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Case No: CO/5577/2008 and C0/5511/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2009

Before:

LORD JUSTICE SCOTT BAKER
- and -
MR JUSTICE DAVID CLARKE

- -

Between:

THE QUEEN (ON THE APPLICATION OF ADEL ABDUL BARY AND KHALID AL FAWWAZ)	**Claimants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Richard Drabble Q.C and Ben Cooper (instructed by Birnberg Pierce and Partners) for **Bary**
Edward Fitzgerald Q.C. and John Jones (instructed by Quist Solicitors**)** for **Al Fawwaz**
David Perry Q.C and Adam Robb (instructed by the Treasury Solicitor) for the **Defendant**

Hearing dates: 12, 13 February and 20 July 2009

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Judgment

Lord Justice Scott Baker:

Introduction

1. The two claimants, Adel Abdul Bary and Khalid Al Fawwaz, are accused by the Government of the United States of America of participation in a conspiracy to murder United States citizens, United States diplomats and other internationally protected persons. It is alleged that a key figure in the conspiracy was Osama Bin Laden and that two of the overt acts of the conspiracy were the synchronised bombings of the United States embassies in Nairobi and Dar Es Salaam on 7 August 1998. As a result of the explosion in Nairobi 213 people died and some 4,500 were injured. 11 people died as a result of the Dar Es Salaam explosion.

2. Following an investigation into the bombings, the United States government sought the extradition of the two claimants and a third man, Eiderous. Extradition proceedings followed under the Extradition Act 1989 ("the 1989 Act"). On 8 September 1999 a metropolitan magistrate sitting at Bow Street magistrates' court committed Al Fawwaz to await the defendant's decision as to his return to the Untied States. A similar order was made in respect of Bary and Eiderous on 25 April 2000. A challenge to the magistrate's decision in the case of Al Fawwaz was dismissed by the Divisional Court on 30 November 2000 and a similar challenge by Bary and Eiderous was dismissed by the Divisional Court on 2 May 2001. Appeals to the House of Lords were dismissed in each case on 17 December 2001 (Re *Al Fawwaz and others* [2001] UK HL 69; [2002] 1 AC 556).

3. There followed detailed representations on behalf of all three men arguing against their surrender to the United States and the United States government provided substantial representations in reply. On 13 March 2006 the Secretary of State decided not to surrender Eiderous to the United States because of his serious ill health; he died in July 2008.

4. By letters of 12 March 2008 Bary and Al Fawwaz were informed that the Secretary of State had issued warrants authorising their return to the United States. In June 2008 they commenced proceedings for judicial review of the defendant's decision to extradite them. The present hearing is a rolled up hearing of their applications for permission to apply for judicial review with the substantive hearing to follow if leave is granted.

5. The cases of both Bary and Al Fawwaz predate the Extradition Act 2003 and their extradition from the United Kingdom is governed by the 1989 Act. Section 1(3) of that Act applies Schedule 1 where there is in force in relation to a foreign state an Order in Council giving effect to the terms of a relevant treaty. There was in force at the material time, the United States of America (Extradition) Order 1976 (SI 1976/2144) as amended by the United States of America (Extradition) (Amendment) Order (SI 1986/2020). Accordingly, Schedule 1 applies to this case. Under Schedule 1 the Secretary of State issues an order to proceed to the magistrate specifying the offence or offences which it appears to the Secretary of State are constituted by conduct equivalent to the conduct specified in the extradition request had it occurred in the United Kingdom. The magistrate then conducts an inquiry into the offence or offences to establish whether the evidence before him would make a case "requiring an answer by the prisoner if the proceedings were for trial in England." If the

evidence establishes a prima facie case, the magistrate commits the defendant to await the decision of the Secretary of State. Under paragraph 8(2) of the Schedule, the Secretary of State may by warrant "order the fugitive criminal……to be surrendered to such person as in his opinion be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded……"

6. It is the Secretary of State's decisions at that point that are now challenged. Section 12(2) of the 1989 Act, so far as material, provides:

> "Without prejudice to his general discretion as to the making of an order for the return of a person to a foreign state……
>
> (a) the Secretary of State shall not make an order in the case of any person if it appears to the Secretary of State in relation to the offence, or each of the offences in respect of which his return is sought, that
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> (i) by reason of its trivial nature; or
>
> (ii) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or
>
> (iii) because the accusation against him is not made in good faith in the interests of justice;
>
> it would, having regard to all the circumstances be unjust or oppressive to return him."

7. In Diplomatic Notes the United States government has provided the following assurances to the Secretary of State in the event of extradition:

(1) The United States will neither seek the death penalty against, nor will the death penalty be carried out against, the claimants.

(2) The claimants 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.

(3) The claimants will not be prosecuted before a military commission, as specified in the President's Military Order of 13 November 2001; nor will either of them be treated as an enemy combatant.

(4) If either claimant is acquitted, or completes any sentence imposed following conviction, or if the prosecution against him is discontinued, not pursued or ceases for whatever reason, the United States authorities will return him to the United Kingdom if he so requests.

8. The primary focus of the present applications relates to article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("the ECHR") and the prison conditions in which the claimants are likely to be held in the United States. It provides:

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

It is said that if the claimants are extradited to the United States there will be a breach of s.6 of the Human Rights Act 1998 because it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The court is, of course, a public authority and Mr Drabble, who has appeared for Bary, submits that the Secretary of State's decisions must be subjected to anxious scrutiny in the light of all the material available to the court. It is, he submits, near to a fact finding exercise by the court itself.

9. The Secretary of State's decision letters in each case deal in identical terms with the prison conditions likely to be suffered by the claimants. They will be detained in federal rather than state run prisons. There is a real possibility that they will be subject to special administrative measures ("SAMs") and be housed in Supermax units. They are likely to be detained at least pre trial in the Metropolitan Corrective Centre ("MCC") in New York. The Secretary of State thought the best indicator of their likely treatment was provided by (a) the evidence as to the treatment of Mr El Hage, a co-defendant, who was detained in the MCC pending his trial and (b) the transcript from the New York trial dealing with the conditions in the federal Supermax prison at Florence, Colorado. We have been provided with a great deal more evidence that was not before the Secretary of State.

10. The Secretary of State concluded that apart from the limited material before her there was only very unspecific evidence adduced as to the conditions in the facilities in which the claimants are likely to be detained and in her view that evidence was either too general to give rise to a real risk of treatment in breach of article 3 and/or did not reveal that the conditions in which they would be detained gave rise to a real risk of treatment in breach of article 3. Having considered the matter she expressed her conclusion in these terms namely that the claimants have:

> "failed to establish substantial or strong grounds for believing (they) would face a real risk of treatment in breach of article 3 ECHR. In particular:
>
> (a) There is substantial evidence of close judicial oversight of the prison conditions in which Mr El Hage was detained. For example, the trial judge personally inspected those conditions.
>
> (b) The Trial Judge specifically dealt with Mr El Hage's complaint that he was subjected to unnecessary strip searches. The Trial Judge conducted an inquiry into the reasons and justifications for the strip searches to which Mr El Hage was subject and was satisfied that there were good penological reasons for the strip searches.

(c) Further, many of the complaints which were made by Mr El Hage and which have been substantially adopted by (the claimants) as to the conditions in which he and his co-defendants were held have to be viewed against the background, as the trial judge found, that two of Mr El Hage's co-defendants had inflicted a life threatening injury on a prison guard and that there was a general concern that the attack in question (using a concealed weapon) had been planned over a considerable period of time. As such, stringent security measures were justified. The extent to which (the claimants) might be subject to similar security measures would depend, in part, on (their) behaviour and that of (their) fellow inmates at the facility in which they were detained.

(d) When Mr El Hage complained that by reason of prison conditions his mental condition had deteriorated to the extent that he was no longer able to participate in the trial or assist in the preparation of his defence, the trial judge ordered that he be examined by three independent medical experts. All three concluded that Mr El Hage was malingering and deliberately fabricating amnesia and that, contrary to his claims, he was able to assist in the preparation of his defence and participate in his trial."

11. The Secretary of State then said that the transcript dealing with the conditions at the federal Supermax prison in Florence did not reveal that they would amount to a breach of article 3, in particular because of the security risks posed by those detained there. She added that:

(1) There were no material differences between the legal protections afforded by article 3 and United States law;

(2) The protections afforded by United States law were consistent with article 3 and;

(3) There was independent judicial supervision of prison conditions sufficient to preclude a real risk of breach of article 3.

She also said that the claimants would be detained subject to detailed regulations that balance the rights of prisoners with the legitimate administrative and security needs of prisons which would comply with article 3 and that the conditions under which they would be detained could be challenged both administratively and by way of application to the court.

12. After the hearing before us on 12 and 13 February 2009, both the claimants and the defendant submitted further material to us about the conditions in ADX Florence, Colorado, the federal Supermax prison in which it was contended the claimants would be likely to be held following conviction. This further material included the appendices to a letter from the US Department of Justice Federal Bureau of Prisons ("BOP") dated 9 April 2007, a further declaration from Mr Wiley dated 6 March 2009, who is a warden at ADX, Florence, Colorado and a letter from Professor

Rovner who is Director of the Civil Rights Clinic at the University of Denver. It was agreed that the court should consider all this further evidence when reviewing the claimants' article 3 claims and the court heard further oral submissions on 20 July 2009.

Bary's health

13. Bary suffers from a recurrent depressive illness and is presently detained in Long Lartin prison. There are several reports from Dr Sumi Ratnam, a consultant forensic physiatrist, but the most recent is dated 26 February 2007. There is, however, a more recent G.P. note. Broadly, Bary has a history of low mood, disturbed sleep, disturbed appetite, anhedonia (lack of pleasure) reduced energy, disturbed concentration, hopelessness and suicidal feelings which together reflect a severe depressive disorder. He has been prescribed antidepressants but does not take them because of his beliefs. The psychiatric evidence, which is undisputed, suggests that if extradited to America his mental health would probably deteriorate which would in turn increase the risk of suicide and affect his fitness for trial. However, as Dr Ratnam said in October 2006, she is not able to predict his fitness for trial which has to be judged at the time of the process. The GP note suggests that Bary's mental health improved until the end of 2008 when the regime in his unit drastically changed, since when it has deteriorated.

14. In *R (Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 (Admin) Hale L.J, as she then was, said at para 42 it would not generally be unjust to send someone back to face a fair process to determine whether or not he is fit to face trial. She added:

> "I accept that it may be wrong or oppressive to do so if the inevitable result will be that he will be found unfit. But even in those circumstances there may be countervailing considerations. For example, if there is the counterpart of our process in the other country, where a person may be found to have committed an act which would otherwise have been a serious crime, particularly if it were to be a crime of violence involving risk to the public, and if it would then be appropriate to detain the person for medical treatment, it would be in the public interest to enable that process to take place."

15. Bary's fitness to be tried seems to me to be a matter for the United States' authorities to consider at the relevant time. Mr Perry Q.C for the Secretary of State makes the further point that even if Bary is tried and convicted his mental health would be an important factor in deciding whether he should be sent to ADX Florence, Colorado. In summary, and I think this was accepted, Bary's mental health is not a factor that is such as to cause a different outcome to his article 3 claim from that of Al Fawwaz.

The areas of dispute

16. At the beginning of his oral submissions at the February hearing Mr Perry identified under headlines seven remaining areas of dispute. The first three all relate to the article 3 claim and the likely circumstances of detention in the United States. They are detention under SAMs, detention at ADX Florence, Colorado and life imprisonment without parole with the additional feature of the conditions of

detention. The other four are trial in the United Kingdom, refoulement, assurances by the United States' government and designation of Al Fawwaz as a global terrorist.

SAMs

17. Special administration measures (SAMs) are measures of special confinement that can be imposed on prisoners when there is a substantial risk that a prisoner's communications or contact with persons could result in death or serious bodily injury to persons (see the United States Code of Federal Regulations). These measures may include, but are not limited to, housing the defendant in administrative detention and/or limiting the defendant's correspondence, visiting rights, contacts with the media, or telephone use. Although reviewable annually they may be continued indefinitely. It is not disputed that there is a high probability the claimants will be subjected to SAMs, certainly pre-trial and very probably post conviction as well.

18. Various issues relating to SAMs were raised and dealt with by the Divisional Court in *Ahmad and Aswat v United States of America* [2006] EWHC 2927 (Admin), a case to which I shall return in more detail later. These were that (i) by the imposition of SAMs each appellant would be "punished detained or restricted in his personal liberty by reason of his…..religion" and so there would be a bar to extradition under s.81(b) of the Extradition Act 2003 (*Ahmed and Aswat* was a 2003 Act case and it was suggested only Muslims were subjected to SAMs). (ii) They would also be prejudiced in the preparation and/or conduct of their defence, principally by inhibitions placed upon communication with their legal advisers, and so there would be violations of article 6 of the ECHR. (iii) There would be violation of article 3 of the ECHR given that SAMs involves, or may involve, solitary confinement. Laws L.J's conclusions on these points is to be found at para 97 of his judgment with which Walker J agreed:

> "In my judgment the evidence does not begin to show that the imposition of SAMs, were that to occur (as it may), would mean that either appellant would be "prejudiced at his trial" (s.81(b) of the 2003 Act), or that it would violate the appellant's rights under ECHR article 6, not least given that a flagrant denial of justice has to be shown. Nor, for good measure, does it show (what Mr Fitzgerald must I think establish) that the United States authorities would knowingly perpetrate a violation of the sixth amendment to the American Constitution."

Laws L.J also rejected the contention that SAMs were only applied to Muslims and were therefore discriminatory.

19. It is not suggested that the evidence about SAMs is significantly different in the present case from that in *Ahmed and Aswat*. That case is currently under consideration by the ECtHR which has put a number of questions to the parties. However, for the purposes of the present case it seems to me clear, as submitted by Mr Perry, that the SAMs issues have been resolved in favour of the Secretary of State and it is therefore unnecessary to say anything more about them.

The claimants' detention at ADX, Florence Colorado

20. I deal next with the second and third headlines identified by Mr Perry. In deciding whether there is a real risk of article 3 ill treatment through detention in ADX Florence Mr Perry submits that there are three core issues to be considered:

> (i) whether the claimants are likely to be detained in ADX Florence;
>
> (ii) whether the conditions of detention will be such as to be incompatible with article 3, either through the length of detention there or the effect of detention on their health;
>
> (iii) whether there is a practical and effective remedy.

21. It is, I think, common ground that the court should proceed on the basis that there is a real risk that the claimants will be detained in ADX Florence if convicted. The focus therefore is on (ii) and (iii), in particular the conditions and length of detention and whether there is any practical and effective remedy for the claimant against treatment that would otherwise amount to a violation of article 3.

22. I turn therefore to consider first the evidence about detention at ADX Florence. Mr Drabble makes the basic point that the regime at ADX Florence was designed to deal with the most difficult prisoners who could move down the system to circumstances of less security as their behaviour improved. It was not designed for terrorists who have been placed there in particular since the 9/11 terrorist bombing in New York.

23. The claimants submitted a great deal of evidence about ADX Florence, much of which was not before the Secretary of State. The evidence that was before us at the hearing on 12/13 February 2009 is in bundle 1C and runs to almost 300 pages. This has since been supplemented by a further report from Professor Rovner, Associate Professor of Law and Director of the Civil Rights Clinic at the University of Denver and dated 20 April 2009.

24. The circumstances of detention are broadly as follows. All inmates at ADX Florence have a single cell. Cells are generally side by side and allow communication by yelling or using the air ventilation as a voice conduit, although it is said that yelling is prohibited. A diagram of a cell has helpfully been provided at bundle 6 page 228. The most restrictive types of housing units in what is described as the 'general population' are the B unit and the H unit. The B unit houses the most dangerous, violent, disruptive and assaultive inmates. Each cell is about 87 square feet and inmates receive a minimum of seven out of cell hours a week. Each cell has two doors: a solid metal door that opens into the prison hallway, and an inner barred grille. Metal straps and bristles along the bottom of the outer door help to stifle communication between prisoners.

25. Virtually all of an ADX prisoner's daily activities occur within the confines of his single cell. Food is delivered through a slot in the door, and he eats his meals alone. He receives educational and religious programming – and some medical care – through a black and white television set in his cell. Showers are located within the cells and operate over 90 second intervals. Inmates in 'general population' cells have a window that allows some natural light into the cell, but only indirectly because the window looks out onto the concrete pits that serve as outdoor recreation areas. The sun is not visible. Prisoners at the ADX rarely have contact with any other living

thing, except the gloved hands of the correctional officers. Prisoners never touch soil, see plant life or view the surrounding mountains.

26. The ADX staff who perform "the rounds" often do so by speaking with inmates in brief exchanges through the double doors of their cells. Any interaction between ADX staff and a 'general population' inmate while in his cell is done with a correctional officer, with a baton, present. The staff and inmate are separated by a barred grille. If the interaction occurs outside the cell, the prisoner is restrained and at least two correctional officers, one maintaining control of the restraints and the other with a baton, are present. Inmates in the "general population" units ordinarily require shackles behind the back when being moved from their cells, and may be subjected to a strip search. Any time a 'general population' inmate is handcuffed from the front – which occurs whenever he leaves the unit – a Martin chain, black box and leg irons are used. The inmate is escorted by two staff, one of whom carries a baton while the other maintains control of the handcuffs.

27. In the 'general population' units, inmates receive very limited time for exercise; exercise periods are sometimes cancelled. During the very limited times when an ADX inmate is afforded out of cell recreation, he exercises alone, either in an indoor room or an outdoor cage. There is never group recreation. Indoor recreation is conducted in an empty cell that is larger than the prisoner's cell where he is housed, but not large enough to run in. There is a single pull-up bar in each indoor recreation unit but prisoners are given nothing else when they go to recreation. Outdoor recreation is conducted in a concrete pit with walls so high that prisoners cannot see any of the earth around them. The top of the concrete pit is covered in chain link, and inside the pit are steel cages that the prisoners are locked in for two hours each time they recreate outside. Prisoners in ADX 'general population' units receive one 15 minute social telephone call per month. Pursuant to ADX policy, any call that is "accepted" (even by an answering machine) is considered to be a "completed" call regardless of its actual duration. All social calls made by prisoners in the ADX are monitored and may be recorded. ADX policy provides that prisoners confined in 'general population' units are permitted up to five social visits per month and that inmates in the "special security" or H units, which houses those inmates subject to SAMs also "may receive social visits". Social visits at ADX, however, are restricted in several significant respects.

28. The special security or H unit only houses those inmates who are subject to SAMs or restrictions imposed by a court. There are some relatively minor differences between the H and the B units. In particular the H unit cell area is somewhat smaller and the minimum out of cell exercise is five hours a week rather than seven. H unit cells do not have a shower or saliport.

29. The above description of daily life at ADX Florence is largely taken from the account given by Professor Rovner but I do not think it is significantly disputed. Warden Wiley, the warden at the provided two sworn declarations; the first dated 30 October 2007 was prepared for the *Abu Hamza* case, but is equally applicable in the present case and the second, which was largely an updating exercise, is dated 6 March 2009.

30. Warden Wiley's evidence is that the ADX has nine housing units which allow a phased housing unit/privilege system. The stratified system of housing inmates is used to provide inmates with incentives to adhere to the standards of conduct

associated with the maximum security programme. As the inmates at the ADX demonstrate periods of clear conduct and positive institution adjustment, so they may progress from the 'general population' units (with the most restrictive regime) through intermediate and transitional units to the pre-transfer unit with increasing degrees of personal freedom and privileges at each stage. The types of privilege are determined by the type of housing unit to which the prisoner is assigned. It will take an inmate a minimum of 36 months to work his way through the layered housing system. It is the goal of ADX to transfer inmates to less secure institutions when the inmate demonstrates that a transfer is warranted and he no longer needs the control of the ADX.

31. The claimants rely on the fact that a prisoner may be deferred from the step down unit programme for "longer periods of time" "due to the very serious nature of the original placement factor". In short, the point that is made is that because of the very grave crimes for which (if convicted) the claimants will be incarcerated, there is every prospect that they will be held in ADX Florence indefinitely.

32. There is no doubt that the regime at ADX Florence is very tough especially on those in the B or H units where, it is argued, the claimants would be likely to be detained, if not indefinitely at least for many years.

33. In his declaration of 6 March 2009 warden Wiley makes the following general points:

- The BOP policy is to treat all inmates humanly and decently and without discrimination.

- ADX Florence houses less than one third of 1% of the BOP's overall inmate population. 95% of the inmate population at ADX Florence was transferred to ADX Florence from other facilities and only 5% are direct court commitments.

- There exists a rationale for imprisonment for ADX Florence that is based on objective criteria and individual factors taking into account the security needs for each prisoner. The inmates housed at ADX Florence meet one or both of two basic criteria: the inmate's conduct in other correctional institutions created a risk to institutional security and good order, posed a risk to the safety of staff, inmates or others, or to public safety; and/or as a result of the inmate's status either before or after incarceration, the inmate could not be safely housed in the general population of a regular correctional facility.

- Admission cannot be predicated solely upon the type of crime that the prisoner has been convicted of and there is no specific policy in relation to Al Qaeda prisoners.

- The close scrutiny of inmates for designation to ADX Florence is reflected in the designation of inmates who have convictions for terrorism activities and/or ties to international terrorism. As at the date of the declaration, 206 persons were in the custody of the BOP who had convictions for international terrorism activities and/or ties to international terrorism. Of those only 35 were determined to need the additional security controls of ADX Florence. Those 35 inmates were determined to have been convicted of, charged with, associated with, or in some way linked to terrorist activities and as a result there were national security management concerns and safety concerns that could not adequately be met in an open population

institution. The remaining 171 were housed throughout the BOP at various other places, including medical centres and medium and high security facilities.

- Detention at ADX Florence also features attendant procedural rights and supervision which is delivered via the administrative remedy programme.

- A prisoner may seek a review before the United States district courts of any issue relating to his confinement.

- In the five years from 2004 to 2008 prisoners obtained a total of 352 administrative remedies, 292 at institutional level, 34 at the regional level and 26 at central office level.

- The stringency of conditions imposed upon the prisoner is linked to the risks that the individual prisoner presents. The entire regime is based upon a stratified system that permits the prisoner to accrue privileges. It is not the case that prisoners admitted to ADX Florence are detained indefinitely in conditions of solitary confinement. An inmate may work himself through the layered system, beginning with a minimum stay in the 'general population' unit of 12 months.

34. At the hearing on 12/13 February 2009 the court did not have a complete copy of the letter from the BOP dated 9 April 2007 with all the attachments. That deficiency was remedied by the time of the adjournment hearing on 20 July 2009. The attachments show that terrorist inmates have been in the 'general population' for very different periods of time, the longest being for just over 11 years. What the attachments do not do is give any information about the identity of individual prisoners and, more importantly, why they continue to be held in the general population unit. Mr Perry makes the point that not all those with terrorist convictions held at ADX Florence have Al Qaeda or similar affiliations.

35. Mr Perry submits, and I accept, that the nature of the terrorist affiliation of the claimants is likely to be very relevant to the issue of risk to public safety and to the duration of that risk and consequently for how long they will have to be held in the most secure conditions. The fact that 171 of the 206 held in the custody of the BOP who have convictions for international terrorism activities are held at various other facilities, including medical centres, in my view illustrates the care that is taken to place and keep prisoners according to their circumstances and the nature of the offence or offences of which they have been convicted.

Practical and effective remedy

36. As to the administrative remedy programme for dealing with complaints, Mr Wiley makes the point that there are three levels at which complaints can be directed and that these include an appeal to the Regional Director and from him to the Director of National Inmate Appeals at Washington DC and that generally a prisoner has not exhausted his remedies until he has sought review at each level. The point can fairly be made that the claimants' article 3 concerns are also directed at the system under which they are likely to be incarcerated as well as the detail of the circumstances in which they are likely to be held and that the complaints process will not provide an answer to all their concerns. More important, therefore, in my view is the inmate's

right to challenge in the United States' courts the nature and conditions of his confinement.

37. A letter from the U.S. Department of Justice to the Home Office dated 30 March 2004 records that the Eighth Amendment of U.S. Constitution bars cruel and unusual punishment and places a duty on prison officials to provide humane conditions of confinement including adequate food, clothing, shelter and medical care and to take reasonable measures to guarantee the safety of the inmates. If an inmate has exhausted his administrative remedies he is entitled to file a claim for judicial review in a federal district court under 42 U.S. C $1983 and claim that his conditions of confinement violate his right under the Eighth Amendment.

38. The letter also records that the United States is a signatory to two treaties providing analogous protections, the International Covenant on Civil and Political Rights ("ICCPR") and the Convention against Torture and Other Civil, Inhuman or Degrading Treatment or Punishment (CAT). Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. However, the United States has entered into reservations with regard to each treaty stating that it considers that the protections under Article 7 of the ICCRR and Article 16 of the CAT are coextensive with, and do not extend beyond, the protections available under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

39. The point is made at page 11 in Professor Rovner's statement of 20 April 2009 that of the three plaintiffs in the *Saleh* case (*Saleh et al v BOP* 1 April 2008), who had all been transferred to ADX Florence, two were admitted to the step down programme following the commencement of proceedings and the retention of counsel; the third plaintiff is said to have met all the criteria for the step down programme but been denied entry on the grounds that "the reasons for placement have not been sufficiently mitigated." The claimants' point is that, if convicted, the nature of their offending will make it virtually impossible to persuade the BOP to allow them onto the step down programme. But the answer is the United States is a mature democracy and there is a legal structure within which an inmate can challenge the nature and conditions of his confinement. That legal structure includes the right to counsel, effective remedies and an independent judiciary. Mr Perry submits that the very fact that two of the three plaintiffs in the *Saleh* case were admitted to the step down programme suggests there were good reasons why the third was not. He refers to anecdotal evidence that this was indeed the case, drawing the court's attention to a report in the New York Times.

40. In the letter from Human Rights Watch to the BOP dated 2 May 2007 there is reference to the confinement of seriously mentally ill patients at ADX Florence, and the authorities are urged to restrict the placement of such inmates at ADX and implement policies accordingly. It is not clear what, if any, steps have been taken in the last two years to effect an improvement ADX but at page six of the letter there is reference by Human Rights Watch to there having been "at least 10 lawsuits challenging the prolonged confinement of mentally ill inmates in super maximum security units, and that each has resulted in a settlement or court ruling to restrict the placement of such inmates in those facilities because of the documented adverse impact on their illness." This will (a) be of some comfort to Bary and (b) of more

significance generally, is illustrative of the effectiveness of the courts' supervisory role.

41. We were provided with a copy of the judgment of the US Court of Appeals for the tenth circuit in *Ajaj v United States of America and ors* 15 September 2008. The plaintiff challenged his conditions of confinement at ADX Florence as well as the BOP's failure to provide notice of or a hearing concerning his transfer to ADX in 2002. It was claimed that federal officers violated the eighth amendment by holding him with deliberate indifference in confinement at ADX. Essentially the plaintiff's claims failed. The court however noted that the eighth amendment's prohibition of cruel and unusual punishment imposes a duty on prison officials to provide humane conditions of confinement, including adequate food, clothing, shelter, sanitation, medical care and reasonable safety from serious bodily harm and that this placed a burden on the plaintiff to show first that his conditions of confinement were objectively sufficiently serious and second that the federal officers were deliberately indifferent to his safety, a yardstick that does not seem to me to be very different from inhuman or degrading treatment as proscribed by article 3 of the ECHR. Chief Judge Henry, in a concurring judgment, pointed out that as a general rule prisoners are entitled to some out of cell exercise and that total denial of exercise would constitute cruel and unusual punishment prohibited by the eighth amendment. I regard *Ajaj* as important, not as to its particular facts but because it illustrates that there is an effective right of challenge for someone in the claimants' position should they find themselves in ADX Florence without appropriate access to the step down procedure. My view is fortified by the decision of the United States Supreme Court in *Wilkinson and ors v Austin* 545 (US) 2005. That was an appeal from the Court of Appeals for the sixth circuit. The case involved the process by which Ohio classified prisoners in its Supermax facility. It is true that this case involved a state prison, the Ohio State Penitentiary, rather than a federal prison, but the conditions of incarceration were substantially comparable to those at ADX Florence. Again, this case demonstrates the judicial oversight that is available.

42. The final U.S. case to which it is necessary to refer is *Sattar v Gonzales* (2009 07 – cv – 02698 WDM – KLM) in which a claim in the U.S. District Court for the District of Colorado that subjection to SAMs violated the plaintiff's constitutional rights was rejected. Miller J said that although he appreciated that what constitutes cruel and unusual punishment is reflective of society's views of decency, which may include consideration of international law. United States jurisprudence is clear that to sustain an Eighth Amendment deprivation claim a plaintiff has to demonstrate he has been deprived of a basic human need and this did not include deprivation of human contact in that case, which was that he was prevented from talking to other inmates and went for months without speaking to anyone other than BOP officials. Mr Drabble relies on this decision as showing how the U.S. courts deal with Eighth Amendment claims and suggests that it illustrates a gap between the Eighth Amendment and article 3. It does, however, indicate that the courts supervisory powers are real rather than illusory.

43. In summary, the core of the claimants' article 3 claim is that they are likely to be subject to SAMs as soon as they are held in the United States and that if convicted they will be held in ADX Florence on a life sentence without parole in extremely harsh conditions. It is likely to be at least five years before they are even eligible for

the step down procedure (two years pre-trial and three years post trial) and that in all probability they will be held in the general population unit for a great deal longer. The combination of (i) life imprisonment without parole, (ii) extremely harsh conditions of confinement and (iii) the likelihood of such conditions continuing indefinitely all add up to treatment that violates article 3. Since there is real risk that they will be incarcerated in such conditions indefinitely the principle in *Soering v United Kingdom* (1989) 11 EHRR 439 applies and the United Kingdom would be in breach of its obligations under the convention if they are extradited.

Article 3 – the authorities

44. Before expressing any conclusions on the article 3 issue it is necessary to examine the authorities. This court, like the Secretary of State, is required by s.6 of the Human Rights Act 1998 to consider in each case whether there is a real risk that article 3 of the ECHR will be violated in the event of the claimant's extradition to the United States.

45. The root authority is *Soering*. The applicant, who was a West German national, alleged that the Secretary of State's decision to extradite him to the United States would, if implemented, give rise to a breach by the United Kingdom of article 3. If convicted of capital murder he would be exposed to the so called "death row phenomenon". The ECtHR held unanimously that it would. This case establishes that article 3 not only prohibits the contracting states from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other states. The United States is not, of course, a signatory to the convention although, it is submitted, the eighth amendment to the United States Constitution provides similar safeguards. However, the law is clear that the claimants in the present case must not be surrendered out of the protective zone of the convention without the certainty that the safeguards which they would enjoy are as effective as the convention standard. The court summarised the position thus at para 91:

> "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

46. The law has moved on considerably in dealing with a variety of different situations in relation to Article 3 claims. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 Lord Bingham of Cornhill said, citing *Soering* and other authorities, at para 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment……"

47. The high threshold required to establish an article 3 case was pointed out by Dyson L.J in *Deya v the Government of Kenya* [2008] EWHC 2914 (Admin) who emphasised that the burden of proof remained on the claimant. Lord Bingham referred in *Ullah* to the marked lack of success of applicants in Strasbourg in article 2, 3 and 5 cases as highlighting the difficulty of meeting the stringent test imposed by the court.

48. A thread that runs through the authorities is the importance of international co-operation which is in my view a factor that ties in with the high threshold required to establish any violation of the convention in the present type of case see e.g. *Soering*, para 89, Lord Hoffmann in *R (Wellington) v Secretary of State for the Home Department* [2009] 2 WLR 55, para 24 and Hale L.J in *Warren* para 40. Being a case to which the 1989 Act applied, the United States had in the present case to establish a prima facie case of conspiracy to murder as indeed they did to the satisfaction of all courts up to the level of the House of Lords. It cannot now be disputed that there is evidence available to the United States which appears to implicate both claimants in offences of the first order of gravity. It is a matter for the United States authorities where and in what circumstances they detain the claimants both pre-trial and after conviction. This is not a matter which can be dictated by the United Kingdom.

49. Many of the points taken by the claimants have been resolved by decisions in other cases or they have been otherwise overtaken by events such as assurances by the United States government. Thus, the death penalty, trial by a military commission, torture, indefinite detention and life imprisonment without parole are no longer real issues. The central focus is on whether the circumstances in which they are likely to be detained will amount to a breach of article 3.

50. Much of the ground that might have been relevant to this case was covered by the Divisional Court in *Ahmed and Aswat*. Following the dismissal of their appeals to the Divisional Court they were refused leave to appeal to the House of Lord by the appellate committee. Their case awaits determination by the Strasbourg Court. Pursuant to article 39 the status quo has been preserved pending resolution of their appeal and they still await extradition to the United States. At the end of his judgment Laws L.J made these important observations at para 101:

> "Taking stock of the whole case, I would make these final observations. There are I think two factors which constitute important, and justified, obstacles to the appellants' claim.

> They are obstacles which might arise in other cases. The first is the starting-point: Kennedy L.J's observation in *Serbeh* that "there is (still) a fundamental assumption that the requesting state is acting in good faith." This is a premise of effective relations between sovereign States. As I have said the assumption may be contradicted by evidence; and it is the court's plain duty to consider such evidence (where it is presented) on a statutory appeal under the 2003 Act. But where the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess special force. The second obstacle is linked to the first. It is a general rule of the common law that the graver the allegation, the stronger must be the evidence to prove it. In this case it has been submitted that the United States will violate, at least may violate, its undertakings given to the United Kingdom. That would require proof of a quality entirely lacking here."

51. The next important authority is *Mustafa* (otherwise *Abu Hamza) v The Government of the United States of America and Anr* [2008] EWHC 1357 (Admin). Abu Hamza's extradition to the United States was sought under the Extradition Act 2003, but for present purposes there is no distinction from the 1989 Act. His extradition was sought for what can broadly be described as terrorist offences. Sir Igor Judge P, as he then was, had this to say at para 61 about assurances given by the United States:

> "The United States of America is a major democracy, one of the repositories of the common law. Whatever criticisms may be made of it, and even allowing for human fallibility, in all the many years of mutual extradition agreements between the United States and the United Kingdom, no example has been drawn to our attention where either the executive or the judiciary of the United States failed to honour any assurances or undertakings given in the course of extradition proceedings. That is a remarkable record, and the consequences of breaches of assurances accepted in good faith would be hugely damaging for the standing of the United States, and as the USA authorities plainly recognise, the knock on consequences for subsequent applications by the United States for extradition would be disastrous. Putting all this in context, references to human rights abuse in Guantanamo Bay and touchdowns in Diego Garcia, previously denied, coming to light, because the United States authorities gave this information to the United Kingdom government are irrelevant."

And at para 62:

> "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."

The president went on to say that a whole life tariff, which was likely to be imposed in the event of conviction, would not of itself constitute a breach of article 3. He then went on to make these important observations about the conditions in Supermax prisons.

"65. There is a considerable body of unchallenged evidence about the conditions in Supermax prisons generally. There are differences between "Supermax" prisons operated by different states, and indeed between the state run Supermax prisons and the ADX. It is unnecessary to rehearse this evidence. Our concern is not the generality of conditions faced by prisoners in "Supermax" prisons, but with the circumstances which would be likely to apply to the appellant. The direct evidence is given by Mr Wiley, the warden of ADX in Florence Colorado. There is no dispute about the appellant's medical condition, summarised earlier in the judgment. Mr Wiley states that he has been advised by the chief of health programs for the FOB (Federal Bureau of Prisons) that if, after a full medical evaluation "it is determined that (the appellant) cannot manage his activities of daily living, it is highly unlikely that he would be placed at the ADX but, rather, at a medical centre". This statement is said by Mr Jones to be "self serving". He argues that it conflicts with much of the other published material from authoritative sources. He drew our attention to material which dealt with conditions in "Supermax" prisons, and to the details of information about the likely conditions which would apply if the appellant were detained at ADX Colorado. He sought permission to rely on a report dated March 2008 from Professor Andrew Coyle, professor of prison studies at the school of law, at King's College London. For the reasons given in a witness statement by Ms Arani, we were satisfied that it would not have been possible for this report to be obtained in time for the proceedings before Judge Workman. We therefore admitted it.

66. On analysis it does not carry these issues further forward. Professor Coyle was not able to visit ADX Colorado. He therefore restricted his evidence to commenting on the available written material, including Mr Wiley's evidence. Basing himself on his view that "the balance of available evidence suggests that (the appellant) might expect to stay in the ADX Florence for many years", he concludes that it is likely that there would be a violation of Article 3 in terms of the appellant's conditions of detention. Among the annexes to his report is a lengthy letter dated 2nd March 2007 from Human Rights Watch to the director of the FOB. That letter makes numerous criticisms of the ADX regime in measured but forceful terms. It expresses concern "about the effects of long

term isolation and limited exercise on the mental health" of ADX inmates, but it does not criticise the regime's treatment of the inmates' physical health problems, and if there were any such evidence in relation to their physical as apposed to their potential mental problems, it seems likely that Human Rights Watch would have addressed the problem.

67. A common thread which runs through all the reports is the potential adverse effect on the mental health of inmates of long term social isolation. As it happens, unless the ADX Florence regime ignores the appellant's medical condition and his need for nursing assistance, the fact that his disabilities are so grave will mean that he will, of necessity, be less likely to suffer the social isolation that is the greatest concern of all those who criticise the Supermax system. It is noteworthy that, not withstanding the many criticisms, Professor Coyle says of the staff at ADX Florence that they are "professional in the way they carry out their duties". There is no reason to believe that there is a real risk that the appellant's many medical needs would be left untreated by the FOB. Professor Coyle does not engage the evidence of Mr Wiley, nor does he seek to explain why Mr Wiley's account of the advice that he has received from the FOBs chief of health program is or might be wrong. We can see no basis for rejecting Mr Wiley's evidence about the arrangements likely to be put in place for the appellant if he is convicted in the USA.

68. Judge Workman examined Mr Wiley's evidence about the circumstances which would apply to an inmate of ADX Florence. He concluded that if such a regime "were to be applied for a lengthy indefinite period it *could* properly amount to inhuman and degrading treatment which would violate Article 3" (emphasis supplied). Having examined the conflicting material he believed that Mr Wiley's evidence would be "more accurate, he being more closely associated with the penal institution concerned", and someone who played "an important part in implementing the policy in that establishment". On this basis the judge was satisfied that the defendant "would not be detained in these conditions indefinitely, that his undoubted ill health and physical visibilities would be considered and, at worst, he would only be accommodated in these conditions for a relatively short period of time. Whilst I found these conditions offensive to my sense of propriety in dealing with prisoners, I cannot conclude that, in the short term, the incarceration in the Supermax prison would be incompatible with his Article 3 rights." Mr Jones adopted the conclusion that detention in conditions in a Supermax prison would be incompatible with the appellant's Article 3 rights, but suggested that the judge's finding that the appellant's undoubtedly ill health and physical disabilities

> would be considered, and his observations about the likely length of time that he would be accommodated in the standard conditions at ADX Florence were unfounded. In the context of the appellant's medical condition, we agree with judge Workman and his conclusion is not undermined by the fresh evidence from Professor Coyle.
>
> 69. We must add two footnotes. 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 in 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 medical centre because of his ailments would be avoided. "

He concluded with these words:

> "70. We should add that, subject to detailed argument which may be advanced in another case, like Judge Workman, we too are troubled about what we have read about the conditions in some of the Supermax prisons in the United States. Naturally, the most dangerous criminal should expect to be incarcerated in the most secure conditions, but even allowing for a necessarily wide margin of appreciation between the views of different civilised countries about the conditions in which prisoners should be detained, confinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, than ill treatment which contravenes Article 3. This problem may fall to be addressed in a different case."

This is that different case. We must decide the point that was expressly left open by this court in *Abu Hamza*.

52. It was made clear in *Miklis v The Deputy Prosecutor General of Lithuania* [2006] EWHC 1032 (Admin) by Latham L.J at para 11 that the fact that human rights violations take place is not itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends on the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically

vulnerable by reason of a characteristic which would expose him to human rights abuse. However, in the present case apart from Bary's mental health we are looking at the regime in a Supermax prison for convicted terrorists in general rather than any specific characteristic that relates to these claimants in particular.

The Wellington case

53. *Wellington*, to which I have already referred, is a case in which the government of the United States sought the extradition of the claimant for trial on criminal charges in Missouri. The allegations included two counts of murder in the first degree, the prescribed penalties for which were death or imprisonment for life without parole or release except by the act of the state governor. The claimant sought judicial review of the decision to extradite him on the grounds that it was incompatible with his article 3 right. His claim failed. The House of Lords held that the imposition of a life sentence did not of itself amount to inhuman or degrading treatment within the meaning of article 3 although the imposition of an irreducible life sentence might raise an issue under article 3. However it would not be regarded as irreducible unless the national law afforded no real possibility de jure or de facto of review with a view to commutation or release. The fact that the state governor rarely exercised his powers was not enough to make the sentence de facto irreducible. Even if the sentence was irreducible and might therefore contravene article 3 if imposed in the United Kingdom it would only be a contravention in the context of extradition if the sentence was likely on the facts to be clearly disproportionate.

54. The interesting aspect of the case for present purposes is the divided opinion of their Lordships on whether the desirability of extradition was a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the level of severity necessary to amount to a violation of article 3. The opinion of the majority (Lord Hoffmann, Baroness Hale and Lord Carswell) was that punishment which would be regarded as inhuman and degrading in the domestic field will not necessarily be so regarded when the choice between either extraditing or allowing a fugitive offender to evade justice altogether is taken into account. Lord Hoffmann cited the statement of the ECtHR in *Soering* at para 86 that the beneficial purpose of extradition in preventing fugitive offenders from evading justice could not be ignored in determining the scope of application of the convention and of article 3 in particular. He then said at para 22 that article 3:

> "applies only in a modified form which takes into account the desirability of arrangements for extradition. The form in which article 3 does apply must be gathered from the rest of the judgment (in Soering) and subsequent jurisprudence."

55. He noted the court's distinction in para 88 in *Soering* between torture on the one hand and inhuman or degrading treatment on the other, and said that torture attracted such abhorrence that it would not be compatible with the values of the convention for a contracting state knowingly to send a fugitive to another state if there were substantial grounds for believing he would be subjected to torture, "however heinous the crime allegedly committed", but that the position in relation to inhuman or degrading treatment is more complicated. What amounts to such treatment depends on all the circumstances of the case. He went on at para 24, having cited the ECtHR in *Soering* para 89 that it was clear that:

> "…the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the "minimum level of severity" which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account."

He went on at para 27:

> "A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* (2005) SC 229 that in Scotland the practice of "slopping out" (requiring a prisoner to use a chamber pot in his cell and empty it in the morning) may cause an infringement of article 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries, poorer then Scotland, where people who are not in prison often have to make do without flush lavatories."

He added at para 36 that, unlike *Soering*, there was no other jurisdiction in which the claimant could be tried, and that, absent extradition to Missouri, he would be entitled to remain in Britain as a fugitive from justice. Therefore the standard of what amounts to inhuman and degrading treatment for the purposes of article 3 must be a high one.

56. I shall return to the question of whether the claimants might be tried in this country and whether this case might be distinguishable from *Wellington* in that respect. However, I have concluded that it is not.

57. Baroness Hale delivered a concurring speech in which she agreed with the reasons given by Lord Hoffmann. It is true *Wellington* was a case concerned with the fact of a whole life tariff rather then the conditions in which it would be served and that she said that there was nothing to suggest that the conditions in Missouri prisons were inhuman or degrading (a point that was emphatically disposed of by Laws LJ in the Divisional Court: see [2007] EWHC 1109 ((Admin) para 7). However, the principle that the desirability of extradition should be taken into account in deciding whether the high minimum threshold for article 3 has been crossed seems to me to be just as relevant where the issue is prison conditions as it is to the length of sentence.

58. Lord Carswell, also concurring with Lord Hoffmann, said at 65 E, para 56:

> "When considering the issue the courts of this jurisdiction therefore have to take into account and effect a proper balance between two imperatives, the importance of facilitating extradition and the prohibition against extraditing an alleged offender to face treatment which could be classed as inhuman or degrading.

> 57. I accordingly agree with the reasons given by my noble and learned friend, Lord Hoffmann, in paras 22 – 32 of his opinion for concluding that the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the requesting state attains the minimum level of severity which would make it inhuman or degrading. In particular I would underline the importance of facilitating extradition, as appears from para 89 of the judgment of the ECtHR in *Soering*."

59. Lord Scott of Foscote and Lord Brown of Eaton-Under-Heywood, whilst agreeing that the appeal should be dismissed, took a more absolutist approach on this point. Lord Scott observed that the language of article 3 provided no basis for the majority's approach. Lord Brown said at 76E, para 87:

> "Whilst, however, I readily accept that there is a good deal of flexibility in the concept of inhuman and degrading treatment and punishment with many factors in play in determining whether it attains the minimum standard required and whether the risk of such ill-treatment is satisfied, I cannot accept that the expelling state's desire to extradite the person concerned (legitimate though clearly it is) can itself properly be one such factor."

60. Whilst I can see the force of the views expressed in the minority opinions, I prefer the reasoning and opinions expressed on this point by the majority. In my judgment, when deciding whether the conditions in which the claimants are likely to serve any sentence in Supermax conditions cross the threshold of inhuman or degrading treatment under article 3, it is relevant to take into account the importance of facilitating extradition, particularly where, as in this case, the fugitive claimants would not be tried in this country or elsewhere.

61. I turn next to consider the European Jurisprudence in relation to article 3 on prison conditions. *Ramirez Sanchez v France* (2007) 45 EHRR 49 was a case in which the grand chamber held by 12 votes to 5 that there had been no violation of article 3. The case concerned a prisoner who was serving life imprisonment for terrorist offences. He was held in solitary confinement for over 8 years in a run down, poorly insulated cell measuring less than two square metres. He had no contact with prisoners or with prison warders and was only allowed to leave his cell after other prisoners had returned to theirs. His sole activity outside his cell was a two hour daily walk in a walled–in mesh covered area. His only recreational activities were reading newspapers or watching television, and his only visits were from his lawyers (one of whom was his wife) and, once a month, a priest. The reasons given included his dangerousness, the risk of escape, the need to prevent communication with other prisoners and the need to maintain order and security. On each occasion he underwent medical examinations to determine his fitness for solitary confinement. The court said at page 1157, para 145:

> "The court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is

> essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement. In the instant case that only became possible in July 2003."

And at page 1158 para 150:

> "……it nevertheless considers that, having regard to the physical conditions of the applicant's detention, the fact that his isolation is "relative", the authorities willingness to hold him under the ordinary regime, his character and the danger he poses, the conditions in which the applicant was being held during the period under consideration have not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of art 3 of the convention."

62. In *Keenan v United Kingdom* (2001) 33 EHRR 38 the applicant's mentally ill son committed suicide in prison while serving a four month sentence for assault. A fortnight after assaulting two prison officers and only nine days before his expected release date he had been given seven days segregation in the punishment block and an additional 28 days. The applicant complained, inter alia, that her son had been subject to inhuman and degrading treatment in the period before his death. The court made the point at para 108 that the assessment of the minimum level of severity to fall within article 3 was relative and that it depended on all the circumstances of the case. Then it said at para 115:

> "The lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment discloses significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment – seven days segregation in a punishment block and an additional 28 days to his sentence imposed two weeks after the event and only nine days before his expected date of release – which may well have threatened his physical and morale resistance, is not compatible with the standard of treatment required in respect of a mentally ill person. It must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of article 3 of the Convention."

63. The next case is *Peers v Greece* [2001] 33 EHRR 51. The applicant was arrested on suspicion of drug offences and was held in prison, first on remand in a segregation unit and then, following conviction until his release on probation. He alleged that the conditions of his detention in the segregation unit amounted to inhuman and degrading treatment. The court reiterated that the minimum level of severity necessary to engage article 3 is relative and dependent on the circumstances such as the duration of treatment, its physical and mental effects and, in some cases, the sex age and state of health of the victim. It added at para 68:

> "Furthermore, in considering whether treatment is "degrading" within the meaning of article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3."

64. The court went on to record that there was no evidence of a positive intention of humiliating or debasing the applicant but that the absence of such an intention could not conclusively rule out a finding of violation of article 3, and indeed there was a breach of article 3 in that case.

65. The ECtHR found violations of article 3 in *Ilascu and Ors v Moldova and Russia* (8 July 2004, application No 24919/03 ECHR 2005), *Matthew v the Netherlands* (2006) 43 EHRR 23 and *Ocalan v Turkey* (12 May 2005 application No 46221/99). Each of those cases involved extreme facts. In *Ilascu* there was inadequate diet, a cell without natural light, inadequate washing facilities and no heating in winter. In *Matthew* there was solitary confinement for an excessive and protracted period, confinement in a cell that failed to offer adequate protection against the elements and no access to outdoor exercise and fresh air. Without unnecessary physical suffering, *Ocalan* was the sole inmate of an island prison for six years with no access to a television and his lawyers were only allowed to visit him once a week and had often been prevented from doing so by adverse weather conditions.

66. In *Messina v Italy* (25498/94, 8 June 1999) the ECtHR accepted that mafia connections can be a legitimate reason for imposing strict conditions. In that case the applicants claim was held inadmissible as it was manifestly ill founded. The following restrictions were imposed on Messina:

> no access to a telephone;
>
> no correspondence with other persons;
>
> no meetings with third parties;
>
> a maximum of one visit of one hour per month from family members;
>
> no money above a fixed amount to be received or sent out;
>
> only parcels containing clothing to be sent in from outside;
>
> no organisation of cultural, recreational or sports activity;
>
> no right to vote in elections for prisoner's representatives or to be elected as a representative;
>
> no handicrafts;
>
> no food requiring cooking to be purchased;
>
> no more than two hours per day to be spent outdoors.

The court said at page 13:

> "The court notes that treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and the context of the treatment as well as its duration, its physical or mental effects and, in some cases, the sex age and state of health of the person concerned."

And a little later:

> "The court notes 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."

And at page 14:

> "The court notes firstly that the applicant was not subjected to sensory isolation or total social isolation. On the other hand, he was subjected to a relative social isolation, having been prevented from meeting prisoners subject to different public regimes, receiving visits from persons other than family members and making telephone calls. However, although his opportunities for contact were therefore limited, one could not speak of isolation in this context.
>
> It is true that all recreational and sporting activities involving contact with other prisoners were prohibited, as was handicraft work in his cell, that excess to outdoor exercise was limited and that the right to receive certain foods and objects from the outside was also withdrawn.
>
> The court notes that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its report published on 4 December 1997, expressed doubts as to the need for some of the restrictions imposed by these rules (namely, "the total suspension of participation in cultural, recreational and sporting activities; suspension of works; restrictions on…….access to outdoor exercise") in relation to the aims pursued.
>
> However, in the light of the explanations given by the government, the court cannot share these doubts in this case. The applicant was placed under the special regime because of the very serious offences of which he had been convicted or with which he had been charged, in particular crimes linked to

> the mafia. He was prohibited from organising cultural sporting or recreational activities since his encounters with the other prisoners could be used to re-establish contact with criminal organisations. The same was true of access to the exercise yard. The applicant has not established that the Italian authorities concerns were unfounded or unreasonable. The continuing danger that the applicant might re-establish contact with criminal organisations was moreover suggested by the fact that between November 1993 and May 1998, the period during which the applicant was subject to the special regime, he had been arrested on suspicion of the murder of a judge, had been sentenced to 17 years imprisonment, and had other proceedings pending against him for membership of mafia type organisations."

67. Then there is *Bastone v Italy* (59638/00, 18 January 2005) where the restrictions were identical to those in *Messina* and the claim was again held inadmissible. Again the purpose of the restrictions was the prevention of contact with the mafia. The court reiterated at p.5 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 for any other reason but that prohibiting contacts with other prisoners for reasons relating to security, discipline and protection does not in itself amount to inhuman treatment or punishment.

68. Mr Drabble submits that the regime in *Messina* and *Bastone* was very different from the regime in ADX Florence involving as it does 23 hours a day solitary confinement. Mr Perry argues that the conditions in ADX Florence must be contrasted with the conditions in those cases in which the ECtHR has found violations of art 3 for example in *Ilascu*, *Matthew*, and *Ocalan* and *Ramirez Sanchez* in which there was not. The conditions in ADX Florence are, he submits significantly less harsh than in these cases. The bottom line is that the prisoners at ADX Florence are not detained in conditions of complete sensory isolation. Overall their mental and social needs are properly catered for.

69. I draw the following principles from the authorities that I regard as material in assessing whether in ordering the extradition of the claimants to the United States there is a real risk of violation of article 3.

- The test is a stringent one and the burden if proof on the claimants.
- The claimants must not be extradited to the United States unless the safeguards they will enjoy there are as effective as the convention standard.
- It is a matter for the United States' authorities where and in what circumstances they detain the claimants both pre trial and post conviction.
- The importance of international cooperation and maintaining our treaty obligations is an important factor.
- It is essential to focus on what is likely to happen to the claimants in their particular circumstances.

- Punishment that would be regarded as inhuman or degrading in the domestic field will not necessarily be so regarded where the alternative to extradition is that the person sought to be extradited will escape justice altogether.

- Complete sensory isolation coupled with total social isolation cannot be justified whatever the circumstances.

70. None of the authorities, however, seems to me to identify a minimum level of severity in relation to circumstances of incarceration that assists greatly in the present case. All the circumstances have to be taken into account and these include in the present case the importance of extraditing fugitives from justice to friendly states to whom we owe treaty obligations and the extremely grave nature of allegations. Further, the Eighth Amendment to the US Constitution places a duty on prison officials to provide humane conditions of detention.

Alternative venue

71. One reason advanced why the claimants should not be extradited is that they could and should be tried in England. It is said that this is the country from which the preponderance of the evidence against them comes, following searches by the Metropolitan police in September 1998. Mr Drabble for Bary argues that this is a realistic option and that it takes the case out of the category referred to by Lord Hoffmann in *Wellington* in which the only alternative to extradition was that the person sought would walk free. The claimants argue that the defendant gave no consideration to whether the natural forum for the trial was in fact the United Kingdom.

72. Mr Perry's response is that while the decision letter does not expressly deal with the issue of forum, all the claimants' representations were fully considered and the bottom line was that she was not persuaded the case for surrender was outweighed by the points raised in the representations. The argument by extraditees that they should be tried in this country rather than in the requesting state has been advanced in a number of cases in recent years. See e.g. *Wright v Scottish Ministers* (2004) SLT 823, *R (Birmingham) v Serious Fraud Office* [2007] 2 WLR 635, *Ahsan and Tajik v United States of America* [2008] EWHC 666 (Admin) and *Abu Hamza*. In each of these cases the argument was rejected.

73. In *Wright v Scottish Ministers* 2004 SLT 823 The Lord Ordinary said at para 28:

> "Extradition does not and should not depend upon the ability or otherwise of the requested state to undertake its own investigations with the view to prosecuting the case within its own jurisdiction. Such an approach would involve unnecessary duplication of effort, would result in additional delays in the prosecution of suspected criminals and would have an adverse effect upon international relations and international co-operation in the prosecution of serious crime. In most, if not all, extradition cases the requested state would depend upon co-operation from the requesting state if the requested state were to embark upon its own investigation and ultimate prosecution of the case."

74. These observations were underlined by Laws L.J in *Birmingham* at para 126. In *Ahsan and Tajik* the claimants sought to rely on "Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America." The high court held the guidance only applied to cases where the prosecutor in this jurisdiction is seized of a case as a prosecutor. Richards L.J, with whom Swift J agreed, said at para 38:

> "First, the way in which Mr Jones has sought to deploy the guidance has close parallels to the arguments he advanced unsuccessfully in *R (Birmingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635, in that case challenging the decision of the Director of the serious fraud office not to open, pursuant to the power of investigation conferred on him by s1(3) of the Criminal Justice Act 1987, an investigation as to whether or not a prosecution should be brought in the United Kingdom. The court held inter alia, that the request to investigate in effect invited the Director of the serious fraud office to constitute himself the judge of the proper forum of the defendant's trial and to decide the issue in favour of trial in this country and not in the United States and thereby to pre-empt the statutory extradition process (para 65); and that protection of a defendant's convention right was to be found in the material provisions of the 2003 Act rather than in any power of investigation by the Director (paras 70 – 71). It seems to me that Mr Jones's reliance on the guidance in the present case as a means of securing a decision on forum by the Director of Public Prosecutions is a similarly impermissible attempt to circumvent the statutory extradition process."

75. In *Abu Hamza* the court was clearly of the view that the offences should be tried in the United States. It was concerned that a trial in this country would be likely to be met with abuse of process arguments and the prospect that a trial which ought to take place might never do so. Both the lack of connection between this country and the offences and the passage of time seem to me to suggest that the deployment of abuse of process arguments is a very real possibility in the present case too. Furthermore, there has been simply no investigation by the authorities in this country of the offences for which extradition is sought to America, and we are now 11 years down the line.

76. In my judgment the reality is that a trial in this country is neither viable nor appropriate. The connection with this country is tenuous indeed. I note that in the summary of representations of Elderous and Bary dated 3 February 2002 it is stated at page ten that in June 1999 Detective Inspector Alwyn Jones of the anti-terrorist squad said that the nine month investigation that had taken place has not developed sufficient evidence against those under investigation (which included the claimants) to charge them with any relevant terrorist related offences under United Kingdom legislation.

77. The offences for which extradition is sought concern the terrorist bombings of the American Embassies in Nairobi and Des Es Salaam in which many American citizens and others requiring international protection were killed. The natural forum for a trial

is the United States of America, for the claimants and the offences have little connection with this country other than their physical presence. There is no reason why the ordinary principles as outlined by Laws L.J in *Birmingham* should not apply and the reality is the claimants will not be tried here.

Refoulement

78. The claimants contend there is a real risk that they would be removed from the United States to another country in particular Egypt or Saudi Arabia where the death penalty might be imposed or they might be tortured. The Secretary of States' response is that the United States government has given an assurance that if acquitted or after serving their terms of imprisonment they will return the claimants to the United Kingdom should they so request. The claimants submit that such an undertaking is an incomplete answer to their concerns for the Secretary of State said this in his decision letter in each case:

> "Were (they) to be so returned, it would be for (Mr Bary and Mr Al Fawwaz) to satisfy UK immigration authorities that (they were) entitled to enter the country. The fact that the Secretary of State has been prepared to obtain the enclosed undertaking from [the] US authorities and that she is prepared for (Mr Bary and Mr Al Fawwaz) (if they so wish) to be returned at some future date by the US to the UK, should not therefore be taken necessarily as a guarantee of readmission. Any application would be considered in accordance with the legislation in force at the material time, and in accordance with the UK's international undertaking."

79. Their argument runs thus. The claimants are not British citizens and have no right to reside in the United Kingdom. They would have to satisfy whatever the appropriate requirements might be at the time for obtaining leave to enter the UK as visitors. As they do not belong to any of the categories of person who would be granted entry clearance any application would almost inevitably fail. Their presence in this country would be likely to be regarded as contrary to the public interest. In short, the United States undertaking to return them is worth little if the United Kingdom is unlikely to accept them back. The end result would in all probability be that they would be are returned by the United States to their country of origin namely Saudi Arabia.

80. Mr Perry draws the court's attention to article X11(1) of the Extradition Treaty between the government of the UK and the government of the United States – see schedule 1 to the United States of America (Extradition) Order 1976 SI1976, No 2144.

> "Article X11
>
> (1) A person extradited shall not be detained or proceeded against in the territory of the requesting party for any offence other than an extraditable offence 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 third party to a third state –

(a) until after he has returned to the territory of the requested party; or

(b) until the expiration of 30 days after he has been free to return to the territory of the requested party."

Mr Perry also draws attention to the terms of the assurance:

> "The government of the United States assures the government of the United Kingdom that if Khalid Al Fawwaz and Adel Abdul Bary are acquitted or have completed any sentence imposed or if the prosecution against them is discontinued, not pursued or ceases for whatever reason, United States authorities will return Khalid Al Fawwaz and Adel Abdul Bary to the United Kingdom, if they so request."

81. They will therefore, he submits, be physically returned to this country. The Secretary of State is naturally cautious about what would occur following any return. She gives no guarantee of readmission pointing out the position would be considered in the context of the United Kingdom's legal obligations and the legislation in force at the time. As Mr Perry rightly points out, no one can give an assurance today about what the legal position might be in the future. However, once returned the issue of what to do with the claimants is that of the United Kingdom rather than the United States who will have complied with their obligation by returning them. The United Kingdom has, of course a continuing obligation under the Human Rights Act 1998 to comply with the provisions of the ECHR.

82. As Mr Perry observes, the whole case on refoulement is inconsistent with the article 3 case that there is a real risk of inhuman and degrading treatment in long term incarceration. There is some inconsistency in contending a real risk of refoulement to a third country on the one hand and a real risk of inhuman and degrading treatment through the circumstances of incarceration in the United States on the other. In my view it is stretching imagination to breaking point to conclude that there is a real risk that following return to this country in pursuance of the undertaking the claimants will immediately be returned to the United States without any investigation by the courts in this country and then sent to Egypt or Saudi Arabia.

Assurances

83. It was submitted to the Secretary of State that the assurances provided by the United States could not be relied on because they are not effective as a matter of law and the United States would not comply with them. The starting point is that there is a fundamental assumption that the requesting state is acting in good faith (see Kennedy L.J in *Serbeh v Governor of H.M. Prison Brixton* [2002] EWHC 2356 (Admin) para 40). This observation was cited with approval by Laws L.J in *Ahmad and Aswat* at para 74. In the passages that I have cited earlier in this judgment Sir Igor Judge P referred in *Abu Hamza* to the fact that no instance had been drawn to the court's attention in which over many years of mutual extradition agreements with the United States either the executive or the judiciary of the United States had failed to honour any assurances or undertakings given in extradition proceedings and that the history unswerving compliance with them provides a sure guide that the diplomatic

assurances in that case would be honoured. The same, it seems to me, applies with equal force in the present case. The court can proceed with complete confidence that the United States will honour the four assurances referred to in para 7 supra.

The Global Terrorist Issue

84. Al Fawwaz made representations to the Secretary of State in the letter of 6 August 2004 with respect to the prejudicial effect on any future trial of his having been designated as a global terrorist. He is on the US Treasury Office of Foreign Assets Control's list of "Specially Designated Nationals and Blocked Persons." A person on this list is referred to as a "Specially Designated Global Terrorist ("SDGT"). He was designated a SDGT by President Bush on 19 April 2002, pursuant to Executive Order 13224. Only "foreign persons" may be so designated. The list is public and easily accessible on the internet.

85. The way Al Fawwaz now puts his case is that his designation as a SDGT on this list creates a real risk of a flagrant denial of the right to a fair trial guaranteed by article 6 of the ECHR and/or he might be prejudiced at his trial by reason of his nationality (para 1(2)(c) of Schedule 1 to the Extradition Act 1989 and article 3(a) of the UK–USA Extradition Treaty 1986) and that accordingly the Secretary of State has acted unlawfully in ordering his extradition.

86. Mr Fitzgerald submits that the fact that Al Fawwaz is on this list, authorised by none less than the President of the United States, is an unnecessary public prejudgment of guilt. It is argued that the request for his extradition has been made with a view to trying or punishing him on account of his religious or political opinions and, if surrendered, he will be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

87. Mr Fitzgerald submits that the important point is that this is discriminatory. Only non-US citizens may be designated and in practice this is Asians; this is prejudicial and precisely what the provision in the treaty is seeking to protect against. The US designation preceded similar ones by the United Nations and the UK which do not discriminate in this way. The vice is the designation only of *foreign* global terrorists.

88. Mr Fitzgerald relies on *Knowles Jr v United States of America and the Superintendent of Prisons of the Commonwealth of the Bahamas* [2006] UKPC 38 as authority for the proposition that a person may be prejudiced in their enjoyment of the right to a fair trial on grounds of nationality when they are designated as a drugs kingpin (as in *Knowles*) or a global terrorist (as in the present case).

89. *Knowles* is a case from the Bahamas. Section 7(1)(c) of the Bahamian Extradition Act 1994, which closely mirrors Section 6(1)(d) of the 1999 Act provides, so far as material, as follows:

> "(1) A person shall not be extradited under this Act to an approved state or committed to or kept in custody for the purposes of such extradition if it appears to the Minister, to the court of committal or the Supreme Court on an application for habeas corpus

……

(c) that he might, if extradited, be denied a fair trial…..by reason of his…. nationality…."

90. Knowles argued that he might, if extradited to the United States be denied a fair trial because on 31 May 2002 the President of the United States had publicly designated him a drug "kingpin" within the meaning of the relevant legislation, with the result that he became subject to the sanctions and penalties provided by it. He submitted that his designation as a drugs "kingpin" was tantamount to a declaration of his guilt by the highest authority in the government. As this had already been published and could be found on a government website, any juror would or might learn of his designation and he would not have a fair trial if a juror was prejudiced by such knowledge. Further, this prejudice derived from his nationality as the legislation did not apply to US citizens.

91. Small J, in the Supreme Court of the Bahamas accepted this argument and discharged the committal order that had been made by the magistrate. The Court of Appeal rejected the "kingpin" argument on the merits and reinstated the magistrate's committal order. Knowles appealed to the Privy Council who held that the Bahamian Court of Appeal had no jurisdiction to entertain an appeal against a grant of habeas corpus; their jurisdiction was wholly statutory. The judge's order granting habeas corpus was therefore restored. Small J's reasoning was therefore never examined on appeal and I would regard *Knowles* as of little weight in support of Mr Fitzgerald's argument, which draws a distinction between the higher article 6 test of "a flagrant denial of a fair trial" and the lower statutory test of being prejudiced in the right to a fair trial by reason of nationality.

92. The Secretary of State in the decision letter relied on another Privy Council case *Heath and Matthews v USA* [2005] UKPC 45 in which the appellants challenged their extradition from St. Christopher and Nevis to the United Stated on the basis that they had been designated in similar manner to *Knowles*. They argued this meant they would be unable to obtain a fair trial in the United States. Lord Brown of Eaton-Under-Haywood giving the opinion of the Judicial Committee said:

"24……Put succinctly, it is Mr Fitzgerald's basic submission that the United States courts would be unable to safeguard the appellants against the prejudicial effects of their designation. He recognises, as he must, that to avoid extradition on this ground he has to establish a real risk that the appellants will suffer a flagrant denial of justice in the requesting state. The evidence, he submits, supports such a conclusion.

25. Their Lordships regard this as an impossible argument. As Lord Mustill said in giving the judgment of the board in *Nakissoon Boodram v Attorney General* (1996) 47 WIR 459, 495:

"The proper *forum* for a complaint about publicity is the trial court, where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury,

> and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for a cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution.""

93. *Heath and Matthews*, it seems to me, disposes conclusively of Mr Fitzgerald's article 6 argument. In my judgment the fact that the claimant has been specially designated on a list of global terrorists (even assuming the jurors are aware of it) adds little if anything to what they already know. Anyone allegedly involved in the conspiracy to bomb the American Embassies in Nairobi and Der Es salaam would be likely to be pretty high up the United States Government's wanted list and I cannot see that the fact of being on that list adds anything to the allegations that the jury would have to try. It would no doubt be made clear to them at the trial that what had to be proved was the indicted allegation and that presence on a list added nothing. Accordingly, I accept Mr Perry's contention that there is no material risk that the designation of Al Fawwaz will cause him any prejudice at his trial.

94. The second limb of Mr Fitzgerald's argument is that Al Fawwaz will be prejudiced because of his nationality as only non US nationals can be designated and therefore para 1(2)(c) of Schedule 1 to the 1989 Act is offended. It seems to me that the short answer to this point is that designation is not triggered by nationality but by perceived global terrorism. The fact that United States citizens cannot be designated is neither here nor there for the purposes of extradition. There is no question of the possibility of prejudice arising at his trial because of nationality. If there is any prejudice, it is caused by advance adverse publicity as a result of the designation and that is a matter, as Lord Brown pointed out in *Heath and Matthews*, to be dealt with by the court of trial.

95. In my view there is nothing in the "global terrorist" point. Bary has not been designated and at its highest any claim by him would be one stage removed from Al Fawwaz's designation. As in my judgment Al Fawwaz fails on this point any claim by Bary must fail too.

96. Before leaving this point I would make two further observations. The first is that by the designation of Al Fawwaz the United States was acting in compliance with its international obligations. The second is that Al Fawwaz does not, apparently, object to trial in the United Kingdom where exactly the same issue on risk of prejudice would arise.

Conclusion

97. My conclusion on the article 3 issue is as follows.

(1) It is reasonably likely that the claimants will be subjected to SAMs and will be held in ADX Florence following trial.

(2) Neither SAMs (see *Ahmed and Aswat*) or life without parole (see *Wellington*) cross the article 3 threshold in the present case. 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 and in the context of a whole life sentence.

(3) 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.

98. 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 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 BOP acts unlawfully.

99. My conclusions on the other issues are:

(1) Trial in the United Kingdom is not a realistic option.

(2) The assurance that the claimants would be returned to the United Kingdom in the circumstances described rules out the risk that they will be refouled to a country such as Egypt or Saudi Arabia in breach of article 3.

(3) All the assurances given by the United States government can be relied on with complete confidence.

(4) There is no substance in the arguments on behalf of Al Fawwaz arising from his designation as a global terrorist.

100. I would grant permission to apply for judicial review on all the grounds pursued before us but refuse judicial review.

101. Mr Justice David Clarke:

102. I agree.