which falls so far short of the requirements of a fair trial that the applicants' trials would amount to flagrant denials of justice. On the contrary, as the High Court found in the fourth applicant's case, there is no appreciable difference between the approach taken by the United States courts and that set out by the Grand Chamber in *Jalloh*.

160. The Court would only add that these conclusions apply with equal force to the general allegations made by the fourth applicant. The Court in *Harutyunyan*, cited above, accepted that the use of incriminating evidence which had been obtained as a direct result of torture of the applicant and two witnesses rendered the applicant's trial unfair. However, as the High Court found, *Harutyunyan* is readily distinguishable from the fourth applicant's case. In his case, it is not suggested that any witness statements which are the product of torture will be introduced in evidence nor that any witnesses will give live evidence confirming what they have previously said under torture. Finally, even applying the low standard of proof that the fourth applicant urged it to do, the Court is unable to conclude that evidence will be adduced at his trial that may be said to have been obtained indirectly by torture of third parties. Should any such evidence arise, its admissibility must also be a matter for the trial judge and, thereafter, for the appellate courts.

161. For these reasons, the Court considers that these complaints must be rejected as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

H. The applicants' remaining complaints

1. Prejudice arising from pre-trial publicity

162. The first three applicants also alleged that they would receive an unfair trial due to the extensive publicity that the events of 11 September 2001 and the United States Government's subsequent counter-terrorism efforts had received. No prospective juror could be untouched by that publicity or by the rhetoric of the United States Government. This had worsened pre-existing prejudices among members of the American public against Muslims. The jury in each trial would be asked to decide on the credibility of prosecution and defence witnesses and the jury's prejudices could prove decisive; jurors would inevitably make a connection between

the applicants and terrorists suspects who were being detained as enemy combatants. In addition, the second applicant's trial had been moved to New York, when the more natural venue was Oregon or Seattle: a New York jury would clearly be affected by the attack on the Twin Towers.

163. The Court considers this complaint to be without foundation. As it has stated, in extradition cases, an issue will only arise under Article 6 when there is a real risk of a flagrant denial of justice in the requesting State. The publicity that the events of 11 September 2001 have received is unprecedented. However, the applicants are not indicted with offences which relate directly to those events. The mere fact that a terrorism trial takes place in New York is not grounds for suggesting that the jury would be so prejudiced that the trial would amount to a flagrant denial of justice. Furthermore, clear safeguards are in place in United States federal criminal procedure to ensure that jurors are able to try cases impartially. This is illustrated by the trial of Oussama Kassir where, according to the evidence of Mr Bruce, a week was spent on jury selection (see paragraph 11 above). There is every reason to expect that the same rigour would be applied to the selection of the applicants' juries. This complaint must also be rejected as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

2. Alleged prejudice arising from public designation of the fourth applicant as a terrorist

164. On 23 September 2001, the President of the United States of America signed Executive Order 13224 entitled "blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism". On 19 April 2002, the United States Department of Treasury designated the applicant as coming under the terms of that order and accordingly blocked any assets he had in the United States. The accompanying press release stated:

> "Abu Hamza al-Masri identifies himself as the Legal Officer for the Islamic Army of Aden, the terrorist organization that claimed credit for the bombing of the USS Cole in Yemen. The President designated the Islamic Army of Aden as a financier of terrorism when he launched the financial war on terrorism on September 24, 2001. In written statements, Hamza seeks support and backing for jihad against the Yemeni regime and the return to Islamic law. The Islamic Army of Aden has taken responsibility for the kidnapping of foreigners, including the kidnapping of 16 tourists in December of 1998, that resulted in the killing of three Britons and one Australian. In interviews, Hamza has endorsed the killing of non-Muslim tourists visiting Muslim countries."

165. The fourth applicant alleges that his trial would be prejudiced by this public designation. The designation was only possible because of the lengthy delay by the United States in initiating extradition proceedings. The safeguards within the trial process were insufficient to cure the prejudice; the courts were powerless to prevent such publicity, particularly

the dissemination of such statements in the electronic media. It was unlikely that any New York juror would be unaware of the prevailing view of the fourth applicant as an international terrorist.

166. The Court observes that it does not appear that the fourth applicant raised this point in the domestic proceedings. In any event, it is manifestly ill-founded. Although the press release does go further than merely announcing the decision to freeze the fourth applicant's assets, and thus it may be said to lack the necessary discretion and circumspection required by *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, § 38, some comment on a matter of such public interest is inevitable. There is also no direct link between this freezing order and the criminal investigation later carried out by the United States Government or the extradition request (cf. *Allenet de Ribemont* at § 37). In any trial in the United States it would remain for the prosecution to prove the charges against the applicant to the appropriate standard of proof and for the trial judge to direct the jury to try the case on the basis of the evidence alone. It cannot be said that a press release dating from 2002 would render such a trial unfair, still less give rise to the flagrant denial of justice required in an extradition case. Accordingly the Court rejects this complaint, pursuant to Articles 35 §§ 3 and 4 of the Convention.

3. Plea bargaining

167. The first three applicants also complained that a violation of Article 6 would occur because the threat of a long sentence by United States prosecutors would lead to coercive plea bargaining amounting to a flagrant denial of justice. They argued that the same threats made against James Ujaama would be made against them and they too would be induced to plead guilty simply to receive shorter sentences. Mr Aswat relied specifically on the fact that discussions had already taken place at HMP Belmarsh between him and the United States prosecutor in which he had been informed of the possibility of a reduction in his sentence if he co-operated with the prosecution. All three applicants considered the role of the prosecution in plea bargaining to be oppressive and abusive.

168. In the Court's view, it would appear that plea bargaining is more common in the United States than in the United Kingdom or other Contracting States. However, it is a common feature of European criminal justice systems for a defendant to receive a reduction in his or her sentence for a guilty plea in advance of trial or for providing substantial co-operation to the police or prosecution (for examples of plea bargains in the Court's own case-law see *Slavcho Kostov v. Bulgaria*, no. 28674/03, § 17, 27 November 2008; *Ruciński v. Poland*, no. 33198/04, § 12, 20 February 2007; *Sardinas Albo v. Italy*, no. 56271/00, § 22, 17 February 2005; *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999). Often, early guilty pleas will require the prosecution and

the defence to agree the basis of that plea. For that reason, the fact that the prosecution or trial judge indicates the sentence which the defendant would receive after pleading guilty at an early stage and the sentence the defendant would receive if convicted at trial cannot of itself amount to oppressive conduct. Therefore there is nothing unlawful or improper in that process which would raise an issue under Article 6 of the Convention. In the Court's view, such an issue would only arise if the discrepancy between two sentences was so great that it amounted to improper pressure on a defendant to plead guilty when he was in fact innocent, when the plea bargain was so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear to be the only possible way of avoiding a sentence of such severity as to breach Article 3.

169. This is not the case for any of the present applicants. The Court finds nothing untoward in the willingness of the United States prosecutors to discuss Mr Aswat's possible sentence with him in advance of extradition. Similarly, there are no grounds for suggesting that United States prosecutors would act unlawfully or improperly in discussing possible sentences with the other two applicants upon their extradition. Finally, in the federal criminal justice system, a measure of protection is provided to defendants by the role of the sentencing judge whose task it is to ensure that the plea agreement is entered freely and voluntarily. That procedure would apply to the applicants should they choose to enter into a plea bargain. The Court therefore finds that the applicants have failed to demonstrate that the United States federal plea bargaining system, as it would apply to their trials, amounts to a flagrant denial of justice. Accordingly, this complaint must also be rejected as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

4. Alleged prejudice arising from the delay in seeking the extradition of the fourth applicant

170. The fourth applicant alleged that his trial would be prejudiced by the delay in seeking his extradition. He attributed this delay to a political decision taken by the two Governments to resuscitate charges against him, which were investigated and not prosecuted in 1999; it was untenable that the investigation had only advanced as a result of the interview recorded by Ms Quinn. There was now very little evidence available to the fourth applicant. Witnesses were missing either because they had been executed or, fearing extradition or prosecution, they had refused to testify on his behalf. Real evidence, such as telephone records, trial transcripts and medical and photographic evidence of torture of witnesses in Yemen, would no longer been available.

171. In the Court's view, the allegation of a politically motivated prosecution is unsubstantiated. In addition, the Court has never found that a trial in a Convention State was unfair simply because of the delay in

bringing the prosecution (see for example, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI where the applicant was tried for war crimes committed forty-four years earlier). Admittedly, the fourth applicant goes further and alleges that, for the Yemen charges, the delay has meant that he will unable to conduct his defence properly. However, the examples of missing evidence and witnesses were considered by the High Court: the Court accepts its finding that none of the witnesses who are now unavailable would have been able to assist the applicant's defence. In any event, as with the complaints made in respect of evidence allegedly obtained by torture or ill-treatment, this is a matter that can be raised before the trial court in the United States. The same is true for the alleged prejudice resulting from the absence of real evidence. This complaint must be rejected as manifestly ill-founded in accordance with Articles 35 §§ 3 and 4 of the Convention.

5. The fourth applicant's Article 8 complaint

172. The applicant submitted that his extradition would be a disproportionate interference with his private and family life as guaranteed by Article 8 as he had lived in the United Kingdom since 1979 and had a wife and nine children there. The Court reiterates that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition (see *King v. the United Kingdom* (dec.), no. 9742/07, 26 January 2010). This is particularly so given the gravity the offences with which the fourth applicant is charged. There are no such exceptional circumstances in his case and this complaint is therefore manifestly ill-founded and must be rejected in accordance with Articles 35 §§ 3 and 4 of the Convention.

6. The failure of the Director of Public Prosecutions to consider trial in the United Kingdom

173. The third applicant, whose observations were adopted by the first and second applicants, considered that the United Kingdom was the natural forum for prosecution. This affected the proportionality of the interferences with their rights under Articles 3, 6 and 8 of the Convention which would take place if they were to be extradited. They were British nationals. The offences with which they were charged were alleged to have taken place in the United Kingdom. The evidence against them had been gathered there. It could be presented more fairly in the United Kingdom and any British trial would have to conform to Convention standards. The obligation upon States to extradite or prosecute (*aut dedere aut judicare*), which applied in respect of certain crimes, including terrorism, was of some relevance. If the United Kingdom refused to extradite the applicants it

would be under an obligation to prosecute them. Indeed, prosecution in the United Kingdom rather than extradition to the United States was the only just satisfaction they sought. Lastly, the *Soering* judgment demonstrated that the possibility of trial in a Contracting State was relevant to whether an applicant's extradition would be compatible with the Convention.

174. The Government considered these arguments to be misconceived. Trial in the United Kingdom would fail to satisfy the wider public interest which lay in honouring extradition commitments. They further argued that the United States was the only appropriate forum for prosecution given the nature of the alleged offences, which were wholly directed against the United States. It was irrelevant that evidence had been gathered in the United Kingdom. The applicants had failed to recognise the wholly exceptional circumstances of the *Soering* case. It had never been disputed in *Soering* that both the United States and the Federal Republic of Germany enjoyed jurisdiction, the Federal Republic had itself submitted that the applicant's extradition to the United States would breach his Convention rights, and the case concerned the imposition of the death penalty when there was a virtual consensus against such punishment among the Contracting States.

175. The Court observes that the parties disagree as to whether the United Kingdom is the natural forum for prosecution of the applicants, though it does appear to be accepted by the Government that prosecution would be possible in the United Kingdom. The Court recalls that there is no right in the Convention not to be extradited (*Parlanti v. Germany* (dec.), no. 45097/04, 26 May 2005; *Soering*, cited above, § 85) and, by implication, there is no right to be prosecuted in a particular jurisdiction. Hence, in extradition cases it is not for the Court to adjudicate on the natural forum for prosecution; when a Contracting State chooses to extradite an applicant the Court's only task is to determine whether that extradition would be compatible with that applicant's Convention rights. However, the Court also recalls that in *Soering*, cited above, § 110, the Court considered that the possibility of prosecution in the Federal Republic of Germany rather than the United States was a “circumstance of relevance” for the overall assessment under Article 3 in that it went “to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case”.

176. In the present cases, the Court has found that there is no real risk that the applicants will be subjected to ill-treatment through designation as enemy combatants, extraordinary rendition or the imposition of the death penalty. It has also found that the imposition of special administrative measures would not meet the necessary threshold for Article 3 and that their imposition would not amount to a flagrant denial of justice for the purposes of Article 6. It has reached a similar conclusion in respect of the alleged prejudice arising from pre-trial publicity and the process of plea bargaining.

Consequently, it is of no relevance to the merits of these complaints that prosecution in the United Kingdom would be a more proportionate interference with the applicants' rights under Articles 3 and 6 of the Convention; proportionality could only be a consideration if those Articles were found to be engaged.

177. The Court has, however, declared admissible the first, second and third applicants' Article 3 complaints in respect of detention at ADX Florence. It has also declared admissible all four applicants' Article 3 complaints in respect of the length of their possible sentences. At this stage, therefore, and in light of paragraph 110 of the *Soering* judgment, the Court considers it appropriate to allow the applicants to rely on the possibility of prosecution in the United Kingdom in any further submissions they make in respect of these complaints.

178. Finally, to the extent that the first three applicants also appear to rely on Article 8 in their submissions in respect of forum (and indeed only make general references to that Article), their complaint must fail for the same reasons as the fourth applicant's freestanding Article 8 complaint: there are no exceptional circumstances in the cases which would make their extradition disproportionate. This part of the complaint is therefore manifestly ill-founded and must be rejected in accordance with Articles 35 §§ 3 and 4 of the Convention.

7. Detention without the requirement of a prima facie *case*

179. The first and second applicants also complained that their detention in the United Kingdom pending extradition violated Article 5 of the Convention since they had been detained without any evidence having been produced or any judicial finding that there was a *prima facie* case against them. This violated their right to security of person and amounted to arbitrary detention. They accepted that detention without the need to demonstrate a *prima facie* case was acceptable for extraditions which took place between European Union member States under the European Arrest Warrant system. This was because European Union member States were also member States of the Council of Europe. Different considerations applied in relation to extradition to the United States, which was not a member of the Council of Europe and thus not subject to the jurisdiction of the Court.

180. The Court recalls that in *Chahal v. the United Kingdom*, 15 November 1996, § 112, *Reports of Judgments and Decisions* 1996-V it found that:

> "Article 5 § 1 (f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary ... Indeed, all that is required under this provision is that 'action is being taken with a view to deportation'. It is therefore immaterial, for the purposes of Article 5 § 1 (f),

> whether the underlying decision to expel can be justified under national or Convention law."

The Court does not consider that it should depart from this ruling and read into Article 5 § 1 (f) a requirement that there be a *prima facie* case before a person can be detained with a view to extradition. The applicants have not argued that the United Kingdom authorities did not have the power to detain them unless there was a *prima facie* case against them. Nor have they argued that there no legal basis at all in national law for their detention. The Court therefore finds that their detention complies with the requirements of Article 5 § 1 (f) of the Convention.

I. The interim measures indicated under Rule 39 of the Rules of Court

181. In light of its decision to declare each application partly admissible, the Court considers that the indications made to the Government under Rule 39 of the Rules of Court in respect of each applicant must continue in force pending the determination of the remaining complaints on the merits.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the first, second and third applicants' complaints concerning detention at ADX Florence and the imposition of special administrative measures post-trial;

Declares admissible, without prejudging the merits, the applicants' complaints concerning the length of their possible sentences;

Declares inadmissible the remainder of each application;

Decides to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the applicants should not be extradited under further notice.

Lawrence Early
Registrar

Lech Garlicki
President