



Neutral Citation Number: [2008] EWHC 1357 (Admin)

Case No: CO/1748/2008

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/06/2008

**Before :**

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**MR JUSTICE SULLIVAN**

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**Between :**

**Mustafa Kamel Mustafa (Otherwise Abu Hamza)**  
**- and -**

**Appellant**

**(1) The Government of the United States of  
America**

**Respondents**

**(2) Secretary of State for the Home  
Department**

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Alun Jones QC and Ben Brandon (instructed by Arani & Co) for the Appellant  
Hugo Keith and Clair Dobbin (instructed by The Crown Prosecution Service) for the first  
Respondent

James Eadie QC (instructed by the Treasury Solicitor) for the second Respondent

Hearing dates: 12th-15<sup>th</sup> May 2008  
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**Approved Judgment**

## **President of the Queen's Bench Division :**

### **This is the judgment of the Court**

1. The extradition of Mustafa Kamel Mustafa (otherwise known as Abu Hamza) is sought by the Government of the United States of America (USA). These are connected appeals first, against the order of District Judge Workman at the City of Westminster Magistrates Court on 15<sup>th</sup> November 2007 sending the case to the Secretary of State for the Home Department under section 87(3) of the Extradition Act 2003 (the Act) for her decision whether the appellant is to be extradited, and second, against her decision under section 93(4) of the Act ordering his extradition.
2. We shall have to address the timetable in detail, but for present purposes it is sufficient to notice that the indictment was dated 19<sup>th</sup> April 2004. The appellant was arrested on 27 May 2004. The request for extradition was submitted by the USA on 24 May 2004. The appellant was remanded in custody. The proceedings are governed by the Extradition Act, and for these purposes, the USA is a Part 2 territory. The extradition proceedings were interrupted when the appellant was charged with offences contrary to United Kingdom law. In due course he was prosecuted to conviction, and sentenced to imprisonment. The extradition proceedings resumed in May 2007, and were subsequently adjourned because of the appellant's medical condition. When he was fit, the proceedings resumed, and were concluded on 15 November 2007.
3. The appellant is accused of conduct which, had it occurred within the United Kingdom, would have amounted to the following offences:
  1. Between 23<sup>rd</sup> December 1998 and 29<sup>th</sup> December 1998, conspired with others to take hostages in Yemen.
  2. Between the same dates, aided and abetted counselled and procured Abu Hassan and others to commit the offence of hostage-taking in Yemen.
  3. Between 1<sup>st</sup> October 1999 and 30<sup>th</sup> April 2000, conspired with others to control and manage an association of persons in Bly, Oregon, who would be organised and trained, or organised and equipped for the purpose of enabling them to be employed for the use or display of physical force in promoting a political object, namely to make hijrah to and to fight jihad in, Afghanistan.
  4. Between the same dates, conspired with others to control and manage an association of persons in Bly, Oregon, who would be organised and trained, or organised and equipped in such a manner as to arouse reasonable apprehension that they were organised and either trained or equipped for the purpose of enabling them to be employed for the use or display of physical force in promoting a political object, namely to make hijrah to, and to fight jihad in Afghanistan.
  5. Between the same dates, conspired with others to have with them firearms in Bly, Oregon with intent to commit one or more of the following indictable offences:

unlawful drilling; prohibition of quasi-military; possession of explosives under suspicious circumstances; enlistment in the service of a foreign state.

6. Between the same dates, conspired with others to use or have possession of property, namely a training camp and equipment, intending that it shall be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism, namely the fighting of jihad in Afghanistan
  7. Between 1<sup>st</sup> October 1999 and 31<sup>st</sup> December 1999, gave, lent or otherwise made available to another money, namely £4000, knowing or having reasonable cause to suspect that it would be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism, namely the fighting of jihad in Afghanistan.
  8. Between 1<sup>st</sup> June 2000 and 19<sup>th</sup> December 2001, conspired with others to give, lend, or otherwise make available money including travel expenses for persons to attend Afghanistan, and other property including a letter of introduction to a high ranking member of the Taliban, knowing or having reasonable cause to suspect that it would be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism, namely attendance and terrorist activities at an al Qaeda terrorist training camp and elsewhere in Afghanistan involving the use and possession of light weaponry, machine, explosives, detonators, mines, anti-aircraft weapons and the planning of bombings, hostage taking and suicide bombing.
  9. Between 1<sup>st</sup> March and 30<sup>th</sup> April 2001, conspired with others to invite CC-2 to receive instruction and training in the use of firearms and explosives in Afghanistan.
4. In summary the indictment is divided into groups of charges which relate to three areas of alleged criminal activity. Charges 1 and 2 are related to hostage taking in the Yemen in December 1998. This crime culminated in the deaths of several hostages. Charges 3-5 address arrangements for an alleged terrorist training camp at Bly, Oregon in the USA between October 1999 and early 2000, which culminated in charges 6-9, violent jihad in Afghanistan between June 2000 and December 2001.
  5. Since the appellant's arrest two of his alleged co-conspirators, originally unnamed, have been named and indicted. They are Oussama Kassir and Haroon Aswat. Aswat's extradition was ordered by the second respondent on 1<sup>st</sup> March 2006. His appeal against that order was dismissed in the High Court on 30<sup>th</sup> November 2006. ([2006] EWHC 2927 (Admin)) His case is now under consideration before the European Court of Human Rights. Kassir was extradited from the Czech Republic to the USA.
  6. As we shall see, it was a recurring feature of the submissions by Mr Alun Jones QC on behalf of the appellant that the three groups of charges were properly to be regarded as manifestations of a world-wide terrorist conspiracy. It is indeed possible to conclude that in the broadest non-legal sense such a conspiracy may exist, and if so, that there may be many hundreds, if not thousands, of supporters involved to a greater or lesser extent in it. However that is remote from the specifics of the three distinct groups of offences in which the appellant is alleged to have been involved,

and for which he provides a common link. On any view, and indeed reinforced by Mr Jones' contention that the groups of alleged offences are themselves to be regarded as manifestations of an overall conspiracy, we have no doubt that the interests of justice require that the three groups of offences should be tried in the same jurisdiction. There is an undoubted link between the Yemen crimes and this country, but save in the broad sense that terrorist activity abroad may be prosecuted in this jurisdiction there is none between this country and the Bly Oregon offences or the Afghanistan offences. On the other hand there is a direct link between the United States and the Yemen offences and the United States and the Afghanistan offences, and the Bly Oregon offences are exclusively related to the United States. On any view, there is ample justification for a trial of all three groups of offences in the United States.

7. We must also highlight at the outset the focus by Mr Jones on the appellant's very poor health. The combined effect of his disabilities is undoubtedly very serious. He is 48 years old. His medical complaints include "type 2" diabetes and raised blood pressure, for both of which he is prescribed appropriate medication, extensive psoriasis, hyperhidrosis (excessive sweating provoked by a neurological condition) which requires him to shower and change his clothes at least twice daily, blindness in the right eye, with poor vision in the left, and bilateral traumatic amputation of the distal third of both forearms for which prostheses are fitted. The stumps in both arms are subject to regular outbreaks of infection, which have been increasing in severity. As we shall see the appellant's health is deployed by Mr Jones to reinforce a number of his criticisms of the decisions currently under appeal, and his submission that these alleged offences should be tried in this country.
8. The order made by Judge Workman is criticised on three grounds, each of which, if properly considered, should have resulted in the failure of the extradition proceedings.
  - a) It would be an abuse of process to extradite the appellant to face trial for the alleged offences in the United States of America. The request for extradition is "tainted" because, contrary to Article 3 of the European Convention of Human Rights, it is founded in whole or in part on evidence obtained directly or indirectly by torture or ill treatment. This is the "torture" ground. It is linked to an alleged failure by the judge to correct and overrule the refusal by the second respondent to disclose relevant material which it is said would bear on this issue:
  - b) Extradition to the United States would be incompatible with the rights provided for the appellant under articles 3, 6 and 8 of the European Convention. There is a real risk that if extradited the appellant would be subjected to torture or ill treatment contrary to article 3, and that there would be a disproportionate interference with his rights under article 8. Linked with this submission is the suggestion that it would be inappropriate for courts in this country to act or rely on diplomatic assurances tendered by the first respondent. This is the "ECHR" ground.
  - c) By reason of the passage of time since the alleged offences were committed, it would be unjust and oppressive for the appellant's extradition to be ordered. This is the "delay" ground

The decision of the Secretary of State is criticised on what, effectively, are the same grounds.

9. The papers prepared in support of the appeal are voluminous. During the course of the hearing our attention was directed to numerous passages from a vast array of documents and reports. Something of the bulk of the papers can be discerned from the fact that at the conclusion of the hearing, at our request, a core bundle of papers was prepared. We are grateful to counsel for their considerable efforts in producing it. However, taken with bundle A which was said to be “essential”, the material core evidence extended to very nearly 800 pages, some closely typed. We shall endeavour to summarise the contentions said by the appellant to derive from a consideration of the material, without reciting it. We should also record that our attention was drawn to numerous authorities, but save where absolutely necessary, we do not propose to refer to or list them. In our view the essential principles are clear.

### **Chronology**

10. On 23<sup>rd</sup> December 1998 six members of the “Supporters of Sharia” were arrested in Aden in respect of planned bombings of Western targets. Explosives, weapons, documents and tapes were found. A few days later, on 28 December 1998, sixteen Western tourists were kidnapped in the Yemen. The leader of the kidnapping gang was Abu Al Hassan. The victims included several citizens of the United Kingdom, as well as two from the United States. Yemeni forces intervened on 29<sup>th</sup> December. The hostages were used as human shields. Four of them were killed. Three of the four dead were British nationals, the other was Australian. Two of the hostages were seriously injured, one a citizen of the United States, Mary Quinn.
11. While these calamitous events were in progress, on 29<sup>th</sup> December 1998, in this country, the appellant ordered £500 of additional airtime for satellite telephone for use by Abu Al Hassan. Shortly afterwards, the appellant attempted to obtain a refund.
12. Two days later officers from the Metropolitan Police anti-terrorist branch flew to the Yemen, and at much the same time, an investigation was put into progress by the United States authorities.
13. On 11<sup>th</sup> January 1999 the appellant was interviewed on British television. He admitted that he had been contacted by the kidnappers, but denied that their leader was a member of the Supporters of Sharia. He acknowledged that one of the suspects was possibly his stepson, but stated that he was unaware of any connection between the kidnappers and those planning to bomb Western targets. A week later he gave another interview in which he admitted that the Supporters of Sharia had issued a communiqué on 30<sup>th</sup> December 1998 but he repeated that he himself only became involved after he had been contacted by Abu Al Hassan. A number of subsequent media interviews followed. However, in these interviews, the appellant distanced himself from any criminal involvement in the Yemeni offences. He was acting as an information channel at the time, seeking to find an honourable solution to the crisis.
14. In the meantime Mary Quinn was interviewed and “de-briefed” by detectives from Scotland Yard and agents from the Federal Bureau of Investigations. Approximately a month later she was again interviewed by an officer from the Metropolitan Police anti-terrorist branch and an FBI officer. These interviews were recorded. However

they did not provide any direct evidence implicating the appellant. They are referred to in the first Metropolitan Police OIC report, dated 1 March 1999, and another undated Metropolitan Police report, which appears to be a second report, prepared later in 1999.

15. On 15 March 1999 the appellant was arrested for suspected involvement in the Yemen hostage taking, and his house was searched. He was interviewed between 15<sup>th</sup> and 18<sup>th</sup> March. These were effectively “no comment” interviews. Property taken from his home was returned to the appellant in December 1999.
16. On 5<sup>th</sup> May 1999, the trial of the hostage takers in the Yemen concluded. Mr Jones suggested that those who were tried in the Yemen were or would have been victims of torture or cruel and inhuman treatment. Abu Al Hassan and two others were convicted and sentenced to death by firing squad. A fourth defendant was sentenced to 20 years imprisonment. The other defendants were acquitted. Abu Al Hassan’s execution took place on 17<sup>th</sup> October 1999.
17. Pausing in the narrative, Mr Jones submitted that, looked at overall, by this date ample evidence had gradually become available to justify the appellant’s prosecution in this country for involvement in the Yemeni offences. He pressed us with the grounds advanced for opposing the appellant’s appeal against the decision of the Home Secretary made very much later, in 2003, depriving him of his “British citizenship”. In them it was alleged that the appellant had made a number of observations in the media which were, or were regarded as admissions that he was in contact with the kidnappers during the kidnapping and supported it; that the Supporters of Sharia received a telephone call from Abu Al Hassan on 28<sup>th</sup> December 1998, and that their subsequent press release, which was signed by the appellant, contained a justification for their actions and further commented that if Abu Al Hassan was executed, matters would escalate and that there would be killings without kidnappings.
18. In considering these submissions we cannot avoid noting that Ms Arani, the appellant’s solicitor who acted for him throughout this period of arrest and interview stated in terms that notwithstanding the interviews which lasted for three days, together with production and explanation orders, at that time “they appeared no closer to having any sort of case against him”. Referring to both the appellant and another man, now deceased, who was arrested at the same time for the same offence, she continued that the “explanation” orders which were sought were “nothing more than a last desperate attempt to compel them to talk in the hope that they will implicate themselves and others, including those who were being held in Yemen without charge”. Without accepting the accuracy of that assertion, the observations by the appellant’s solicitor about events in early 1999 tend to undermine Mr Jones’ submission that a prosecution for the Yemeni offences should have been mounted here.
19. According to the undated report from the Metropolitan Police in 1999 the kidnapping offences and the planned bombing offences were linked. It was however decided in the United Kingdom that neither the appellant nor any other suspect should be prosecuted for criminal involvement in the Yemeni hostage taking offences. The report expressed itself in unequivocal terms, that links between the appellant and the hostage takers were established, but it continued “evidentially the links have proved

inconclusive, and rely heavily on information gathered from Yemeni sources which would not ordinarily be admissible during a British trial...there does not appear to be evidence to prove that Abu Hamza...conspired with the kidnappers to bring about the kidnap or deaths of the tour groups hostages although suspicions will always remain". No doubt there were reasonable grounds for suspicion about the nature of the appellant's contacts with the Yemen in December 1999. In this jurisdiction however that would not have been sufficient to found a prosecution, let alone a prosecution with a realistic prospect of success.

20. The Bly, Oregon conspiracy began in October 1999. Its objective was to train for violent jihad in Afghanistan. In very brief summary, a military style army camp was established in Bly Oregon. Training was given in the use of weaponry and firearms and combat techniques. Thereafter those trained were to be deployed in Afghanistan. One of those involved in this conspiracy was known as CC-1, James Ujaama, a citizen of the USA. Those who attended the camp included Aswat and Kassir. Later, Ujaama arranged for CC-2, Feroz Abassi, to be taken to Afghanistan and introduced to CC-3 Al Libi, an alleged "front line" commander in Afghanistan. For the moment no further narrative of the details of the conspiracy, or the appellant's alleged involvement in it is necessary.
21. On 22<sup>nd</sup> October 2000 a recorded interview took place between the appellant and Mary Quinn. In the course of the interview the appellant made a number of significant self-incriminating observations. However, his more public interviews continued to assert that his involvement with the Yemeni offences was not criminal. Thus, in December 2002, in a Newsnight programme, he asserted that his contact with the Yemen at the time of the hostage taking was to see whether any honourable way to achieve the release of the hostages could be found.
22. It was not until February 2003 that the FBI became aware of the appellant's tape recorded interview with Mary Quinn. Her account of her experiences in the Yemen in December 1999 was published later, in 2005, "Kidnapped in Yemen". Mr Jones suggested that it is "difficult to understand" how this recorded interview escaped the attention of the FBI until January 2003. However that is the evidence and we can see no reason to disbelieve it. Then, significantly, in March 2003, James Ujaama agreed to be interviewed in relation both to the Bly Oregon and Afghanistan offences. A significant body of evidence lends weight to his allegations that the appellant was involved in the Bly Oregon and Afghanistan conspiracies. Shortly afterwards, on 14<sup>th</sup> April 2003, in the USA, Ujaama pleaded guilty to his participation in these offences and entered into a written co-operation agreement. The first witness testified in the investigation by the grand jury in June 2003, and further witnesses testified in December 2003 and April 2004.
23. On 19<sup>th</sup> April 2004, the appellant was indicted in the United States. An arrest warrant was issued. The request for his extradition followed on 21<sup>st</sup> May, and he was arrested on 27<sup>th</sup> May.
24. The first extradition hearing in this country began on 23<sup>rd</sup> July 2004. During the course of the hearing Ujaama's identity was disclosed. The hearing was adjourned to 19<sup>th</sup> October 2004. However, on 26<sup>th</sup> August 2004, the appellant was arrested on suspicion of committing offences in the United Kingdom, and on 18<sup>th</sup> October he was

charged. This led to the postponement of the extradition proceedings, and preparation for the appellant's trial in this jurisdiction.

25. On 7<sup>th</sup> February 2006 the appellant was convicted and sentenced to 7 years' imprisonment. On 28<sup>th</sup> November 2006 his appeal against conviction was dismissed by the Court of Appeal Criminal Division. Contentions on the appellant's behalf at his trial that an abuse of process arising from the delay which occurred between 1999 and 2004 had occurred, reinforced by a claim that the appellant had been given an implied assurance that no action would be taken against him, were rejected. (see [2006] EWCA Crim 2918 at paras 55-57) Leave to petition the House of Lords was subsequently refused. Nearly three years after they were adjourned, the extradition proceedings began again. The case was sent to the Secretary of State on 15<sup>th</sup> November 2007, and she ordered the extradition of the appellant on 7<sup>th</sup> February 2008.
26. Mr Jones drew attention to a letter from the Attorney General of the United States dated 8<sup>th</sup> January 2008 to the Secretary of State, complaining about the delayed extradition process. He observed that if extradition was further delayed until the end of the sentence currently being served by the appellant in autumn 2008 "in the worst case, it might mean we would eventually have to abandon our extradition request". The letter stated the obvious. In any proceedings the longer delay the greater the difficulties which arise in establishing the facts. However, the letter represented an endeavour by the authorities in the USA to avoid delay which had the potential to weaken the strength of the prosecution case. After all it is now five years since James Ujaama entered into his written co-operation agreement, and his importance to the prosecution case is obvious. We are, of course, conscious of the problems created for a defendant by delay, but we cannot interpret this letter as an expression of concern that the appellant would be unlikely to receive a fair trial in the USA on that basis.

### **Delay**

We shall begin by dealing with the third criticism of Judge Workman's decision.

27. The principles are well understood. The passage of time may constitute a barrier to what would otherwise be an appropriate order for extradition provided it would result either in a judicial process in the requesting country which, by reference to the language of s82 of the Extradition Act 2003 could properly be stigmatised as "unjust", or if the impact on the individual whose extradition is sought would, in the light of the changed circumstances since the date of the offence, be "oppressive". Both concepts amply cover any unfairness in the proposed proceedings arising from delay.
28. It was submitted to Judge Workman that it would be unjust to extradite the appellant because the passage of time would cause irretrievable prejudice to the preparation for and conduct of any trial in the United States. It was nearly ten years since events alleged in the Yemen case, nine since the events alleged in Bly Oregon, and eight since the Afghanistan terrorist offences occurred. Judge Workman accepted that in relation to the Yemen allegations, material which the appellant might seek to deploy at his trial would not be available to him, but that, he held, was not caused by the passage of time, but arose because of the "nature of the allegation". He further considered that there was no obvious delay in relation to the Bly Oregon and

Afghanistan charges and noted that there had been “no detailed submissions as to culpability for any delay”.

29. The submission that the passage of time had caused prejudice was repeated to us by Mr Jones. In summary, witnesses would no longer be available to the prosecution and the defence. The case was stale. The delay was attributable to delays in the United States and the choice of extradition proceedings rather than a trial in the United Kingdom. The judge failed to give sufficient weight to the consequences of the delay to the dimming of witness recollection, and the loss and destruction of documentary material. It was wrong to attribute these problems to the nature of the proceedings faced by the appellant.
30. As we have already recorded Mr Jones suggested that a great deal of material said to implicate the appellant in the Yemeni crime was obtained by and through British intelligence, and that indeed by mid-1999 the investigation was more or less complete. He was at pains to highlight that the strength of the evidence amply justified the appellant’s prosecution at a much earlier date, and given the death of the three British citizens, the interest of this country in such a prosecution was obvious. Therefore, he argued, the United Kingdom is the proper forum for trial of the offences covered by the charges the appellant now faces. The appellant was living here at all material times, and although the offences were indeed “extradition offences” for the purposes of the 2003 Act, the criminal conduct alleged against him would be triable and should be tried in this country.
31. However that may be, as we have also recorded, it was decided by the Metropolitan Police that there was insufficient evidence to justify the prosecution of the appellant in this country for any offences connected with the Yemen outrage. Notwithstanding what we shall choose to regard as a mere forensic flourish deployed by Mr Jones in his written submissions, where he referred to a “genuinely independent criminal justice system”, and appeared to imply any failure to prosecute for the Yemen offences in this country would indicate that the criminal justice system here is not truly independent, we cannot find the slightest evidence to suggest that the decision that the appellant should not be prosecuted in this country was reached otherwise than on an objective analysis of the available evidence. We reject the innuendo that it was tainted by some improper collusive agreement with the authorities in the United States to leave the responsibility for bringing criminal charges against the appellant to them. There is not the slightest evidence to justify it.
32. In our judgment the prosecution of the appellant for alleged involvement in the Yemen offences was not properly viable until the FBI became aware of the contents of the interview between Mary Quinn and the appellant. These interviews wholly undermined his assertion of innocent involvement in those offences, and provided sufficient evidence to justify a prosecution by adding weight to what were previously reasonable but unconfirmed and unprovable suspicions of his involvement in them. Shortly afterwards, in March 2003, Ujaama provided credible evidence linking the appellant with the Bly Oregon and Afghanistan conspiracies. Until it became available, the appellant was not linked with either the Bly Oregon or the Afghanistan offences and there was no basis whatever on which his extradition for this offences could be sought, nor indeed for that matter, for him to be prosecuted for his involvement in them. Both Mary Quinn and James Ujaama live in the United States. Although no doubt arrangements could be made to invite Mary Quinn to give

evidence in the United Kingdom if the appellant were prosecuted here, (although query, whether there could be any lawful basis for commanding her attendance) the same can hardly be said of James Ujaama. His agreement is with the authorities in the United States. In any event, the United States has a clear and obvious interest in this prosecution.

33. The issue arising in relation to the Yemen charges is utterly simple: either the appellant's admitted contacts with Abu Al Hassan and his gang were innocent, indeed honourable, or they were criminal. The prosecution must establish that they were criminal. We fail to see how any of the hostages or any of the Yemeni forces who stormed the compound in which they were detained, or indeed any evidence from the trials of the Yemen Seven or the hostage takers can throw any light whatever on the nature of the appellant's involvement. The suggestion that he might have called Abu Al Hassan himself as a defence witness at any trial if he had not been executed is totally unreal. The cross-examination of him by the prosecution would have been devastating in its impact on the appellant's defence. In any event there was not nor could there ever have been the slightest prospect of a trial of the appellant beginning before Abu Al Hassan's execution. Another suggestion is that the British members of the Yemen Seven would be in a position to give evidence of the torture and human rights abuses to which they were subjected in the Yemen. They would be irrelevant to any issue at the appellant's trial. Similarly, the assertion that the circumstances in which some of the hostages were shot remained "controversial to this day" fails any possible relevance test.
34. The difficulties facing the submission is further revealed in the context of the Bly Oregon and Afghanistan allegations. In relation to these allegations the single question is whether the appellant was involved in the criminal activities alleged against him. It is said that the passage of time "must surely have deprived him of any meaningful ability to call witnesses from the Finsbury Park mosque to speak about Ujaama's and Abassi's decisions in 2000, their association with the appellant, and whether the appellant encouraged them to act as alleged in the indictment". This is vague in the extreme. No potential witness to any of these matters who might have been but no longer is available has been identified. Moreover as we know in the context of the Yemen allegation, the appellant was perfectly capable of asserting an innocent involvement or interest in 1999 and 2000, which was subsequently undermined by new evidence. It is, however, most unlikely that the appellant would have made exculpatory remarks in relation to the other offences: to have said anything at all would have drawn attention to them. In any event, the proceedings in relation to Bly Oregon and Afghanistan were started as soon as realistically practicable after the appellant's involvement became apparent, and it was appropriate for the allegation to be made.
35. The reasons for the delay thereafter are obvious from the narrative. What is more, since 2004, the appellant can have been under no illusions about his position. The extradition proceedings against him were postponed while he was being prosecuted for a separate but serious offence in this country. No one suggested that that prosecution was or should be treated as a replacement for the extradition proceedings, or that they were somehow being discontinued, or treated as discontinued. In short, the delay in these proceedings since 2004 is consequent on the legitimate purpose of bringing the appellant's additional criminal activity in this country to justice here.

36. Like Judge Workman, notwithstanding the passing of the years, we are quite unpersuaded that the complaint based on delay is sustained. In this context it would not be “unjust” nor “oppressive” for the appellant to be extradited to the USA to face the charges for which he is currently indicted.

### **Torture**

37. We must emphasise at the outset that there is no suggestion that the appellant himself has been the victim of torture, and none of the evidence proposed to be advanced against him in the USA (including his admissions to Mary Quinn) derives, either directly or indirectly from unacceptable ill treatment of which he was the victim.
38. Mr Jones’ submission on this issue therefore developed at some distance from the appellant himself, and indeed from the Yemen offences. His focus was the Bly Oregon and Afghanistan offences. James Ujaama is a crucial witness for the prosecution in relation to them. He has made a plea bargain with the prosecuting authorities in the United States. Under its terms he will give evidence against the appellant at his trial or forfeit the advantages accruing to him under the agreement. That constitutes a pressure on him to give evidence, but it does not remotely come within the realms of ill-treatment or torture.
39. The critical link between the Bly Oregon and Afghanistan offences involves a British citizen called Feroz Abbasi. There is no other significant British connection with either the Bly Oregon or Afghanistan offences. The history of Abbasi’s arrest in Afghanistan and his subsequent transfer to the United States is fully set out in the papers. The suggestion is that he was subjected to torture not only on his arrest in Afghanistan, but also when he was taken and detained in Guantanamo Bay. However that may be, the USA has made clear, in terms which constitute an undertaking, that any references to evidence and information provided by Abbasi were excluded from the request for extradition and they are not and will not be relied on in proceedings against the appellant in the USA. The information of which Abbasi was the source is identified in the papers and, without making any concessions to the assertion that Abbasi was the victim of torture, any reliance on Abbasi’s evidence is expressly retracted. Accordingly, while there are reasonable grounds to suspect that Abbasi may have been tortured, it is unnecessary to carry out further investigations in order to ascertain whether he was. His evidence is no longer relied for the purpose of these proceedings and would constitute inadmissible hearsay in the USA because, unsurprisingly as an alleged co-conspirator, he would not be willing to return to the USA to give evidence.
40. There is a further limb to the “torture” contention. Ibn Al-Shaykh Al-Libi as an individual in charge of training camps in Afghanistan in 2001. He was arrested in late 2001 or early 2002 in Afghanistan, and subsequently transferred to the United States and detained in Guantanamo Bay. It is suggested that he was the subject of illegal “rendition” or “abduction” by the authorities in the United States to Libya. A number of sources are said to show that he was tortured both in Afghanistan, and Guantanamo Bay, and following his rendition. He is also said to have been detained and tortured in Egypt and Jordan. He is now said to have “disappeared”. Again, whatever the truth about these assertions, Al-Libi’s involvement, if any, would, like Abbasi, be as a co-defendant, one of the appellant’s co-conspirators. He is not a witness, no evidence

from him will be deployed at the appellant's trial, and none has been used in support of the extradition proceedings.

41. Drawing the threads together, we can summarise the position very shortly. Mr Jones suggested that evidence obtained by torture should be rejected. Such conduct outrages civilised values, and to admit such evidence would constitute an endorsement if not an encouragement to its use. On the issue of principle we agree, but the stark reality is that when the possible use of *direct* "torture" is addressed, it emerges that none of the victims of alleged torture provide evidence against the appellant. None of those allegedly ill-treated by the authorities anywhere in the world provide or will provide evidence against him either in relation to the extradition request or to any trial which may take place in the United States.

**"The fruits of the poisoned tree"**

42. Faced with these realities, Mr Jones advanced his challenge to the extradition proceedings on the basis that there are substantial grounds for believing that both the extradition request and the evidence at any subsequent trial in the USA are founded, if not in whole, at least in part on evidence obtained *indirectly* by torture, frequently described as the fruits of the poisoned tree.
43. Mr Jones focussed our attention on the evidence of Mr Butsch, a special agent employed by the FBI, the co-lead investigator of the allegations against the appellant, an expert witness in the USA in relation to the identities and activities of Al Qaeda leaders, operatives and associates, and Al Qaeda training camps in Afghanistan prior to September 2001. In his affidavit he speaks of "confessions" given by at least one of those convicted of bombing an embassy of the USA, and makes further references to the hostage taking conspiracies in the Yemen. Mr Jones contended that much of what Mr Butsch learned, and much of his expertise, which would be deployed in evidence in the appellant's trial in the USA, is based, at least in part, on information coming into his possession as a result of torture, and therefore that part of his evidence represents the "fruits of the poisoned tree". We shall not repeat the assertions made by Mr Jones in relation to torture, and in particular the allegations that Abassi and Al Libi were tortured. However he asserted that Mr Butsch had taken part in interrogations in Pakistan which must have involved torture. When that assertion is examined, however, it appears that Abassi himself, when recording in his diary the way in which he was treated in Kandahar when FBI agents were interviewing him, said that it was "not so bad". Another man, Begg, provides evidence which does not include any assertion that Mr Butsch tortured him, or was present at or party to any occasion when he was tortured or ill-treated.
44. It is clear that general matters relating to Al Qaeda, its views and objectives, is publicly available. The circumstances in which Ujaama became a witness for the prosecution are clear. The single glimmer of a possibility that any direct evidence against the appellant might be tainted by indirect torture arose in the context of Ujaama's evidence. In summary, Mr Jones suggested that his evidence against the appellant was or might have been founded on material which became available after Abassi was captured in 2002. From this it was said that there are reasonable grounds to believe that the evidence which Ujaama would give represents the indirect fruits of Abassi's ill-treatment. However, Ujaama himself was not tortured, and there is nothing to suggest that any of his evidence against the appellant proceeded either

from what Abassi told him, or from what those who interrogated him in the USA (always with his defence lawyer present) told him that Abassi had said. In short, there is nothing to suggest that Ujaama's allegations in relation to Bly Oregon and Afghanistan derive from anything said by Abassi under torture.

45. Mr Jones then focussed attention on the affidavit of Mr Bruce, an Assistant United States Attorney and co-lead prosecutor in the appellant's case. His information depended on four years of personal involvement in the investigation, prosecution and extradition of the appellant, and he says that in the course of discussions he spoke to "domestic and foreign law enforcement officers, prosecutions and intelligence offences". He also studied a vast body of material gathered in the course of the investigation as well as "extensive additional evidence...from all over the world". According to Mr Jones' argument, it is an inevitable consequence of the process of information collection and gathering by Mr Bruce that he, like Mr Butsch, must have been supplied with information which was originally produced, or included information originally produced by torture or ill-treatment.
46. From this, Mr Jones went on to argue that there was ample material to justify the requirement for further information to be disclosed to him by the USA which would enable him to penetrate to the heart of the torture issue, but whether that order should be made or not, there was in any event clear evidence that torture was used on some of the individuals involved and identified in these proceedings, and in view of the clear inference that the application for the appellant's extradition included such material, the inevitable conclusion is that the extradition proceedings should fail. The appellant will be tried in the USA on the basis of the fruits of torture, not least because in the USA, evidence obtained by torture is admissible. The fact that torture was involved in the process goes merely to its weight.
47. In our judgment the reasons why this submission is flawed can be grouped under three separate headings, as follows:
  - i) The submission fails to recognise that, unlike evidence obtained directly by torture, "the fruits of the poisoned tree" are, in principle, admissible under domestic law, and that in this respect there is no fundamental difference between the approach to such evidence either in this country or in the USA.
  - ii) The allegation that the evidence against the appellant is "tainted by torture" is made in the most general terms, is unsupported by evidence, and also fails to distinguish between evidence which is the indirect fruits of torture and that which is indirectly obtained as a result of ill-treatment falling short of torture.
  - iii) The underlying contention that the approach in the USA to evidence tainted by torture is "deficient", because evidence that a witness has been tortured would go to weight rather than admissibility (a) does not address the fact that the case against the appellant does not rely on evidence from any witness who is said to have been tortured, or from torture of the appellant himself; (b) draws a legal distinction between admissibility and weight which is, on the facts of the present case, a distinction without any practical difference; and (c) is, notwithstanding the evidence of Ms Stemler, an attorney employed by the United States Department of Justice accepting the evidence of Mr Maloy, an attorney in the United States instructed on behalf of the appellant, in conflict

with authorities in the USA and with the understanding of both the House of Lords and the European Court of Human Rights about the approach of courts in the USA to such evidence. (see *A and other v Secretary of State for the Home Department* [2006] 2 AC at paragraph 17 and *Jalloh v Germany* (Application no. 54810/00) at paragraph 105.

48. Whether there is a material difference between the approach to evidence obtained directly by torture in this country and the USA, there is no material difference between the approaches of the two legal systems to evidence obtained *indirectly* by torture. The “fruits of the poisoned tree” are not inadmissible in a criminal trial in this country. Accordingly, even if the prospect that such evidence would be deployed at the appellant’s trial in the USA were satisfactorily established, it could not be said to be an abuse of process for the appellant to be extradited to another jurisdiction where, like our own, such evidence would, in principle, be admissible. The appellant relied on the latter half of one sentence in the opinion of Lord Hoffman in *A (2)* where he said that evidence obtained as a result of torture “may be so compelling and so independent that it does not carry enough of the smell of the torture chamber to require its exclusion”. However none of the material relied on by the USA carries anything of the smell of the torture chamber sufficient to require its exclusion in a trial in this country. The evidence of Mr Butsch will be deployed against the appellant at his trial in the USA. However, as we have indicated, most of the background matters to which he refers can be found in publicly available material. To the extent that his expertise is derived in part from discussions with security and intelligence officials in other countries, his position is no different from that of any other witness who has expertise in relation to the activities of Al Qaeda. The fact that the original source of some of the information about these activities, much of which is now publicly available, may have resulted from torture or ill-treatment of unknown or even identifiable individuals in distant countries where the rule of law may not be given the proper respect demanded of it here does not mean that background evidence about Al Qaeda and its activities given by a witness who professes expertise in the subject carries with it “the smell of the torture chamber”.
49. On analysis the submission that the expert evidence likely to be given by Mr Butsch at trial has been “tainted by torture” is wholly unparticularised. Moreover the assertions made on the appellant’s behalf do not attempt to distinguish between evidence that may have been obtained by torture and evidence obtained by ill-treatment falling short of torture. While the latter may be excluded in a criminal trial in the United Kingdom under section 78 of the Police and Criminal Evidence Act 1984, there is no absolute bar to its admissibility. Article 15 of the United Nations Convention against Torture requires that any statement “established” to have been made as a result of torture shall not be “invoked”, while article 16 demonstrates that within the Convention itself a clear distinction is drawn between torture and forms of ill-treatment not amounting to torture. Where Article 16 applies the exclusion rule again is not absolute. The position is not materially different in the context of the European Convention of Human Rights. The “general question” whether the use of evidence obtained by ill-treatment in breach of Article 3 falling short of torture “automatically renders a trial unfair” for the purposes of Article 6, was left open in *Jalloh* (paragraph 107). An allegation that evidence is “tainted by violations of

Article 3” goes to its weight, not to its admissibility (per Neuberger LJ in *A (2)* [2005] 1 WLR 414, paragraph 263). Our attention was drawn to *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290, but in that case the court was concerned with evidence obtained directly by torture and was considering whether there was a real risk that statements extracted under torture would be used. The principles in *A (2)* and *Jalloh* were applied.

50. Mr Jones also drew our attention to the decision of the ECtHR in *Harutyunyan v Armenia* (application number 36549/03) a judgment dated 28<sup>th</sup> June 2007, in which the court was concerned with a confession and witness statements obtained in violation of Article 3. *Jalloh* was referred to and the court concluded, at paragraph 63, that:

“Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violent or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value”.

Although the court did not have to decide whether the treatment inflicted on the appellant and two witnesses amounted to torture within Article 3, it clearly had regard to the findings of the domestic court as to the severity of the ill-treatment which had “the attributes of torture” when reaching its conclusion that there had been a violation of the right to a fair hearing under Article 6. This decision does not assist the appellant in the present case. There is no suggestion here that evidence obtained by violence or brutality will be used as proof of the guilt of the victim of such violence or brutality.

51. In accordance with the present arrangements, the USA is not required to produce the evidence on which it will rely at the appellant’s trial. However the allegations against him have been set out in some detail in narrative form in statements from Mr Butsch and Mr Bruce. The appellant was therefore provided with an opportunity to particularise those aspects of the evidence against him where he could contend that there is a real risk that the evidence may have been obtained indirectly by torture. It is significant that nothing specific has been identified. Generalised allegations that some, unspecified, parts of a case against an appellant might be indirectly tainted by torture do not provide a sufficient basis for allowing an appeal on abuse of process grounds (see *R (Government of USA) v Bow Streets Magistrates Court* [2007] 1WLR 1157 at para 84). In the present case, even if, on the appellant’s case, it were possible to conclude that some of those named in the papers had been subjected to torture, nothing obtained from them is relied on in the course of these proceedings, and where Mr Butsch and Mr Bruce are analysing material from all sorts of disparate sources in order to properly carry out their duties, their evidence as a whole is not tainted by the possibility that in part they may be informed by the fruits of torture, at any rate to the extent that further disclosure is required or that their evidence should be disregarded.
52. We must next address the contention that by contrast with the jurisdiction in this country under section 78 of the 1984 Act to exclude evidence obtained directly or indirectly by torture or ill-treatment in breach of Article 3, the powers of the courts in the United States are “deficient” because the evidence that a witness has been tortured goes not to admissibility but to weight. Mr Maloy provided evidence in support

relying on *Portelli* 469 F. 2d 1239(2<sup>nd</sup> Circ 1972). In this case, after torture by the police, a witness, Melville, provided a damaging witness statement against Portelli, and when the trial took place 8 months later, repeated the same story in open court. The court distinguished between a confession which had been coerced from a defendant which would be excluded as a matter of law and the testimony of a witness forced to make a pre-trial statement who had subsequently asserted that his testimony at trial was true. In the latter case the evidence was admissible, and it was for the jury to consider whether it was true. We doubt the relevance of this decision to the present appeal, and we can indeed imagine circumstances in which after due inquiry of the witness a judge in this country would admit such evidence and invite the jury to decide what weight, if any, should be attached to it. However it is not suggested that at any trial in the USA evidence may be given against this appellant by any witness who has, under torture, previously made a damaging statement against him. In relation to Ujaama the appellant merely contends that he has been improperly coerced into giving evidence against him. This is an issue which can be explored in cross-examination, and will in due course go to the weight to be attributed to Ujaama's evidence. In any event, we note that two years after the decision in *Portelli*, the first circuit of the US Court of Appeal decided in *La France* 499 F 2d 29 that the court was under a duty to exclude evidence if, after conducting its own inquiry, it found evidence to have been unconstitutionally coerced. Mr Maloy does not refer to this decision. Indeed our perception of the lack of any material difference between the approaches adopted in this country and in the USA towards "torture tainted" evidence is reinforced by the most recent decisions in the House of Lords and the European Court of Human Rights. This is consistent with the longstanding opinion of the United States Supreme Court in *Rochin v California* [1952] 342 US 165 upholding the due process clause in the constitution of the USA where the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offences". In *A (No 2)* Lord Bingham referred to this decision and clearly regarded the law in the USA as to the inadmissibility of involuntary confessions as being in harmony with the position under English common law. In *Jalloh* the ECtHR, having considered the case law in the USA, found support for its decision by adopting the approach of the Supreme Court, saying that "any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to prescribe or, that it was so well put in the US Supreme Court's judgment in the *Rochin* case "to afford brutality the cloak of law" (paragraph 105). Given these authorities, at the very highest level in the USA, the United Kingdom and the European Court of Human Rights, we are unpersuaded that there would in practice be any significant difference between the approaches of the two legal systems towards evidence that it allegedly tainted by torture.

53. For these reasons, which, notwithstanding their length, represent but a brief summary of the material deployed before us in the papers and oral argument, this criticism of Judge Workman's decision also fails.

## **European Convention of Human Rights**

### **Trial in the United Kingdom**

54. The 2003 Act provides the criteria by which the decision whether to extradite or not is governed. Subject to specific safeguards, if the conditions are satisfied, extradition

should follow. We must now address the ground of appeal based on the appellant's ECHR rights and whether, whatever the apparent justification for extradition, it should nevertheless be refused. Irrespective of his submissions in relation to torture and "tainted" evidence the foundation for Mr Jones' submission is that the appellant could and should stand trial in the United Kingdom for his alleged involvement in these offences. We have already identified our clear view that these offences should be tried in the same jurisdiction and that the most obvious forum for their trial would be the USA. Nevertheless Mr Jones relies on a number of advantages which would accrue to the appellant if he were tried here, where there would be jurisdiction for his trial to take place, and these include the preservation of his ECHR rights.

55. Perhaps the first and most obvious advantage was one which, for understandable forensic reasons, Mr Jones did not advance. The "delay" in any such prosecution, and the circumstances in which it occurred, would provide the foundation for an argument that any future trial in the United Kingdom would constitute an abuse of process on well recognised principles. Before the appellant's trial in this country, and after his conviction, it was urged unsuccessfully on his behalf that he would not receive or had not received a fair trial on, among other grounds, the nature and quality of the pre-trial publicity. Following his conviction and unsuccessful appeal the publicity argument in any subsequent trial of the three groups of offences would be deployed with renewed force. It would be coupled with submissions based on the delayed process and the unfairness of proceeding with offences of such seriousness, not only when it was decided nearly a decade ago that the appellant should not be prosecuted, but also on the basis that if he was to be tried at all, he should have faced criminal proceedings once, and should not, after conviction, have to endure resuscitated charges. In short, the abuse of process argument in relation to a trial of the matters engaged in the extradition proceedings would be deployed with yet greater force if the appellant were to be tried here. The argument would be reinforced to the absence of any direct or indirect United Kingdom connection with the Bly Oregon offences and the subsequent offences in Afghanistan.
56. If this abuse of process argument were successful, the trial of the appellant in this country in this jurisdiction would be stayed. The authorities in the United States would then re-seek his extradition. It would then be argued that the extradition should not be permitted on precisely the same grounds which are now advanced, fortified, of course, by the argument that it had been sought to try the appellant in the United Kingdom, and that the proceedings had been stayed. There would, on any view, be a substantial delay, and a trial which ought to take place might never do so. It is sometimes overlooked that that, too, constitutes an abuse of process.
57. These observations do not imply any criticism of Mr Jones. The simple reality is that any counsel briefed to defend the appellant on these charges would, at the very least, be entitled to make these submissions, and would be failing in the performance of his professional duty to his client if he elected not to do so.
58. Mr Jones identified the advantages available to the appellant in a trial conducted here. The police and security officials who were involved in the investigation of the Yemen offences in 1999 and 2000 would be readily available to give evidence. We simply do not understand how any of these witnesses could assist with the appellant's case. If they were to give any evidence at all they would almost certainly be providing evidence in support of the prosecution. The defence, as indicated on his behalf, is a

simple one. He was acting as an innocent channel of communication. If the ideas of others involved in the process were pernicious, and dangerous, he was ignorant of them. It therefore follows that the British hostages, now back in this country, could not add anything to assist him. They were simply the victims of whatever part in the process he may have played. They cannot contribute to the question whether his involvement was criminal or not. Examining the corresponding disadvantages identified by Mr Jones, we accept that Abbasi would be unlikely to visit the United States to give evidence in support of the defence. If however it were contemplated that he might be called to give evidence to support the appellant, a very careful forensic decision would have to be made when one result of doing so would be likely to be that the confession which implicates the appellant in the Afghanistan group of charges would be placed before the jury. We are making no decision on the point, but, on any view, the prospect of calling Abbasi to give whatever evidence he could in support of the appellant would be fraught with difficulty and potentially catastrophic consequences to the defendant.

59. We shall not address each of the individual potential advantages identified by Mr Jones. They are equally nebulous. Set against them, a further consideration merits attention. A trial here would almost certainly lack the live evidence of James Ujaama, and probably, but less certainly, the live evidence of Mary Quinn. The evidence of these two crucial witnesses would, at most, be available to be used before the jury in the form of written witness statements, to be read. Any such proposal would be strongly opposed on behalf of the appellant. The exercise of judicial discretion in these circumstances would require very fine judgment, and it would certainly not be impossible that the judge would refuse to allow such critical and crucial incriminating evidence to be read.

### **Assurances**

60. The argument is redolent with implied, if not express criticism of the United States of America, and its judicial processes. In effect we are invited to the conclusion that the diplomatic assurances given by the USA cannot be relied on, or more tactfully, cannot be wholly relied on. We have read Diplomatic Notes which make it clear that (a) that the United States will not seek nor carry out the death penalty against the appellant; (b) that the appellant 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”. He would not be prosecuted before a military commission, nor “criminally prosecuted at any tribunal or court other than a ...Federal Court”, and he will not be treated as “an enemy combatant”; and if the prosecution is discontinued, or he is acquitted, or when he has completed any sentence following conviction, if the appellant requests it, he will be returned to the United Kingdom.
61. It is of course possible to identify occasions when justifiable criticism can be directed at some of the activities for which the USA is responsible both within and outside the country. It seems to us, however, critical to acknowledge that it would be splendid, but wholly unrealistic, to be able to say with absolute assurance that nothing ever goes wrong in this or indeed any other country. Utopia, after all, represents the fantasy society of an idealist. Occasional errors and lapses from the highest standards consequent on human fallibility should not undermine the assumption that a civilised country, respecting the rule of law, will abide by undertakings and assurances given

on its behalf and that the rule of law will be applied to its criminal processes. 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.

62. Mr Jones referred us to an Amnesty International Report dated 10<sup>th</sup> March 2008 entitled “*United States of America: to be taken on trust?*”. This deals with assurances given by the United States in the context of extradition and the “war on terror”. No one needs reminding of Amnesty International’s reputation, but in this report a great deal of comment is erected on the basis of very little evidence. The report addresses the position of Babar Ahmad and Haroon Aswat, one of the appellant’s co-conspirators in the Bly, Oregon charges. The report concludes that there is no “guarantee” that they will remain within the United States criminal justice system, and Amnesty International declares that it is not “in a position to assess the likelihood that they will be designated as “enemy combatant” if extradited to the United States.” The organisation considers that while the USA’s global “war paradigm remains in place, this remains a possible outcome, despite the diplomatic assurance provided by the US embassy in London”. All this said, the report itself acknowledges that it has “no evidence to suggest that the assurances have not been given in good faith or to suggest that the US authorities are planning to remove either Babar Ahmed or Haroon Aswat from the criminal justice system after extradition, and it does not intend to call into question the independence of the federal prosecutors involved in this case”. In short, Amnesty International is suggesting that there should be a guarantee that the assurances given by the United States government will be complied with. In our judgment, however, that is not the appropriate test, which, seeking to encapsulate it briefly, is whether there are substantial grounds for believing that there is a real risk of treatment which would contravene the appellant’s Article 3 rights (see *Saadi v Italy* (Application no. 37201/06) a judgment of the Grand Chamber of the ECtHR dated 28<sup>th</sup> February 2008, para 125) We do not seek to add to the views expressed by the Divisional Court in *Aswat v USA* [2006] EWHC 2927 (Admin), or indeed the rejection, as manifestly ill-founded, by the European Court of Human Rights in *Al Moayad v Germany* (Application no. 3586/03, para 68) of the contention that the diplomatic assurances of the United States in the context of the “war on terror” can and should no longer be relied on. 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

### **Ill-treatment: Article 3**

63. A separate submission arising under Article 3 is directed at the consequences of the extradition proceedings if in due course the appellant were convicted. It is submitted that the appellant would be sentenced to multiple terms of life imprisonment with the overwhelming likelihood that he would be required to serve his sentence in the Federal Bureau of Prisons' (FOB's) "Supermax" prison "ADX" in Florence Colorado. He would there be subject to Special Administrative Measures (SAMS). In the appellant's circumstances, in particular his medical condition, the treatment to which he would be subjected at ADX Colorado would contravene the rights protected by Article 3.
64. We agree that if convicted the appellant would be sentenced to very lengthy terms of imprisonment, and that in all likelihood, a whole life tariff would be imposed. Of itself this would not constitute a breach of Article 3.
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 programmes for the FOB 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 2<sup>nd</sup> 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 opposed 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, notwithstanding 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 with 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 FOB's chief of health programme 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 disabilities 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 undoubted 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 at ADX Florence would indeed be carried out. This would take place as soon as practicable after the issue arises for consideration, so that the long delay which appears to have applied to another high profile convicted

international terrorist, who is now kept at an FOB medical centre because of his ailments would be avoided.

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 criminals 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, then ill treatment which contravenes Article 3. This problem may fall to be addressed in a different case.

### **Family life – Article 8**

71. This leads to the further consideration, whether an extradition order would constitute a disproportionate interference with the appellant's family life. Effectively it is submitted that in the unlikely event that the appellant's family would be permitted to enter the United States in order to visit him, the physical and financial obstacles to travelling to a remote high security prison in the Midwest would be virtually insurmountable. Accordingly, if extradited, the appellant faces no real prospect of continuing contact with his family, except for occasional telephone calls and correspondence, for the rest of his life. The appellant has a large family, and it is plain that the consequences of extradition, and subsequent conviction, would gravely interfere with his family life. When addressing the question whether any interference with the appellant's Article 8 rights would be disproportionate great weight should be accorded to the strong public interest in honouring extradition arrangements. The facts would have to be "striking and unusual" to lead to the conclusion that extradition was a disproportionate interference with an extraditee's Article 8 rights: *Jaso (and others) v Central Criminal Court* No. 2 Madrid [2007] 2983 (Admin), para 57. The offences alleged against the appellant are very serious indeed, the more so if that they were all part of the same "global conspiracy to commit international terrorism". The public, indeed the international interest, in bringing conspiracies of this kind to justice in the most appropriate forum transcends national interests, a view shared by the members of the United Nations which have become parties to the Convention against Terrorism.
72. Mr Jones submitted that extradition to the United States would indeed constitute such disproportionate interference because, in reality, the appellant would be deprived of the family visits which he currently enjoys, and would continue to enjoy if he were tried and convicted of these offences in this country. The problem with this submission is that whether convicted in the United Kingdom or the United States, the sentences imposed on the appellant would certainly be very lengthy indeed, and could be the deprivation for the rest of his life of anything resembling a normal family life. A reasonably informed assessment of the likely length of time the appellant would be ordered to serve in this country would be a whole life sentence and a minimum term of not less than 40 years imprisonment. If he was serving the sentence in the United Kingdom, the appellant would be imprisoned in high security conditions. Those have applied to him in HMP Belmarsh for the last 4 years. Visits of family members to him in Belmarsh are permitted. If imprisoned in the United States he would be deprived of such visits as he presently enjoys. This deprivation must be set against

the statutory purpose underlying the 2003 Act. It was intended to clarify, and codify, the rules for extradition so that criminality might be better combated in a “global world”. The Act must be applied, and our extradition commitments honoured. Inevitably, the more serious the offence, the longer the likely sentence, and the greater the interference with the extraditee’s Article 8 rights, but the common approach to terrorism throughout the civilised world would be derailed if an extradition process which might culminate in amply justified sentences of huge length, to be served in prisons abroad, could, save in the most exceptional circumstances, constitute a breach of the defendant’s Article 8 rights: otherwise the entire purpose of international co-operation on this issue would be undermined.

### **Conclusion**

73. A number of further matters of detail were raised by Mr Jones, and indeed after the conclusion of the oral argument, we received further observations by the appellant himself through his solicitors. They do not impinge on our clear conclusion that the order made by Judge Workman was properly made, and that the subsequent decision of the second respondent was unassailable. Both appeals are accordingly dismissed.

### **Procedural guidance**

74. We have referred to the voluminous amount of material prepared in support of the appeal. Before the hearing began we were provided by the appellant’s representatives with twelve files containing nearly 5,000 pages of documents, together with three volumes containing 39 authorities. These were duplicated, to a considerable extent, by two volumes from the first respondent containing 29 authorities. Further documents and authorities were produced during the course of the hearing. The claimant’s skeleton argument did not include a reading list. No core bundle was provided. As mentioned earlier, we were provided, after the hearing had concluded, with a core bundle of documents and a core bundle of authorities.
75. On an appeal to the High Court under section 103 of the 2003 Act an appellant is entitled to challenge “the relevant decision” on both fact and law. The factual and legal issues raised on such appeals are often of some complexity. It is our impression that court time is wasted because no Practice Directions have been issued as to the conduct of such appeals. These appeals must be dealt with expeditiously; hence the need for clear procedural guidance.
76. In applications for judicial review paragraph 15 of the Practice Direction supplementing CPR Part 54 sets out a timetable for the filing and service of skeleton arguments, and a list of what they must contain:
- (1) a time estimate for the complete hearing, including delivery of judgment;
  - (2) a list of issues;
  - (3) a list of the legal points to be taken (together with any relevant authorities with page references to the passages relied on);

- (4) a chronology of events (with page references to the bundle of documents (see paragraph 16.1);
- (5) a list of essential documents for the advance reading of the court (with page references to the passages relied on) (if different from that filed with the claim form) and a time estimate for reading; and
- (6) a list of persons referred to.

Paragraph 16 of the Practice Direction requires the claimant to file a paginated and indexed bundle of relevant documents, including those required by the defendant and other parties.

77. Until further guidance is issued, these Practice Directions should be adopted for the purposes of appeals under section 103. If the bundle exceeds 500 pages the parties should agree a core bundle in accordance with paragraph 15 of the Practice Direction which supplements CPR Part 52. The parties should also agree a joint bundle of authorities. Since the principles are well established more than one joint bundle of authorities will seldom be justified. There is one very obvious procedural difference between an appeal under section 103 and an application for judicial review. In the case of the latter, the claimant is required to set out not merely a detailed statement of his grounds for bringing the claim, but also a statement of the facts relied upon: 54 PD.5.6. Unlike other statutory appeals to the Administrative Court, where the tribunal or other decision taker at first instance will have set out the facts in some considerable detail, the judgments of the District Judges designated to hear extradition cases under the 2003 Act are, for reasons which are wholly understandable, models of brevity. The background facts are often summarised in a nutshell. If an appellant considers that the District Judge's summary of the factual background is incomplete, or inaccurate, in any material respect, then the appellant's skeleton argument should set out the facts on which the claimant relies, with appropriate cross references to the paginated bundles of documents. The respondents will then be able to indicate their agreement, or disagreement with the claimant's statement of facts in their skeleton arguments. The same process will apply in reverse if the respondent is dissatisfied with the District Judge's summary.