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Case Nos: CO/10214/2012, CO/10190/2012, CO/10416/2012, CO/10393/2012, CO/10556/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE OUSELEY

- -

Between :

Abu Hamza, Khalid Al Fawaz, Abdel Bary, Babar Ahmad, Talha Ahsan	**Claimants**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

Mr Alun Jones QC and Mr Ben Brandon (instructed by **Sonn Macmillan Walker**) for the **Claimant Abu Hamza**
Mr Edward Fitzgerald QC and Mr Malcolm Hawkes (instructed by **Quist Solicitors**) for the **Claimant Al Fawaz**
Ms Phillippa Kaufmann QC and Mr Ben Cooper (instructed by **Birnberg Peirce & Partners**) for the **Claimant Babar Ahmad**
Mr Hugh Southey QC and Mr Ben Cooper (instructed by **Birnberg Peirce & Partners**) for the **Claimant Abdel Bary**
Mr James Eadie QC, Mr Ben Watson and Ms Heather Oliver (instructed by **Treasury Solicitor**) for the **Secretary of State for the Home Department**
Ms Clair Dobbin (instructed by **Crown Prosecution Service**) for **The Government of the USA (Abu Hamza)**
Mr James Lewis QC (instructed by **Crown Prosecution Service**) for **The Government of the USA (Al Fawaz & Abdel Bary)**
Mr Patrick O'Connor QC (instructed by **Ward Hadaway**) for **Mr Karl Watkin, Interested Party**
Mr Jeremy Johnson QC (instructed by **Metropolitan Police Solicitor**) for **Commissioner of the Metropolitan Police**

Mr John McGuinness QC (instructed by **Crown Prosecution Service**) for **Director of Public Prosecutions**

Hearing dates: 2, 3 & 4 October 2012

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Approved Judgment

The President of the Queen's Bench Division:

This is the judgment of the court.

INTRODUCTION

1. Each of the five claimants is the subject of an extradition request issued by the Government of the United States of America in order that each of them may stand trial in that country for terrorism related offences. Each has brought separate claims for judicial review and for stays of their extradition, raising different issues in each case, except for an issue common to four of them relating to the prison conditions they would experience at ADX Florence, Colorado.

2. These proceedings are the latest and, if we refuse permission, the last, in a lengthy process of appeals and applications that has continued for some 8 years in the case of two and 6, 13 and 14 years in the case of three. The background procedural facts of each individual may briefly be summarised as follows.

Al Fawaz and Abdel Bary

3. Al Fawaz's extradition was requested in September 1998, some 14 years ago. The District Judge ruled on 8 September 1999 that his extradition could proceed. His appeal to the High Court by way of an application for a writ of *habeas corpus* was rejected on 30 November 2000.

4. Abdel Bary's extradition was requested in July 1999. The District Judge ruled on 25 April 2000 that his extradition could proceed. His appeal to the High Court was dismissed on 2 May 2000.

5. Both of those proceedings are governed by the old law applicable under the Extradition Act 1989.

6. Both Al Fawaz and Abdel Bary appealed to the House of Lords where their appeal was dismissed on 17 December 2001, with the court finding that the claimants were liable to extradition to the United States on the existence of a *prima facie* case of conspiracy to murder, of which the most terrible manifestation was the bombing of two US Embassies in East Africa, in which over 200 people were killed and 4,500 injured. After several representations to the Secretary of State between November 2001 and December 2005, the Secretary of State rejected both claimants' representations on 12 March 2008, finding that the United States' assurances could be relied on and that the claimants were not at risk of the death penalty.

7. Al Fawaz and Abdel Bary subsequently applied for judicial review of the Secretary of State's decision. On 7 August 2009 Scott Baker LJ found that there was effective judicial oversight of 'supermax' prisons and considered that neither of the claimants' cases crossed the Article 3 threshold. Although a point was certified for the Supreme Court in relation to the compatibility of ADX prison conditions with Article 3, on 16 December 2009, the Supreme Court refused permission to appeal.

Abu Hamza

8. Abu Hamza's extradition was requested by the United States on 21 May 2004, now over eight years ago. The case against him is that he conspired to take hostages in the Yemen, to set up a terrorist training camp in Oregon and to give other support to terrorists. He was arrested in London on 5 August 2004. Abu Hamza served seven years' imprisonment after being convicted of offences in the United Kingdom. Thereafter extradition proceedings were resumed, with the Senior District Judge ruling on 15 November 2007 that his extradition could take place. The Secretary of State ordered his extradition on 7 February 2008. The High Court rejected Abu Hamza's appeal on 20 June 2008 and also refused on 23 July 2008 to certify a point of law that would permit an appeal to the House of Lords.

Babar Ahmad

9. Babar Ahmad was arrested in London on 5 August 2004. The case against Babar Ahmad is that through websites operated from the UK and a mirror website in the US and by extensive e-mail correspondence, he solicited funds for terrorism for the Taliban and other Mujahideen. A material part of that effort was directed at the United States. The most serious allegation is communication with an enlistee in the US Navy when on patrol, his encouragement of that person and the possession of details of the vulnerability of a US battle formation in the Straits of Hormuz; the allegation is to the effect that the enlistee was encouraged to betray his fellow crew members and his country.

10. The CPS declined in 2004 to prosecute on the basis that there was insufficient evidence in the UK for a successful prosecution. He was charged in the United States. On 17 May 2005 the Senior District Judge ruled that his extradition could proceed. On 15 November 2005 Babar Ahmad's extradition was ordered. Babar Ahmad's appeal to the High Court was rejected on 30 November 2006. On 6 June 2007 the House of Lords refused leave to appeal.

Talha Ahsan

11. Talha Ahsan's extradition was requested on 15 September 2006. The case against him is similar to that against Babar Ahmad. The Senior District Judge ruled on 19 March 2007 that his extradition could proceed. The Secretary of State then ordered his extradition on 14 June 2007. His appeal was refused by the High Court on 14 April 2008, and a month later that court refused to certify a point of law that would permit an appeal to the House of Lords.

The claimants' ECtHR Appeals

12. Each of the claimants, after the decision of the UK courts permitting extradition, applied to the ECtHR.

13. On 6 July 2010 the European Court of Human Rights declared admissible the five claimants' complaints concerning detention at ADX Florence "supermax" prison and the imposition of Special Administrative Measures (SAMs) if convicted. Under Rule 39 of the Rules of that Court, the court indicated to the UK Government that it would

be desirable in the interests of justice not to extradite the claimants until further notice.

14. The following issues were declared inadmissible by the Court. Abu Hamza's complaint in respect of ADX Florence was deemed inadmissible, with the court finding that as a result of his medical conditions there was no real risk of his spending more than a short period in ADX Florence. The court further declared inadmissible each of the claimants' complaints based on Articles 6 and 8 in respect of detention at ADX Florence.

15. Following the court's admissibility decision the Government of the United Kingdom and the claimants filed observations with the court. The court also received third-party comments from various non-governmental organisations. On 10 April 2012 five judges of the Fourth Section of the Court dismissed each of the five claimants' cases. On 24 September 2012 the petition for the claimants' case to be referred to the Grand Chamber was refused.

16. As a result of that decision, and with the bar to extradition and the Rule 39 order now being removed, each of the five claimants has brought proceedings before this court to challenge the refusal of the SSHD to delay or prevent their surrender to the United States.

Nature of the challenges in this court

17. The four claimants other than Abu Hamza have sought to argue before us that the prison conditions they would face at ADX Florence 'super max' prison in Colorado would be incompatible with Article 3 of the European Convention on Human Rights. Abu Hamza does not face a real risk of more than a very short term of detention there.

18. The individual challenges are as follows:

    i) Al Fawaz seeks to challenge the order that exists for his surrender. He submits that new evidence casts doubt on the existence of a *prima facie* case against him and on the US Government's good faith in continuing to seek his extradition. Proof of a *prima facie* case was required under the 1989 Act.

    ii) Abdel Bary also submits that new evidence has arisen to cast doubt as to whether there is a *prima facie* case against him. In addition he contends that because of a deterioration in his psychiatric condition, extradition would be a breach of Article 3.

    iii) Abu Hamza seeks an injunction to give him time to seek to re-open the statutory appeal under Rule 52.17 of the Civil Procedure Rules 1998 that was determined against him on 20 June 2008. He submits that new evidence has arisen which shows he is unfit to plead, and that this issue should be resolved before his surrender to the US authorities.

    iv) Babar Ahmad and Talha Ahsan have each made submissions arguing that their extradition cannot take place as there exists the possibility of a domestic prosecution in the United Kingdom, and of the possibility of a private prosecution under the Terrorism Act 2000. The decisions of the DPP on the

question of prosecution, and of the DPP very recently in refusing consent to a private prosecution are said to be unlawful; they too are challenged. Each of these possibilities they submit means that they should not be extradited, and instead that UK based legal action should take precedence. Mr Karl Watkin, a private individual, has sought to prosecute Babar Ahmad and Talha Ahsan in the UK for terrorist offences for which the consent of the DPP is required. It has very recently been refused. He is an interested party to the claimants' challenge to that refusal of consent.

v) Mr O'Connor QC, on Mr Watkin's behalf, disavowed any intent to challenge the decision of the Senior District Judge given on Thursday morning (4 October 2012) to refuse to issue summonses for a private prosecution by Mr Watkin of Babar Ahmad and Talha Ahsan for solicitation to murder, an offence the private prosecution of which does not require the consent of the DPP. The Senior District Judge doubted whether the evidence provided was sufficient for that particular offence but also held that the application for the summonses was an abuse of the process of the court as an attempt to intermeddle with the extradition process.

Observations

19. Before turning to the decision in each particular case it is important to make seven general observations.

20. First, as is apparent from what we have set out in summary, each of these claimants long ago exhausted the procedures in the United Kingdom. They then applied to the European Court of Human Rights on a number of matters. That failed. There can be no doubt that each has, over the many years, either taken or had the opportunity to take every conceivable point to prevent his extradition to the United States.

21. Second, there is an overwhelming public interest in the proper functioning of the extradition arrangements and the honouring of extradition treaties. It is also in the interests of justice that those accused of very serious crimes, as each of these claimants is in these proceedings, are tried as quickly as possible as is consistent with the interests of justice. It is unacceptable that extradition proceedings should take more than a relatively short time, to be measured in months not years. It is not just to anyone that proceedings such as these should last between 14 and 8 years.

22. Thirdly, it is necessary to emphasise the importance of finality in litigation and the particular importance of that principle in extradition cases because of the public interest in an efficient process, the need to adhere to international obligations and to avoid a recurrence of the delays which have so disfigured the extradition process in the past and to which successive appeals over time can subject it.

23. Fourth, a necessary part of finality in litigation is that all parts of a case should be raised on the first occasion on which they properly can be raised; where subsequent events or significant evidence are said to give rise to a need for further consideration, they must be deployed as soon as possible and not withheld until any preceding action has concluded.

24. Fifth, all of the applications were raised at the end of last week or the beginning of this week. We have been provided with over 15 files and have heard argument from those instructed on behalf of the claimants and from Mr Eadie QC and Mr Watson for the Secretary of State over three days on the applications now raised. Each of the claimants has therefore had a very full opportunity to put his application to the court so that we can consider whether there is anything to go forward. As was made clear by Mr Eadie QC at the conclusion of the second day of the hearing, if we refuse permission or refuse the stays, as these applications are all in criminal causes or matters, there is no appeal from our decision and the Secretary of State will be free to make arrangements for the extradition of each of the claimants. That position was not contested.

25. Sixth, we have carefully considered all of the arguments and the full judgment which we will give is necessarily long as it has had to examine all the points made. We considered that we should deliver that judgment orally as soon as we had reached our decision as the claimants and the Secretary of State are entitled to know whether these proceedings come to an end and extraditions can take place or, whether, in the case of each applicant there is a matter which justice requires to be further considered and the extradition halted.

26. Finally, as we will observe in the course of our judgment in relation to Abu Hamza, there may well be a need to reconsider the inter-relationship of the statutory appeal scheme, the ability to re-open appeals and the role of judicial review. As has happened elsewhere, there may be real dangers in the structure of a scheme which not only has a statutory appeal procedure but which has become complicated by judicial review proceedings which can be used to re-open or raise again issues that have already been decided.

27. The order in which we will deal with the claims and issues is:

    i) Prison conditions

    ii) Khalid Al Fawaz

    iii) Abdel Bary

    iv) Abu Hamza and

    v) Babar Ahmad and Talha Ahsan

I PRISON CONDITIONS: DETENTION IN CIRCUMSTANCES OF MAXIMUM SECURITY AT ADX, FLORENCE, COLORADO

28. We deal with this issue first as it is a common issue to all but one of the claimants, Abu Hamza, for reasons we have explained.

29. The claimants before this court contend that:

i) The Fourth Section of the ECtHR in its judgment of 10 April 2012 misunderstood the evidence provided to it about conditions at ADX Florence, Colorado. In particular it made an error as to the length of time that those who would be subject to SAMs could serve in solitary confinement in the Special Security Unit.

ii) The ECtHR should have accepted the evidence which the claimants had submitted on that issue.

iii) The ECtHR should not have refused to admit the evidence submitted by the claimants in response to evidence submitted by the UK Government; in effect the ECtHR acted unfairly and breached Article 6 ECHR.

30. As each of the four claimants was likely to be subject to SAMs, this court should examine the evidence afresh. If it did so, it should come to the conclusion that the Fourth Section had been wrong and that this court should now consider the claimants' evidence and find that the conditions would amount to a breach of Article 3. This was so despite the fact that the claimants had raised these points in their petition to the Grand Chamber so as to have this error corrected or their evidence accepted; their petition was refused. Whether extradition is sought under the 1989 Act or 2003 Act, the Secretary of State has a reserve power notwithstanding the conclusion of the statutory processes, to stay extradition where it would breach human rights. This court also cannot act in a way which would breach human rights. It is that specific and limited jurisdiction that is invoked for these purposes. We say a little more about it in relation to other claims.

(i) The position in law as to solitary confinement as determined by the judgment of the ECtHR

31. In its judgment of 10 April 2012 the Fourth Section concluded at paragraphs 209-212:

> "209. Whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned.
>
> 210. In applying these criteria, the court has never laid down precise rules governing the operation of solitary confinement. For example it has never specified a period of time beyond which solitary confinement will attain the minimum level of severity required for Article 3 … The court has however emphasised that solitary confinement, even in cases entailing relative isolation cannot be imposed on a prisoner indefinitely.
>
> 211. Equally, although it is not for the court to specify which security measures may apply to prisoners, it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly; to

> restrictions which cannot reasonably be related to the purported object of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk …
>
> 212. Finally in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure."

32. At paragraph 213 the court went on to stress that special attention must be paid to the availability and duration of outdoor exercise and the conditions in which prisoners might take it. The court at paragraph 215 emphasised that the detention of a person who is ill may raise issues under Article 3 and the lack of appropriate medical care may amount to treatment contrary to that provision. It added:

> "In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment… There are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant."

The argument before us proceeded on the basis that no challenge was made to the general legal principles.

33. After setting out those general principles and having set out in a manner to which we will refer the detailed evidence before it, the ECtHR examined the particular facts and concluded that on the facts there would be no violation of Article 3. As we have set out, it is contended that the errors that were made were in the application of the principles to which we have referred to those facts and to the receipt of evidence.

34. It is therefore necessary first to set out the evidence that was before the ECtHR and then to examine whether that court made an error, whether it should have accepted the claimants' evidence and whether it acted unfairly and in breach of Article 6 in declining to accept some of the evidence submitted by the claimants.

(ii) The evidence submitted by the UK Government

35. As is usual in the practice of the ECtHR, after the court's decision on the admissibility, the UK Government submitted observations in which it set out its evidence, its detailed analysis of the facts and the law relevant to the issues before the court. It supported that analysis with extensive evidence and information from the United States authorities and in particular the Department of Justice (DoJ) and the

Federal Bureau of Prisons (BoP). Included within those observations sent on 7 December 2010 were statements by Louis J Milusnic, an associate warden at the ADX at Florence, Colorado whose statement was in large part directed to the conditions for those inmates subject to SAMs and housed in the Special Security Unit and a statement by Ms Patricia Rangel, Manager for the General Population Unit at ADX Florence, Colorado. Her statement was directed in large part to the conditions in the General Population Unit.

36. The two statements therefore put before the court constitute evidence about two differing regimes at ADX Florence, Colorado, namely (1) the regime applicable to those subject to SAMs who were housed in the Special Security Unit (H Unit) and those, a few of whom might be subjected to SAMs, in the General Population Unit. The court summarised that evidence at paragraphs 83-87 in respect of the conditions in the Special Security Unit for those subject to SAMs and at paragraph 88 for those in the General Population Unit.

37. It is not necessary to set out the evidence of each in full as the error alleged to have been made by the Fourth Section only goes to the progress that an inmate could make, such progress being relevant to the time and conditions under which an inmate might be detained in solitary confinement and the degree of that solitary confinement.

38. The statement of Mr Milusnic made clear that the inmates in the Special Security Unit who had been given SAMs were subject to a three phase programme. Phase 1 the most stringent, Phase 2 less stringent and Phase 3 less stringent again. His statement made clear that there could be progression from Phase 1 to Phase 2 and Phase 2 to Phase 3 through six monthly reviews attended by the inmates. His statement set out that there were 12 prisoners in phase 1, 11 in Phase 2 and 4 (all convicted of terrorist activity) who had advanced to Phase 3. The importance of Phase 3, as is apparent from the statement and is recorded in paragraph 84 of the judgment of the ECtHR, is that in Phase 3 group recreation was permitted five days a week in groups of four, the number of non-legal telephone calls was increased to four, inmates ate one meal together and engaged in recreational activities together for one and a half hours a day.

39. In the General Population Unit, according to the statement of Ms Rangel, there were four regimes:

    i) The General Population which was housed in four units. As is set out in Ms Rangel's evidence and recorded at paragraph 88 of the court's judgment one of the features of those in the General Population Unit was that meals were delivered and eaten in the cells.

    ii) The Intermediate Unit which was part of what was known as the "Step Down Programme" where inmates were subject to a less stringent regime. As an example, set out in her statement and recorded in the judgment of the court, meals were provided to inmates by groups meaning that each group was allowed out of their cells one at a time to collect meals but they had to return to their cells to eat.

    iii) The Transitional Unit. This was again a less stringent regime where inmates were unrestrained when out of their cells and permitted to eat their meals with other inmates assigned to the group.

iv) The Pre Transfer Unit where more association was permitted.

It is quite clear from the evidence, as fully recorded in the judgment of the ECtHR, that the Special Security Unit regime and the General Population Regime were different but each permitted progress from a more stringent regime at the outset to a somewhat less stringent regime at the end, such lack of stringency being reflected in a greater degree of association and therefore a lessening in the degree of isolation and solitary confinement.

(iii) The evidence submitted by the claimants

40. The claimants responded in May and June 2011 to those observations. In their evidence as originally submitted and submitted in May and June 2011, evidence was provided as to the time spent at ADX Colorado. This included a survey by Mr Mark Donatelli, a lawyer who had conducted a survey that found that at least 43 inmates of ADX Florence had spent 8 years or more in lock-down conditions there or in other prisons; this is referred to at paragraph 101 of the judgment of the ECtHR. It also included evidence from Professor Rovner of Denver University's clinical programme which is referred to at paragraph 101 of the judgment. In her statement of 27 May 2011, Professor Rovner set out details of the length of time four of the clinical programme's clients had spent at the ADX. She instanced the case of Mr Rezaq who was kept in isolation for 13 years before he was allowed to progress to and through the Step Down Programme and that other clients had spent nine years, seven years and nine years before being admitted to the Step Down Programme. She also gave details of the time six other Arab/Muslim prisoners with SAMs spent in solitary confinement in the Special Security Unit.

(iv) The further evidence submitted by the UK Government and questions asked by the ECtHR

41. On 6 June 2011 the ECtHR invited the UK Government to make a further response. That response was sent on 27 September 2011. Included within that response were letters from the DoJ dated 22 September 2011 and 26 September 2011 which included the response of the BoP. Some of those observations covered specific questions that the court had raised including, as is set out in paragraph 93 of the judgment of the ECtHR, questions as to how long inmates had spent in the Special Security Unit Programme and each phase of that programme. As the information provided by Ms Rangel's statement did not set out the numbers, in contradistinction to the statement of Mr Milusnic to which we have referred at paragraph 38 above, the ECtHR asked how many inmates were in each phase of the Step Down Programme. The court also asked in respect of both the General Population Programme and the Special Security Unit Programme how long each inmate had spent at ADX and how long they had been in each phase of the programmes and how many inmates had completed the programme.

42. It is quite clear, in our view, from the way the questions were phrased, that the ECtHR understood and drew a distinction between the Special Unit Security Programme and the Step Down Programme.

43. The first letter from the United States DoJ (that dated 22 September 2011) set out more details of ADX Florence. It set out information about the General Population

and information about the availability of the Step Down Programme. At page 11, paragraph 4 it stated:

> "Generally, inmates with SAMs are housed in the Special Security Unit and do not have access to the ADX Florence General Population and Step-Down Programme. The inmates housed in the Special Security Unit are provided a programme similar to the ADX Florence General Population and Step-Down Programme which was detailed in [Mr Milusnic's statement].
>
> Please note three things. First, not every inmate with a SAM is required to be housed at ADX Florence. Currently seven inmates with SAMs are housed at other BoP institutions.
>
> Second, since 2003 the BoP vacated or did not renew SAMs for 13 inmates. Of those 13 inmates, seven were transferred from ADX Florence to other institutions or released from BoP custody. The inmates who were transferred to other institutions did not go through the Step-Down Programme. Thus Rovner's assertion the Step-Down Programme is the "only way to leave the ADX" is incorrect. The remaining six inmates entered ADX Florence's General Population.
>
> Third it is possible that an inmate with a SAM could be housed at ADX Florence's General Population. In such a case the inmate could have access to the Step Down-Programme. The restrictions contained in the SAMs determine where an inmate with a SAM is housed."

44. In the second letter (that dated 26 September 2011) the US authorities answered the specific questions raised by the court. It set out the numbers in the Special Security Unit Programme as of 30 September 2011: namely there were 17 prisoners in Phase 1, 9 in Phase 2 and 6 in Phase 3, making the Unit which could house 32, full. It also set out the figures for the General Population, the total there was 252 prisoners with 32 in the Intermediate Unit, 32 in the Transitional Unit and 25 in the Pre Transfer Unit. The letter said that the US Government could not provide information as to how long inmates had spent in each phase of the Special Security Unit Programme and in each phase of the Step Down Programme, giving reasons why it could not do so. The information in the letters is referred to in particular at paragraphs 94 and 97 of the judgment of the ECtHR.

45. After receipt of those letters, the ECtHR sought further information and explained what it needed to know. The response was provided in a letter of 24 October 2011 from the US DoJ. After repeating its objections about providing information, the DoJ and BoP had randomly selected 30 inmates who were currently in the General Population or the three phases of the Step Down Programme and gave figures based on that number; a schedule was appended which showed in respect of each of those thirty the time spent in the General Population Unit, times (if any) spent in the other units and whether there had been prior SAMs. The letter made clear that they would not provide any further information about those in the Special Security Unit.

(v) The claimants' response and the court's decision on the response

46. In response to the provision of that information Birnberg Peirce & Partners, on behalf of the claimants, wrote to the ECtHR on 22 November 2011 commenting upon the information supplied. The letter pointed out that because of the failure to provide data on SAM prisoners, essential information was withheld about the likely fate awaiting the claimants if they were extradited, and in particular concerning the likely and potentially indefinite time which they risked spending in highly restrictive conditions applicable to those who were subject to SAMs. They pointed out that data provided by the BoP to Human Rights Watch demonstrated that inmates who had been in ADX and under SAMs had in many cases been held in isolation for periods for up to a decade; they referred in a footnote to the consolidated evidence before the court.

47. The letter stated that the claimants had in response to the statistics provided on 24 October 2011 by the US DoJ and BoP assembled statistical data based on a far larger sample of 124 prisoners. As the letter made clear, the data was said to demonstrate the years 110 of the 124 inmates had been held at ADX. It was contended that their larger statistical sample showed that 69 inmates had remained at ADX for longer than five years and six months with 3 inmates having remained at ADX for more than 16 years and 14 inmates for more than 15 years. They appended a chart which it was contended graphically highlighted the unreliability of the claim that the data presented by the US authorities was representative.

48. On 7 December 2011 the Registrar returned the observations on the basis that the court had not asked for them.

(vi) The judgment of the Fourth Section

49. In its judgment on 10 April, the Fourth Section of the ECtHR made its findings in relation to the application of the principles to the case of these claimants at paragraphs 218-224. It first held that there was no dispute that the physical conditions at ADX Florence met the requirements of Article 3. The essence of the complaints was principally directed at the lack of procedural safeguards before placement at ADX and ADX's restrictive conditions and lack of human contact. The court rejected at paragraph 220 the lack of procedural safeguards.

50. It then turned at paragraphs 221-224 to the second main complaint, the restrictive conditions and lack of human contact. At paragraph 221, the court set out its conclusion that there was nothing to suggest the US authorities would not continually review their assessment of the security risk posed by the claimants, if convicted. The court added:

> "Moreover as the [DoJ]'s most recent letter showed, the United States authorities have proved themselves willing to revise and to lift the [SAMs] which have been imposed on terrorist inmates thus enabling their transfer out of ADX to other, less restricted, institutions."

51. At paragraph 222 the court stated:

> "The Court also observes that it is not contested by the Government that conditions at ADX Florence are highly restrictive, particularly in the General Population Unit and in **phase one** of the Special Security Unit." (Emphasis added.)

The court then continued:

> "It is clear from the evidence submitted by both parties that the purpose of the regime in those units is to prevent all physical contact between an inmate and others, and to minimise social interaction between inmates and staff. This does not mean, however, that inmates are kept in complete sensory isolation or total social isolation."

The court found that the inmates were not kept in total sensory isolation or total social isolation for the reasons it set out. It concluded:

> "All of these factors mean that the isolation experienced by ADX inmates is partial and relative."

52. At paragraph 223, which is the part of the judgment where the ECtHR is said to have shown it misunderstood the evidence, the court stated:

> "The Court would also note that, as it emphasised in *Ramirez Sanchez*, cited above, § 145, solitary confinement, even in cases entailing relative isolation, cannot be imposed indefinitely. If an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for a violation of Article 3. Indeed, this may well be the case for those inmates who have spent significant periods of time at ADX. **However, the figures provided by the United States' authorities, although disputed by the applicants, show that there is a real possibility for the applicants to gain entry to the step down or special security unit programs.** First, the Department of Justice's letter of 26 September 2011 shows that while there were 252 inmates in ADX's General Population Unit, 89 inmates were in the step down program. The figures provided in that letter for the special security unit program, when compared with the November 2010 figures given by Mr Milusnic, demonstrated that inmates are progressing through that program too. Second, Ms Rangel's declarations show that inmates with convictions for international terrorism have entered the step down program and, in some cases, have completed it and been transferred to other institutions. Ms Rangel's declaration is confirmed by the *Rezaq et al v. Nalley et al* judgment of the District Court where the petitioners, all convicted international terrorists, had brought proceedings to obtain entry to the step down program but, by the time the matter came to judgment, had completed the program and been transferred elsewhere." (emphasis added)

In complaining about the passage which we have emphasised in bold, it was contended on behalf of the claimants that the court was wrong when it said that there was a real possibility for the claimants to gain entry to the Step Down or Special Security Unit Programmes. It showed that the Court had thought that entry to the Special Security Unit was earned as a potential route to leave ADX conditions.

(vii) The appeal to the Grand Chamber

53. Coincidentally, on the last day that was possible, the claimants applied to the Grand Chamber under the rules of ECtHR for the case to be referred to the Grand Chamber. In the detailed and persuasive submissions advanced by Edward Fitzgerald QC, Ben Cooper, John Jones and Gareth Peirce on behalf of the claimants, the claimants put forward as one of their grounds the contention that the Fourth Section had misinterpreted the evidence provided by the DoJ and BoP. It was submitted that the Section had fundamentally misconstrued the data submitted by the DoJ and BoP, that the Section had misunderstood the function of the Special Security Unit, and that the Section had accepted answers from the UK Government that were on their face inconsistent. The submission set out other grounds which were critical of the passages in the judgment to which we have referred. In addition to making those arguments, it was also contended on behalf of the claimants that the Fourth Section had failed to give the degree of anxious scrutiny demanded by an investigation of Article 3 and it had failed to apply the standards of Article 6 to the receipt of evidence advanced by the claimants. The rejection we have referred to at paragraph 48 had been, they contended, a violation of Article 6 and a violation of the principle of equality of arms. The claimants would have shown that the statistics provided by the DoJ and BoP were wrong if this evidence had been admitted.

54. On 24 September 2012, the Grand Chamber declined the application that the case be referred to it.

55. Having set out the procedural history it is now possible to return to the three arguments advanced on behalf of the claimants as to why this court should hold that the conditions to which these claimants would be subjected at ADX Florence were, on the evidence which should have been before the Fourth Section, such that they would be a violation of Article 3.

(viii) Our conclusion on the alleged error of the ECtHR

56. As to the first contention made by the claimants which we have set out at paragraph 29, it is in our view clear, from the way in which the ECtHR set out the evidence and from the detailed description of the evidence, that the court was looking at (1) the distinction between the position in the General Population Programme and the transition to Intermediate, Transitional or Pre Transfer which is applicable to the General Population and (2) the distinction in the Special Security Unit programme between Phase 1 and the transition to Phases 2 and 3. That in our view is evident from the careful way in which the court set out the evidence and in particular from the passages at paragraphs 222 and 223 which we have set out above. The passage in paragraph 223 is referring in each instance to the way in which a prisoner can progress through stages towards removal from ADX. It is not necessary to pass through the General Population Unit Step Down Programme in order to be transferred from the Special Security Unit to another prison, though progress through the Special

Security Unit does not mean that the prisoner will then be transferred; and the court does not suggest otherwise.

57. Moreover the court in setting out the figures distinguished between the General Population Unit and the Special Security Unit. As the court stated, the figures provided by Mr Milusnic in his statement of December 2010 and the figures set out in the letter of 26 September 2011 showed that there were progressions through the Phases of the Special Security Unit Programme. The court in its use of the words "through that programme" plainly showed that it had in mind the distinction between the General Population Unit and the Special Security Unit and that in each there was progress.

58. We are therefore entirely satisfied not only that the ECtHR did not fall into the error alleged in its judgment, but also the judgment contains a careful and clear elucidation of the facts which correctly reflected the evidence before it. There is a minor error in the third sentence of paragraph 96 where the words "or Special Security Unit" appear to have been included in error, but such a minor error in no way vitiates the conclusion we have reached.

(ix) Our conclusion as to whether the court should have accepted the evidence submitted by the claimants

59. As we have set out at paragraph 40 above, extensive evidence was submitted by the claimants which the court received and summarised in its judgment as we have set out. It is quite clear, in our view, that as the court set out the evidence of Mr Donatelli, of Professor Rovner and of the NGOs in the judgment, it must have had that evidence in mind when it considered the conclusions of fact which it reached in paragraphs 221-224 of the judgment. We ourselves have looked carefully at that evidence in the light of the submissions made by Mr Fitzgerald QC to the effect that, on the evidence submitted by the claimants, there was a real risk that they would spend a long period in solitary confinement with no end in sight and in effect the real risk of indefinite detention in solitary confinement. That, it was submitted, would be a breach of Article 3.

60. It is clear, in our view, from the analysis set out by the court that the court looked in detail, not at the overall time a person would spend at ADX Florence, but at the periods of time that were likely to be spent in the differing conditions of restricted confinement as part either of the General Population Programme or part of the Special Security Unit Programme. We can see no reason for saying that the court was not entitled on its detailed analysis to come to the conclusion it did, particularly in the light of the fact that the evidence submitted on behalf of the claimants and received by the court did not draw the careful distinction as to the time spent in different parts of the programme and the possibilities of advancement which the evidence from the DoJ and the BoP had supplied.

61. Given the general principles set out by the court and the evidence before it, we can see no basis for contending that the court should have come to a different conclusion.

(x) Conclusion on the court's refusal to accept further evidence from the claimants

62. We turn to the third and final contention of the claimants, namely that the court had violated the basic principles in Article 6 and other basic principles of justice in its decision, to which we have referred at paragraph 49 above, not to receive the further material submitted by the claimants.

63. In our view it would be a very serious step for this court to take if it were to conclude that the Fourth Section had violated the principles of Article 6 and other fundamental principles of fairness when it refused to receive the further materials supplied by the claimants. Nonetheless it is a step which we could be entitled to take if circumstances justified us in so doing.

64. Although no reason is given by the court, the decision of the court seems to us to be explicable on three distinct bases. First, a court is always entitled to come to the view that the exchange of evidence with one party responding to points made by another must at some stage come to an end. Second, and in our view of much more importance, is the fact that much of the additional material was an analysis of the evidence that was already before the court. Third, as to the new evidence which was comprised in the statistical data that the claimants put forward, there was no detailed explanation of the basis of that statistical data set out in a way it could be verified and analysed. Moreover the data did not distinguish between the overall time spent at the ADX and the time sent on different parts of the Programmes. It is difficult for us to conclude, on the basis of the materials before us, that that data is reliable or in any way casts doubt upon the evidence supplied by the DoJ and the BoP.

65. It seems to us, therefore, that there are reasons why the court took the view that it did, though it did not explain them. It is impossible for us to conclude that the way in which the court reached its decision violated Article 6 or other fundamental principles of justice.

(xi) Consequences of the decision of the Grand Chamber

66. Submissions were made to us as to the principles upon which the Grand Chamber would consider a case and the significance of the Grand Chamber's refusal to hear the appeal from the Fourth Section. Article 43.2 states:

> "A panel of five judges of the Grand Chamber shall accept requests if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance."

67. In guidance issued by the court, a more detailed explanation of Article 43 is given. It seems to us that given the very considerable significance of the decision of the Fourth Section, to the Government of the United Kingdom and to extradition arrangements in general, this was a case within the remit of Article 43 as explained in the guidance. Therefore we can safely conclude that the decision of the Grand Chamber not to refer the case to it is of considerable significance.

68. We were referred to Rule 80 and Rule 81 which provide for circumstances in which an application could be made to the Fourth Section to revise or correct its judgment,

but neither was really applicable to the facts of this case. However what is significant, in our view, is the refusal of the Grand Chamber to hear the appeal.

(xii) The position in this court

69. In the light of s.2 of the Human Rights Act 1998, we are not, as a matter of UK law, bound by the decision of the ECtHR. It is our duty merely to take it into account. It was submitted on behalf of the Secretary of State that in the light of the clear and exhaustive consideration given by the Fourth Section to the issues, we should accept its decision. Mr Fitzgerald QC urged us to treat the decision, even if we rejected the submissions made as to errors and breaches of Article 6, as a "floor but not a ceiling". In other words what the court was setting out was the minimum standards and we were entitled to review the evidence and come to our own view.

70. It is not necessary for us to consider the extent to which this court could or should depart from a decision of the ECtHR on the facts of a particular case, as in our view we see no reason whatsoever to disregard the conclusion reached by the Fourth Section in relation to a breach of Article 3. Their analysis is clear and cogent, and we see no reason to depart from it.

(xiii) Conclusion

71. For these reasons, therefore, we have concluded that no evidence has been produced which provides an arguable case that the ECtHR erred in its conclusions on prison conditions and Article 3, and that we should ourselves reach a different conclusion. This general ground therefore fails. We will return to the specific position of Abdel Bary when we consider his case – see paragraphs 110-118 below.

II AL FAWAZ

72. We have referred at paragraph 6 to the very serious crimes with which Al Fawaz is charged and to the fact the extradition proceedings were begun 14 years ago.

(i) The application made by Al Fawaz

73. The Grand Chamber's decision to refuse Al Fawaz's petition for referral of the Fourth Section decision in April 2012 was sent out in the early evening of 24 September 2012. Subsequent representations from Al Fawaz's solicitors dated 24 September 2012, running to 15 pages, were received by the Treasury Solicitor on 25 September 2012 shortly after 8am. Evidently these had been in preparation for some time before the Grand Chamber decision. Mr Raja, principal of Quist solicitors, acting for Al Fawaz, said that the timing of the Grand Chamber decision had been unexpected and caught them in mid preparation of further representations. The then sudden imminence of extradition had meant that the representations had to be submitted quickly. They had not been storing up arguments seeking only to deploy them as each successive stage in proceedings failed.

74. That may be so on this occasion, however coincidental the timing might initially appear to be. Had there been no adequate explanation and had the representations been withheld while the Grand Chamber decision was pending that would have been an abuse of the process of the Court. We note, however, Mr Alun Jones QC for Abu

Hamza said that the Grand Chamber decision had been expected by everyone for late September 2012.

75. Those late representations were rejected by the Secretary of State in the letter of 28 September 2012. An application was then made for a judicial review of her decision. This, like Abdel Bary's, is a case under the 1989 Extradition Act. The Secretary of State's powers which Al Fawaz invoked are those which arise under para. 8 of Schedule 1 to that Act. It is said that the refusal to withdraw the Extradition Order is an unlawful exercise of the discretion.

(ii) The statutory framework and the test that now has to be satisfied

76. Before turning to the merits of submissions made on behalf of Al Fawaz it is necessary to say a little about the statutory framework within which these submissions fall to be considered. By virtue of s.1(3) and para. 7 to Schedule 1 to the 1989 Act, it is the function of the Magistrate and not of the Secretary of State to decide on sufficiency of evidence for extradition: see also *Norgren v Home Secretary* [2000] EWHC 143 QB paras.41-44.

77. The way in which the Magistrate was required to approach the assessment of whether there was sufficient evidence to amount to a *prima facie* case for extradition purposes was set out in *ex parte Osman* [1991] 1 WLR 277 at 299(H), cited in para.16 of *Re Eidarous and Abdel Bary* [2001] EWHC 798 (Admin).

78. The only power of the Secretary of State which could be engaged at this late stage is accepted to be the discretionary power under para. 8(2) of Schedule 1 to the 1989 Act to withdraw an Extradition Order and refuse extradition when, in the light of a significant change in circumstances or sufficiently compelling new evidence, it would be wrong, unjust or oppressive, or incompatible with ECHR rights for extradition to continue. A refusal by the Secretary of State to exercise that discretion to withdraw an Extradition Order can only be shown to be unlawful on public law grounds. It cannot be unlawful for the discretion to withdraw an Extradition Order not to be exercised, after the conclusions of the Magistrates' Court and Divisional Court that a *prima facie* case exists, unless new evidence of a sufficiently compelling nature comes to light, making it clear that there is now no *prima facie* case. The Secretary of State's refusal to exercise the discretionary power to withdraw an Extradition Order at this stage cannot be challenged on the mere basis that there is an alteration in the state of the evidence. It is not for her to be invited to perform, or perform again, the function of the Magistrate.

79. It is not remotely enough to contend that a piece of new evidence strengthens an argument of the requested person or raises a question mark over a piece of prosecution evidence or the credibility of a prosecution witness. It is not enough to "*cast doubt*", in a phrase considerably overused in this context, on an established *prima facie* case. The previously established *prima facie* case has to be shown not sensibly now to exist, if a refusal to exercise the discretion to withdraw an Extradition Order is to be successfully challenged. This is quite apart from any arguments about abuse of process.

(iii) The prima facie case and the course of the proceedings

80. It was in 1999 that the District Judge concluded that a *prima facie* case had been made out that Al Fawaz with Abdel Bary had conspired with Osama Bin Laden and others to commit acts of terrorism against US citizens, of which the murderous bombing in 1998 of the East African Embassies was an outcome.

81. Al Fawaz challenged that decision by way of an application for *habeas corpus* which the Divisional Court rejected in 2000; *R (Al Fawaz) v Governor of Brixton Prison* [2001] I WLR 1234, and his appeal to the House of Lords was dismissed in 2001, [2002] 1AC 556.

82. Thereafter, many further representations were made on his behalf to the Secretary of State as to why he should not be extradited. All were rejected, including those relevant to the *prima facie* case, set out in a 56 page letter undated, but written on 12 March 2008. This too, was challenged unsuccessfully in 2009 in *Re Eidarous and Bary* (above). A further application to the Supreme Court was rejected in 2009; this precipitated the application to the ECtHR a few days later.

(iv) The case now advanced

83. The factual points now relied on were said to be new evidence which "*cast doubt*" on or "*undermined*" the *prima facie* case and the good faith of the requesting State. A large application for disclosure was made in order to make good those points, with the support of what were described as two expert reports by Mr Nicholas Fielding, an investigative journalist, who also provided a witness statement dated 1 October 2012. Much of this was little more than a commentary on existing material which concluded, quite without relevance, that there never was a *prima facie* case. Mr Fitzgerald QC however helpfully distilled the voluminous papers down to three points:

    i) There had been a proposal to remove Al Fawaz's name from the UN 1267 Consolidated List of Terrorists established pursuant to a UN Security Council Resolution, a listing which was said to draw on the same essential allegations as relied on in the extradition process.

    ii) It was said that a person called Al Faqih had been removed from that same list, thus undermining the *prima facie* case, though he was alleged by Al Fawaz to be a significant conspirator central to the case against Al Fawaz.

    iii) It was said that an MI6 debrief in 2000 of another person, Kherchtou, alleged to have been closely involved with Osama Bin Laden in the 1990s, which had newly come to light, made no mention of Al Fawaz. From this silence, it was said that positive evidence could be inferred that Al Fawaz had no role in the bombings or the conspiracy and that the UK knew it. It was in support of that, that widespread disclosure was sought.

84. We take these points in turn.

(v) Al Fawaz's name on the Consolidated List

85. Al Fawaz remains on the Consolidated List. It was contended on his behalf that telexes leaked in August 2011 through Wikileaks, the authenticity of which the Secretary of State and the US Government did not accept, showed that his was one of a large number of listed names in respect of which the US Government pressed the sponsors of the names on the list for up to date information to justify their continued presence on the list, so that if there had been no recent information about these activities, such names could be removed. The US DoJ wrote on 27 September 2012 saying it had never actively sought his delisting and that Al Fawaz remained on the list.

86. The matter ends there – that is no basis upon which the Secretary of State could lawfully have exercised her discretion to withdraw the Extradition Order. The continuing request for extradition belies whatever inference Al Fawaz seeks to draw from the telexes. It is no more than a point he can raise at trial in his arguments. It does not begin to show the absence of a *prima facie* case or that the extradition and prosecution are being pursued without good faith in some way. And, even if authentic, the telex merely shows that those listed but inactive for some years may be delisted. It says nothing about liability for past activities. There are obvious reasons why Al Fawaz may have been less active over the last few years.

(vi) Al Faqih

87. The significance of the delisting of Al Faqih depends entirely on his significance in the case against Al Fawaz. The name "Al Faqih", submits Mr Lewis QC, for the Government of the United States, became no more than a name on a cloned credit card used to buy satellite phone time; there was no point in his being retained on the list. But more importantly Mr Lewis showed by reference to his opening note before the District Judge in 1999 and by reference to the District Judge's decision and the Divisional Court Judgment that Al Faqih did not rate a mention in the case against Al Fawaz at all. Mr Lewis's further researches showed no more than one passing reference to Al Faqih in the printed case before the House of Lords.

88. The assertion by Mr Fielding in his report that the case has been affected significantly because a crucial relationship had been undermined is hopelessly adrift from the reality of the role which Al Faqih played in the *prima facie* case. It is in reality a completely irrelevant point. We have not thought it necessary to set out the very extensive basis for the *prima facie* case against Al Fawaz – that can be seen from the decision of the Divisional Court to which we have already referred.

(vii) The de-brief of Kherchtou

89. Third, the evidence provided by Mr Fielding of the de-brief of Kherchtou by MI6 cannot possibly undermine the clear *prima facie* case. Kherchtou, according to Mr Fielding was cross examined in the New York trial of East African Embassy bombers in 2000, by which time he had already been de-briefed. A book was published in 2011 by Ali Sufan, said to be a former FBI special agent, which referred to this de-brief. It is however Mr Fielding who reports that Kherchtou produced very little in 2000 to implicate Al Fawaz in the embassy bombings, although Kherchtou was said to be an important witness.

90. The significance of the absence from Kherchtou's evidence in 2000 of comment on the involvement of Al Fawaz with Osama Bin Laden after the early 1990s is a point which could and should have been made years earlier, and did not need Mr Fielding's recent reports.

91. This absence of inculpatory evidence from one witness cannot possibly so undermine the *prima facie* case as to warrant, let alone require, the exercise by the Secretary of State of her discretion under para.8 of Schedule 1 to the Act. This argument did not go to the reliability of a once anonymous witness denoted as CS/1, though to the extent it might bear on it, Mr Lewis pointed out that the Divisional Court had concluded in 2000 (some 12 years ago) that there was a *prima facie* case with or without the evidence of CS/1. In paragraph 64 of the judgment of Buxton LJ, the court commenced its consideration of whether there was a *prima facie* case against Al Fawaz without even relying on CS/1. In subsequent paragraphs up to paragraph 71 the court spelt out the evidence against Al Fawaz quite apart from the evidence of CS/1. In paragraph 71 the court had no hesitation in saying that that evidence and the context of the overall evidence called for an explanation by Al Fawaz, even though each item and the whole might be susceptible of an innocent explanation. In its present state, the evidence pointed sufficiently strongly to his involvement in the conspiracy to amount to a *prima facie* case to be met at trial. The judgment was explicitly endorsed by the House of Lords in [2002] 1 AC 556 at paragraph 44.

92. The Kherchtou evidence and its non-inculpation of Al Fawaz cannot possibly undermine those findings. Further challenges to the *prima facie* case were rejected by the Divisional Court in 2009, years after Kherchtou's evidence had been given. That case concerned a challenge to the Secretary of State's decision on 12 March 2008 in which among other matters the question of a *prima facie* case was again reviewed, albeit not on the grounds now put forward.

93. Accordingly, the *prima facie* case has been examined carefully by a Divisional Court on two occasions. Nothing has subsequently occurred which does more than, taken at its highest, give Al Fawaz the opportunity to raise a query. Looking at the *prima facie* case as described in those two decisions, the Kherchtou silence is of no consequence for the existence of a *prima facie* case.

94. We have also considered a note dated 3 October 2012 prepared by Mr Fawaz's solicitor taking issue with the way in which Mr Lewis described the *prima facie* case. We mention it to show that we have considered it – nothing in it goes to the strength of the *prima facie* case as has been concluded to exist on two previous occasions by the Divisional Court.

(viii) The application for disclosure

95. Al Fawaz also makes on paper a very extensive application for disclosure in reliance on Mr Fielding's report. There is nothing in that application to suggest any non compliance by the United States or domestic authorities with their duties of disclosure. The witness statement of Miss Kundert on behalf of the CPS asserts that the duties have been complied with. She says that the CPS with the assistance of Counsel had undertaken a disclosure exercise which involved considering materials held by the Security Service and the Secret Intelligence Service. The CPS is satisfied that their disclosure obligations in these extradition proceedings were complied with

in relation to materials held by the United Kingdom. There is no general duty of disclosure in extradition proceedings though the requesting State should disclose material which is plainly exculpatory.

96. We are wholly unpersuaded that Al Fawaz can show any failure in the duty of disclosure of significant exculpatory material, such as could suggest that there was no *prima facie* case. There plainly is a *prima facie* case. If any more specific disclosure point arises in the United States that is an issue for the Trial Court. Indeed the full width of the application was not seriously pursued by Mr Fitzgerald, especially in the light of the refusal of Al Fawaz before the Magistrates' Court to pursue some issues to which the application relates with the witnesses who did attend. Some rather overheated allegations by Al Fawaz's solicitors in respect of that were not pursued by Mr Fitzgerald QC.

(ix) Conclusion

97. The application is in our judgment hopeless. We therefore have no hesitation in refusing permission.

III: ABDEL BARY

98. The US seeks extradition of Abdel Bary for conspiring with Osama Bin Laden to commit acts of terrorism against US citizens, with a particular focus on the 1998 bombings of two US embassies in East Africa in which 224 people were killed and 4,500 injured. The proceedings began 13 years ago.

(i) The challenge on the basis of new evidence

99. Abdel Bary contends that the Secretary of State's refusal in a letter dated 27 September 2012 and maintained in a letter of 1 October 2012 not to extradite him, and her conclusion that nothing in his representations of 26 September 2012 precluded her from extraditing him to the United States, is unlawful on two core grounds. The first is the contention that the Secretary of State ought to reconsider whether under the applicable Act, the Extradition Act 1989, there remains a *prima facie* case against him, and arguably ought to conclude that doubt had been cast on it and that it had been undermined. The second contention relates to a deterioration in his psychiatric condition. We consider each separately and consider first the issue as to whether there remains a *prima facie* case.

(ii) The course of the proceedings

100. As long ago as April 2000 the Senior District Judge was satisfied that a *prima facie* case had been made out against Abdel Bary. Abdel Bary's challenge to that decision by way of the then usual route of an application for *habeas corpus* was rejected in 2001; re *Eidarous and Abel Bary* [2001] EWHC Admin 798. The appeal to the House of Lords with that of *Al-Fawaz* was dismissed: *R (Al-Fawwaz) v The Governor of Brixton Prison* [2002] 1AC 556.

101. A lengthy series of representations was made on the claimant's behalf to the Secretary of State which was finally rejected in March 2008. Judicial Review of that decision

was dismissed in 2009. Five days after the Supreme Court refused leave to appeal, an application was lodged with the ECtHR.

102. We have already set out the statutory framework within which this submission falls to be considered at paragraphs 76-79 above.

(iii) The new evidence relied on

103. Abdel Bary made a number of submissions on paper about the strength of the existing evidence which could not possibly support the necessary contention as to the absence of a *prima facie* case. He also submitted that two trials relating to those involved in the bombings had taken place in the United States without him being mentioned. That cannot avail him.

104. The main point made by Mr Southey QC for Abdel Bary is that there is evidence from a co-operating witness Sajid Badat, given in March 2012, to the effect that Osama Bin Laden's group, Al Qaeda, had not merged with the Egyptian Islamic Jihad (EIJ) group until 2001, which was after Abdel Bary's arrest. Abdel Bary was said to be a member of the EIJ group so the inference of a guilty association could not be drawn on the basis of his EIJ membership before 2001. It was said that when Ayman Al Zawahiri (AAZ), its leader, signed up to Osama Bin Laden's declaration in 1998, he did not represent all of the EIJ group membership.

105. First, it was not part of the prosecution case that the guilty association arose by virtue of a merger between Al Qaeda and EIJ at a date earlier than 2001. The prosecution case was that there was a close operational relationship between the 2 groups in the late 1990s. AAZ's signing of Osama Bin Laden's 1998 declaration is part of the evidence for that, but there is no basis for the necessary contention that a gulf exists between inferences of guilty association which can be drawn from the full merger in 2001 and those which could be drawn from a close operational relationship before the merger, which relationship is not undermined by Abdel Bary's new evidence. His argument before us appears to have been that the merger and the close operational relationship were the same events or relationship. They plainly are not. The latter preceded the former. The supposed new point does not deal with the close operational relationship in the late 1990s.

106. Moreover, Abdel Bary's arguments simply tackle one piece of evidence and do not grapple, as they have to do if they are to succeed, with the overall picture of the evidence against him, as Mr Lewis QC for the United States convincingly demonstrated. Evidence of Abdel Bary's membership of the EIJ group was no more than supportive, rather than crucial evidence, of participation in the conspiracy given the evidence of his actual deeds. It is unnecessary to set all of that out from the Divisional Court judgment. The evidence of CS/1 never stood alone as the basis for the US evidence of Abdel Bary's involvement in the conspiracy nor as the basis for the existence of the conspiracy. The Divisional Court judgment between paragraphs 17 and 32, and 36 make all of that perfectly clear.

107. It is clear that there was a *prima facie* case then and still is. The main point made by Mr Southey QC is of no significance. There is nothing either to show that the case in relation to the timings of the receipt of faxes concerning the bombing has been undermined.

108. Mr Southey QC sought to suggest that a mere weakening of the *prima facie* case which still remained a *prima facie* case, was nonetheless relevant to a consideration of the proportionality of extradition under Article 8 ECHR, especially when measured against Abdel Bary's major depressive disorder. That is misconceived. No authority to suggest that it was relevant was cited to us. There is a very considerable difference between the relevance of the gravity of an offence and the strength of the evidence to prove that offence. The strength of a case is not relevant to proportionality – the gravity of the offending alleged is. Were it otherwise the relevance of the strength of the case to proportionality would be a route whereby in any extradition case in which proportionality was an issue, a Court would be obliged to examine the strength of the evidence. That would be wholly contrary to the scheme of the 1989 and even more so of the 2003 Acts.

109. We therefore conclude this ground is hopeless and could not conceivably succeed. We turn to the second ground – the psychiatric condition of Abdel Bary.

(iv) The psychiatric condition of Abdel Bary

110. It is very clear from psychiatric reports which go back to 2004 that over a number of years Abdel Bary has experienced symptoms indicating a major depressive disorder which have been exacerbated by the very many years which he has spent in custody awaiting extradition.

111. In the course of the proceedings before this court in 2009, his psychiatric condition (which was summarised at paragraph 13 of its decision) was one of the significant factors relied upon in support of the contention that to order his extradition would entail a breach of his Article 3 rights, as ADX Florence, Colorado had no proper facilities for dealing with someone with his severe depressive condition.

112. In the application to the ECtHR, this point was raised and considered by the court. Evidence was adduced on behalf of Abdel Bary and the other claimants as to the lack of proper psychiatric facilities at ADX Florence, Colorado. Evidence was submitted on behalf of the United Kingdom from the BoP that there was proper psychological and psychiatric care available, including the evidence of Dr Zohn which is summarised at paragraph 90 of the decision of the court. The court concluded at paragraph 224 that to the extent that Abdel Bary and others relied on the diagnosis of mental health problems:

> "The Court notes that those mental health conditions have not prevented their being detained in high-security prisons in the United Kingdom. On the basis of Dr Zohn's declaration, it would not appear that the psychiatric services which are available at ADX would be unable to treat such conditions. The Court accordingly finds that there would not be a violation of Article 3 in respect of these applicants in respect of their possible detention at ADX."

113. We were provided in this court with a further psychiatric report from Dr Richard Latham who had last given the report relied on in the ECtHR in 2010. That report was the result of an interview by Abdel Bary through a videolink for 30 minutes on 1 October 2012. The report sets out in considerable and helpful detail his medical

records and observes that Abdel Bary continues to experience symptoms of a major depressive disorder. It draws attention to the fact that he is on suicide watch. On the basis of a description of the conditions at ADX, Colorado, which is based more on the evidence put forward by the claimants to the ECtHR than on the evidence of Dr Zohn (which was accepted by the ECtHR) Dr Latham sets out his view that the conditions to which he would be subjected at the ADX facility would constitute actual harm and significantly increase the risk of suicide or irreversible psychological harm.

114. We were also helpfully provided by Mr Cooper with a complaint brought before the US Federal District Court in Denver which set out in detail evidence that contradicted that of Dr Zohn and asserted that in practice there was no proper psychiatric care at the ADX facility.

(v) Our conclusion on the significance of his psychiatric condition

115. It is clear to us that there has been no material change in the psychiatric condition of Abdel Bary. The decision of this court in 2009 makes clear that there was a suicide risk then, but this court considered that there would be no breach of Article 3. The issue was again considered by the ECtHR which again concluded that there would be no breach of Article 3. That court rejected the evidence of the claimants and preferred the evidence of Dr Zohn. That court therefore decided on the facts against all the claimants, including Abdel Bary, in relation to the provision of psychiatric care at the ADX facilities. As the conclusion of Dr Latham in his most recent report is not based on the findings made by the ECtHR, it cannot form the basis of a significant material change of circumstances. The fact that Abdel Bary is now on suicide watch was said by Mr Cooper on his behalf to be the significant change. In the context of the claimant's history and the submissions presented in the past, we cannot agree.

116. Although, as we have explained, we are not bound by the decision of the ECtHR, it cannot be right in the light of general principles of finality to which we have referred that a person can exhaust the appeals in this jurisdiction, then go to the ECtHR and when he has failed on the facts in that court, seek to re-open them in this court in the absence of very clear and very compelling evidence that circumstances have changed so that extradition would now breach his human rights. It cannot be in the overall interests of justice to re-open the facts relating to the availability of psychiatric services at ADX Florence, Colorado in the absence of a compelling change of circumstance. On that basis, the new medical opinion of Dr Latham and the fact that Abdel Barry is on suicide watch is nowhere near sufficient. This ground of the application therefore fails.

117. We would add that we received this morning (5 October 2012) a letter from the Home Office stating that Abdel Bary was being subjected to the heightened regime applicable to all five of the claimants rather than on suicide watch. All five had been placed on that regime because of the stressful circumstances for them during the current week and not because of an increased risk of suicide.

(vi) Conclusion

118. The application by Abdel Bary for permission therefore fails as it has no prospect of success. It and any application for a stay is dismissed.

IV ABU HAMZA

(i) The allegations

119. The allegations against Abu Hamza can be summarised as follows:

i) In December 1998 Abu Hamza conspired to take hostages in the Yemen and procured Abul Hassan and others to commit the offence of hostage taking in the Yemen.

ii) Between October and December 1999 Abu Hamza provided funds, knowing they would be used for terrorism/jihad in Afghanistan.

iii) Between October 1999 and April 2000 Abu Hamza conspired to set up a training camp in Oregon to train people to fight in Afghanistan.

iv) Between June 2000 and December 2001 Abu Hamza provided funds and other property for persons to go to Afghanistan, knowing that such funds and property would be used in connection with terrorism including training in Al Qaeda camps.

v) Between March and April 2001 he conspired to invite a person to receive training in the use of explosives in Afghanistan.

(ii) The request for extradition

120. Over eight years ago, on 24 May 2004, an extradition request was submitted by the United States, Abu Hamza having been indicted in the United States on 19 April 2004. The request was certified by the Home Secretary on 25 May. On 27 May 2004 Abu Hamza was arrested.

(iii) The trial of Abu Hamza in the United Kingdom

121. On 18 October 2004 Abu Hamza was charged with various offences in the United Kingdom of which he was convicted in February 2006. The offences included six counts of soliciting murder. He was sentenced to seven years imprisonment. His appeal to the Court of Appeal was dismissed in November 2006.

(iv) The extradition proceedings

122. In November 2007, nearly five years ago, the Senior District Judge after an extradition hearing under Part 2 of the Extradition Act 2003 sent his case to the Secretary of State. In February 2008 the Secretary of State ordered his extradition.

123. On 20 June 2008 this court dismissed his appeal and refused to certify any point of law of general public importance – see *Mustapha (Hamza) v Government of the United States of America and Another* [2008] 1 WLR 2760. As regards the courts of the United Kingdom his challenge to extradition was at an end.

(v) The application to the European Court of Human Rights

124. On 1 August 2008 Abu Hamza lodged his application with the ECtHR. He applied for and obtained relief under Rule 39 preventing his extradition. As we have set out, the issues raised were very wide-ranging.

(vi) The application to stay the extradition

125. The essence of the application that has been made on behalf of Abu Hamza is that he should not be extradited, as the Secretary of State erred in her decision to refuse to reconsider his extradition on the basis that he was not fit to plead. It is therefore necessary to consider the legal position and the evidence.

126. There was a dispute between the Secretary of State and Mr Alun Jones QC on behalf of Abu Hamza as to the basis of the court's jurisdiction. It was the submission of Mr Jones QC that the appropriate remedy in this case was an application to re-open the appeal and that was the basis of his application. If we follow that course, then it would be for the court to assess under the Act whether the mental condition of Abu Hamza was such that it would be unjust or oppressive to extradite him.

127. It was the contention of the Secretary of State made by Mr Eadie QC that the only jurisdiction available to the court was a review of the ongoing obligation of the Secretary of State as a public authority under the Human Rights Act to withdraw the extradition order where there had been a material change of circumstances which would make it a breach of Abu Hamza's Convention rights to extradite him. He relied on the decisions of this court in *McKinnon v The Government of the USA* [2007] EWHC 762 (Admin), *McKinnon v The Secretary of State* [2009] EWHC 170 (Admin) and *Taylor v The Governor of HM Prison Wandsworth* [2009] EWHC 1020 (Admin).

128. We do not consider it necessary to resolve this issue at this hearing as our conclusion is the same whichever test is applied, though we can see considerable force in Mr Jones' submission on that point. As we have already commented, the prevalence of judicial review in extradition proceedings with their clear statutory framework appears to be adding significantly to the delays that are occurring.

129. If the question arises as to whether it is unjust or oppressive to extradite Abu Hamza in his present circumstances, it is well established that if there is an issue as to fitness to plead, in general that issue should be determined by the courts of the state where he is to be tried, save in an exceptional case where there is no prospect that a court could find a person fit to plead or there are other exceptional circumstances, such as where the prospects of recovery might justify a short postponement of his extradition: see *R (Warren) v The Secretary of State* [2003] EWHC 1177 and *Dewani v South Africa* [2012] EWHC 842 (Admin). In the circumstances of this case, therefore, it is necessary, if this is the correct approach, to consider whether there is an issue of fitness to plead and, if so, whether the circumstances of this case warrant re-opening the appeal concluded in 2008. This would cover both human rights and whether it would be unjust or oppressive to extradite him

130. If, on the other hand, we adopt the approach advanced by Mr Eadie QC, we have to consider the arguability of a review of the Secretary of State's decision that the

extradition of Abu Hamza will not breach his human rights, and decide that human rights issue for ourselves on the review. We therefore turn to consider the facts.

(vii) The facts: Abu Hamza's psychiatric history

131. As long ago as 4 July 2005 Dr Richard Taylor, a psychiatrist whose post in the NHS is at the North London Forensic Science Service, Camlet Lodge Regional Secure Unit, wrote a report on Abu Hamza's psychiatric condition. He wrote further reports in May 2007, May 2008 and most recently on 2 August 2012.

132. Each of these reports sets out at considerable length an account of what he was told by Abu Hamza about his condition, the way Abu Hamza said he had been treated at Belmarsh in the light of his disabilities and his treatment by the media. Dr Taylor's report of 4 July 2005 recorded that Abu Hamza's preoccupation with his physical disability was compounded by signs of clinical depression. Those signs were manifested in impaired concentration, low mood, sleeping difficulties and an increasing preoccupation with his sense of being persecuted by the British and American authorities and by the media. Dr Taylor concluded that the sense of persecution was an additional psychological stresser which was having a further impact on his mood. He expressed a view about fitness to plead. Although Abu Hamza understood the charges and the plea, his total preoccupation with his physical condition and his depressed mood made his ability to follow court proceedings or instruct counsel borderline. He went on to express the view that having regard to Article 6 of the Convention, Abu Hamza could not adequately participate in his trial, given the particular combination of physical disability, medical problems, mental state and the conditions pertaining in the high secure unit at HMP Belmarsh.

133. In the report of May 2008, just before the hearing of Abu Hamza's appeal in this court, Dr Taylor noted that the complications of Abu Hamza's physical health appeared to have a negative impact on his mental health, although Abu Hamza was clearly a man with robust psychological defences. Dr Taylor understood, however, that solicitors and counsel appeared to have difficulties taking instructions from him, as he appeared to have lost his motivation to prepare his defence, feeling that his case was a foregone conclusion. Dr Taylor repeated in essence the observations he had made in 2005 in relation to pressure from the media.

134. Dr Taylor was instructed to prepare a further report in May 2012 following the reporting of signs of memory loss. Because of difficulties in obtaining access to Abu Hamza, his report was delayed until 2 August 2012. In that report Dr Taylor concluded that Abu Hamza was not currently fit to plead in accordance with the criteria set out in *R v Pritchard* (1836) 7 Car & P 303 and the more recent authorities. That was because he would not be able to follow legal proceedings in the light of his current problems with tension, concentration and short term memory loss. The basis of that opinion was that Abu Hamza had developed clinical depression of at least moderate severity which was exacerbated by chronic sleep deprivation. He had a detectable impairment of attention and concentration in short term memory. He required anti-depressant medication and his depression would be unlikely to improve as long as he continued to be subjected to hourly waking and chronic sleep deprivation. He recommended an examination by a clinical neuropsychologist saying he had identified a suitably qualified colleague; he added, "He may also need further investigation such as an MRI brain scan." Following that report one of his solicitors

wrote on 10 August 2012 to ask the Home Secretary not to remove Abu Hamza until his condition had been investigated. His other solicitor wrote on 20 August 2012 to HMP Belmarsh asking for arrangements for an MRI scan.

135. A neuropsychologist was then instructed. He was Dr D Nathaniel-James, a private consultant, who had been Head of Neuropsychology for one of the largest NHS trusts. He was currently a senior lecturer in neuropsychology and clinical psychology at the Royal Free and University College Hospitals. He wrote two reports, one dated 6 September 2012, and the other 27 September 2012. His conclusion in his second report was as follows:

> "The report will show that notwithstanding the findings of the neuropsychological assessment, [Abu Hamza] suffers with short-term memory and concentration difficulties on a day to day basis due to depression and sleep deprivation. The report argues that additionally there may be underlying organic changes to his brain and thus an MRI brain scan should also be performed. The report concludes that currently [Abu Hamza] is unfit to plead but this needs to be reviewed following appropriate treatment and the curtailment of the practice leading to the noted sleep deprivation."

The report set out in detail the methodology used. It also set out the results of what was described as "the test of memory malingering". That test was designed to identify people who were perhaps not applying themselves to the best of their ability during the course of their other assessments and thus demonstrating less than satisfactory engagement or effort. The test appeared difficult but could be performed almost without error even by people with severe brain damage.

136. Abu Hamza performed below the normal range on this test. The report commented that this meant that it was not possible to comment on the extent of any underlying cognitive impairment. Although it did not negate the presence of underlying impairment it did mean that one could not reliably comment on the basis of those objective tests.

137. Dr Nathaniel-James concluded that an MRI scan should be carried out on the basis that:

> "It thus would be pertinent and indeed standard practice to carry out an MRI scan of his brain as part of a good clinical practice regime in suspected cases of early cognitive decline."

He expressed the opinion that Abu Hamza suffered from short-term memory and concentration difficulties on a day to day basis due to the pressure of sleep deprivation. He added that he agreed that Abu Hamza was unfit to plead.

(viii) The Secretary of State's decision

138. Although the last report of Dr Nathaniel-James was not before the Secretary of State, the Secretary of State concluded on the evidence before her that taking the medical reports at their highest she did not consider that they were sufficient to demonstrate

that there was a real risk that the extradition of Abu Hamza would violate his Convention rights.

(ix) Is it too late to take the point?

139. It was submitted on behalf of the Home Secretary that this was a point taken with a view to avoiding extradition. If there had been anything in the mental state of Abu Hamza, given his history of clinical depression, this was a point that should have been properly investigated at an early stage and seeking to delay extradition by asking for a brain scan should not be permitted in the circumstances.

140. It is evident from the documentation placed before the court that those acting for Abu Hamza took action as soon as Dr Taylor reported his conclusion on fitness to plead and the need for a possibility of a brain scan. The possibility that Abu Hamza might be unfit to plead arose from signs observed for the first time in May 2012, and not earlier despite regular visits by a psychiatrist. We do not therefore think it would be fair to dismiss the complaint made on this peremptory basis. It is to be noted that those instructed have acted in good faith and that many of those representing Abu Hamza, including Mr Alun Jones QC and his junior, are doing this *pro bono*.

(x) Is there a basis for concluding that extradition at this point in time would be unjust or oppressive?

141. As we have set out above, we will first consider the position on the basis of the law which Mr Alun Jones QC invited us to apply, namely whether we should re-open the appeal and find it would be unjust and oppressive to extradite Abu Hamza at this time. The question essentially turns on whether there is a case of fitness to plead and the relevance of the MRI brain scan.

142. It is well established that it is for a court to determine whether a person is fit to plead on the basis of the medical evidence before it. Fitness to plead is not generally for us to determine, since we are not the Court of trial, as we have explained at paragraph 129. If, however, we were to apply the criteria set out in *R v Pritchard* as interpreted in the more recent authorities, we would have little doubt in concluding, on the basis of what is set out in the experts' reports provided on his behalf, that Abu Hamza was fit to plead as a matter of the law of England and Wales.

143. However generally it is for a court in the state where a person is to be tried to determine whether a person is fit to plead. The evidence before us suggests that there may be two causes of the symptoms which are said to give rise to possible unfitness to plead – (1) his sleep deprivation and the physical conditions he has been held in at HMP Belmarsh, or (2) a degenerative condition in his brain. If it is the first, then that condition is remediable by a change of conditions which can be effected in the United States. If anti-depressant medication is necessary to remedy his symptoms, there is no basis for contending that that is unavailable in the United States, given the medical evidence that was before the ECtHR and the conclusions of the Fourth Chamber. If, however, any potential unfitness to plead was emerging from a degenerative condition of the brain, then the sooner he is put on trial the better, as delay can only in such circumstances put at risk a trial that is necessary in the interests of justice.

144. There is nothing to suggest that on either basis it would be unjust or oppressive to order his immediate extradition.

(xi) Would extradition violate his Convention rights?

145. It would have to be established that there had been a material or significant change in circumstance that was of a kind that would render it unlawful to carry out the extradition. It must inevitably follow, given our conclusion in relation to the lower test of whether it would be unjust or oppressive, that the evidence simply does not establish that the extradition would be a breach of his Convention rights.

(xii) Our conclusion

146. In our judgment, therefore, there is no basis on which the order of his extradition should be stayed.

V BABAR AHMAD AND TALHA AHSAN

(A) The course of the proceedings

(i) The allegations

147. The case against Babar Ahmad and Talha Ahsan by the US Prosecutor is that they conspired to provide material to support terrorists, to kill or injure those overseas, to launder money to support the Taliban and others, including the Chechnya Mujahideen and to solicit others to commit crimes of violence. They did this by:

i) operating websites from premises in the UK including the Azzam website and a mirror website in the USA from 1997 to 2004 through internet service providers (ISP) in Las Vegas, Nevada and Trumbull, Connecticut and an Alabama company. The websites were used to solicit funds and other property to assist the Taliban and other Mujahideen in terrorism and murder, to remit those funds and to publicise the works of Osama Bin Laden.

ii) The evidence relied on against them indicates that a material part of their activity was directed at those in the United States; one example was the provision of a standard form letter for US citizens to use to disguise the transmission of funds. Another is an allegation that specific individuals in the United States worked with Babar Ahmad to make contributions to the Mujahideen.

iii) An address book recovered through search warrants issued in the United States revealed successful solicitation of donations sent from a residence in Connecticut for transmission to the Chechnya Mujahideen which is alleged to have been responsible for many notorious terrorist attacks in which many were killed.

148. By far the most serious allegation was the possession of classified US naval plans and communication with a US naval enlistee.

i) A computer file was found in premises used by Babar Ahmad in the UK which contained a document discussing a US naval battle group, each of its member

ships including the USS Benfold, the battle group's planned movements and a drawing of the group's formation when it was to pass through the Straits of Hormuz in 2001. The document noted that the battle group was tasked with enforcing sanctions against Iraq and conducting operations against Afghanistan and Al Qaeda. The document stated that the battle group was scheduled to pass through the Straits of Hormuz on 29 April 2001 and explicitly described the group's vulnerability to terrorist attack including, for example, that the group had nothing to stop a small craft with RPG, except their Seals stinger missiles.

ii) The e-mail accounts operated through the ISP, Yahoo, included e-mail exchanges with an individual who described himself as an enlistee in the US Navy on active duty in the Middle East. The e-mail header indicated the individual was communicating from the USS Benfold at the time. One of the e-mails sent in July 2001 described the reaction of officers and other enlistees to a briefing given on the ship to help personnel protect against terrorist attacks similar to the March 2001 attack on the USS Cole. The e-mail praises those who attacked the USS Cole and the men who had brought honour by fighting jihad in Afghanistan and elsewhere. The response from the Azzam publications e-mail account praised the enlistee's comments and encouraged the enlistee to keep up the missionary work for Islam and psychological warfare. The enlisted person was found guilty on 5 March 2008 in a US Federal Court of disclosing national defence information to persons not entitled to receive it on the basis of this betrayal of his shipmates and country. He was sentenced to the statutory maximum of 10 years and his appeals have been dismissed. Although the jury found him guilty of providing material support for terrorists, the judge found that on the version of the statute then in force he was not technically guilty.

149. According to the documents provided by the United States Government, part of the evidence came from search warrants executed in the United Kingdom to which we will refer and part from search warrants executed in the United States.

(ii) The investigation in the United Kingdom

150. The search warrants executed in the United Kingdom were executed on 2 December 2003. Babar Ahmad and Talha Ahsan were arrested. A police investigation ensued. We were told they gave no comment interviews to the police.

151. After the execution of the search warrants, the police were in contact with the CPS later in 2003. Further discussions took place between the police and the CPS on 4 February 2004. On 6 April 2004 an evidence file was submitted to the CPS which analysed the 32 most significant exhibits that had been seized. A meeting then took place on 15 April 2004 between Detective Chief Inspector Boutcher who was the senior investigating officer and Ms Hemming, Head of Special Crime and Counter Terrorism at the CPS, with others present. The meeting lasted three hours due to the volume of material that was considered. At the meeting the CPS asked for further material to be submitted.

152. That further material was submitted on 5 July 2004. That material comprised material that had been retrieved from floppy disks seized during the searches.

153. Not all the computer files were provided as there were a number which had been encrypted and the police had not succeeded in decrypting them. There was therefore, we were told, no purpose in providing that material to the CPS. Nor was all the other material provided, as there was a considerable amount of material that was not relevant to the prosecution decision in respect of Babar Ahmad. However the CPS were provided with the key evidence including the information about the movements of the US Navy battle group to which we have referred at paragraph 148.i), details of signals and methods used to contact covert operatives in Pakistan, a document that discussed sending an individual to Afghanistan and Pakistan, covert methods and data encryption and e-mail exchanges regarding covert travel to Pakistan and Afghanistan. The police had tried to obtain information that linked Babar Ahmad to the websites, but the websites had been taken down and they were not able to obtain that linking evidence. That was significant in the light of the no comment interviews given by Babar Ahmad and Talha Ahsan.

154. On 14 July 2004 the CPS decided not to prosecute as there was insufficient evidence. They so advised the police.

(iii) The commencement of the extradition proceedings

155. Shortly after the decision had been made by the CPS, a criminal complaint was signed by a United States Magistrate on 28 July 2004 charging Babar Ahmad with the matters we have outlined. The same day the US Magistrate signed a warrant for the arrest of Babar Ahmad.

156. On 29 July 2004 the US requested the provisional arrest of Babar Ahmad for the purposes of extradition. On 5 August 2004 a provisional warrant for his arrest was issued.

157. On 1 October 2004, some eight years ago, a full extradition request for Babar Ahmad was made by the United States. That was accompanied by an affidavit of Robert Appleton, an Assistant US Attorney for the District of Connecticut and an affidavit from Craig Bowling, a special agent and computer investigative specialist employed by the Department of Homeland Security. The two affidavits set out in detail the evidence against Babar Ahmad, some of which we have summarised. On 6 October 2004 Babar Ahmad was formally indicted in the United States.

(iv) The review by the CPS of the police papers in relation to Babar Ahmad for the purposes of extradition.

158. On 20 and 21 January 2005 a representative of the CPS attended the Metropolitan Police and reviewed all of the documentation of the searches of the four addresses that related to Babar Ahmad. A number of documents were requested which were supplied to the CPS. The purpose of the review was to ensure the CPS was satisfied that all due consideration had been given to all of the documents prior to the full extradition hearing for Babar Ahmad that was to take place on 2 and 3 March 2005.

(v) The extradition proceedings

159. On 17 May 2005 after the extradition hearing, the Senior District Judge sent Babar Ahmad's case to the Secretary of State. Representations were then made and

exchanges occurred with the United States. On 15 November 2005 the Secretary of State ordered Babar Ahmad's extradition.

160. In response to a letter written by Babar Ahmad's then solicitor in connection with the appeal from those decisions, the CPS confirmed again that the CPS had advised in July 2004 that there was insufficient evidence for prosecution.

161. Babar Ahmad's appeal was heard in this court together with an appeal of Haroon Aswat. The major focus of both the appeal of Babar Ahmad and Haroon Aswat was their contention that, if they were extradited there was a real prospect that they would be tried by a military tribunal, even though the Government of the United States had given assurances that each would be prosecuted before a Federal Court. Other points taken included the contention on behalf of Babar Ahmad that there was no extradition offence and that he was likely to be, if convicted, subjected to SAMs at ADX Florence, Colorado in breach of Article 3 of the Convention.

162. In a detailed reserved judgment delivered on 30 November 2006 by Laws LJ, with which Walker J agreed, the appeal was dismissed: see [2006] EWHC 2927 (Admin). On 6 June 2007 the House of Lords refused Ahmad leave to appeal. Four days later on 10 June 2007 Ahmad lodged an application with the ECtHR.

(vi) September 2006: The decision to prosecute Babar Ahmad was again questioned

163. After the conclusion of the proceedings in the UK, Babar Ahmad's MP wrote on 27 September 2006 to the then Attorney-General Lord Goldsmith QC about his extradition. In his reply on 24 October 2006, the Attorney-General stated that the CPS had concluded in 2004 that there was insufficient evidence to prosecute Babar Ahmad. A copy of that reply was provided to Birnberg Peirce who wrote to the Attorney General on 24 November 2006 setting out the reasons why the CPS might not have taken into account a number of features of Babar Ahmad's position which might lead to a different conclusion. On 19 December 2006, Ms Hemming of the CPS replied reaffirming that there had been insufficient evidence to prosecute and the position was unchanged.

(vii) The extradition proceedings in respect of Talha Ahsan

164. On 28 June 2006 Talha Ahsan was indicted in the United States. On 2 July 2006 the United States requested his provisional arrest for the purpose of extradition. Talha Ahsan was arrested shortly thereafter.

165. On 15 September 2006, a full extradition request for Talha Ahsan was submitted by the US. We were told by Miss Kaufmann QC that the basis of the request was in all material respects the same as that applicable to Babar Ahmad

(viii) Representations on behalf of Talha Ahsan to the CPS in 2007

166. On 18 January 2007 the United Kingdom and the United States through their respective Attorneys General signed a document entitled "Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America".

167. On 9 March 2007 those acting for Talha Ahsan contacted the CPS asking for information about any discussions between the prosecuting and investigating agencies in the UK and the authorities in the US in respect of Talha Ahsan's case, relying on the guidance document signed on 18 January 2007. On 14 March 2007 the CPS replied to those acting for Talha Ahsan stating that the guidance document had no application to Talha Ahsan's case.

(ix) The extradition hearing and appeals in the case of Talha Ahsan

168. After an extradition hearing the District Judge on 19 March 2007 sent Talha Ahsan's case to the Secretary of State. After representations had been considered, the Secretary of State ordered his extradition on 14 June 2007.

169. An appeal was made to this court in respect of his extradition and at the same time an application was made for judicial review of the decision of the DPP not to have considered domestic prosecution. This was dismissed by this court on 10 April 2008: see [2008] EWHC 666 (Admin); we return to that decision at paragraph 194 below. This court refused to certify a point of law of general public importance.

170. On 5 December 2008 Talha Ahsan lodged his application with the ECtHR.

(x) The issue of prosecution raised again in 2010

171. The issue of prosecuting Babar Ahmad and Talha Ahsan was again taken up by Birnberg Peirce on 6 July 2010 when they wrote to the new Attorney-General Mr Dominic Grieve QC about that and other issues. The response to the letter was from the Home Office on 20 August 2010. It was suggested that if there were issues to be raised that precluded the UK from extraditing them, those issues should be raised in the proceedings in the ECtHR.

172. Thereafter, the response of Babar Ahmad and Talha Ahsan in the ECtHR filed in May 2011 raised the issue of the appropriate forum for their prosecution. The submission is recorded in paragraph 165 of the judgment of the ECtHR, but at paragraph 166, the court held that the question of appropriate forum for prosecution did not arise for examination in the present case.

(xi) The action of Birnberg Peirce in and after November 2011

173. Prior to that decision, whilst the proceedings before the ECtHR were continuing, Birnberg Peirce wrote on 7 November 2011 to the DPP a long and detailed letter asking that a reconsideration take place of the decision previously taken that insufficient evidence existed to prosecute Babar Ahmad in the United Kingdom and that there was in consequence thereafter no reason to give consideration to a prosecution of his alleged co-accused, Talha Ahsan. The letter set out over some 13 pages the evidence that it was contended existed against Babar Ahmad and Talha Ahsan. The letter suggested that that evidence gave rise to offences under the Terrorism Act 2000 and referred to cases where the CPS had brought prosecutions on similar cases since 2003. The letter drew attention to what were described as "national forum considerations" and the relevance of that to the proceedings before the ECtHR. It also drew attention to the significant personal difficulties and medical condition of both Babar Ahmad and Talha Ahsan.

174. On 22 November 2011 Ms Hemming replied on behalf of the CPS. The letter stated that "a small number of documents seized by the Metropolitan Police were submitted for advice in 2004". It went on to state, as we have set out, that the CPS had decided in 2004 that on the material provided to them there was insufficient evidence to prosecute. It drew attention to the fact that the extradition proceedings had concluded and domestic prosecutors did not have the evidence in relation to either Babar Ahmad or Talha Ahsan.

175. On 21 March 2012, Birnberg Peirce replied expressing surprise that only a small volume of material had been considered and asking a number of questions as to the documents provided by the police. On 27 April 2012, shortly after the judgment of the ECtHR, Birnberg Peirce wrote a further lengthy letter setting out a number of matters and asking the CPS to consider whether the evidential test had been met.

176. Correspondence was also addressed by Birnberg Peirce to the police. In July 2012, the police reviewed all the material held on Babar Ahmad and others to identify whether there was scope for bringing a prosecution. The conclusion was reached that there was no evidence sufficient to support a prosecution in the United Kingdom. It was not considered that any further material had been generated which would support a prosecution. The police therefore decided not to refer any further material to the CPS.

(xii) The launch of a private prosecution by Mr Karl Watkin

177. Mr Watkin, a businessman who has said he has been concerned about the lack of reciprocity in the extradition arrangements between the UK and the US, as a result of a meeting in May 2012 with his solicitors, Ward Hadaway, asked them to consider whether a private prosecution could be brought against Babar Ahmad and Talha Ahsan.

178. After considering the papers, they contacted Birnberg Peirce who took very short statements from Babar Ahmad and Talha Ahsan dated 5 and 20 August 2012 respectively. Babar Ahmad stated that the websites had been taken off line in June 2002 and that he confirmed " that I continued to be involved in the administration of both websites until a date of which I am no longer certain of in Spring 2002". Talha Ahsan confirmed that a number of items provided by the police to US prosecutors and relied on by them were his and that he had made use of computers taken from his home and his father's work premises by police in February 2006. It appears that the statements were sought to provide evidence of the link between Babar Ahmad and Talha Ahsan and the websites.

179. On 5 September 2012 Ward Hadaway wrote to the DPP stating that they had been instructed by Mr Watkin to commence a prosecution against Babar Ahmad and Talha Ahsan for an offence of soliciting murder under s.4 of the Offences Against the Person Act 1861 and for a number of offences under the Terrorism Act 2000. They sought the consent of the DPP for prosecutions for the offences under the Terrorism Act 2000 (as was required under the Act) and informed the DPP that they had sent a draft summons for the offence under s.4 of the 1861 Act to the Westminster Magistrates Court, as that did not require the DPP's consent. The letter set out a detailed case as to why the evidential test had been met and other factors which supported the bringing of a prosecution. It was made clear that if consent was refused,

the decision would be judicially reviewed. A file of documents accompanied the letter; included were the statements taken from Babar Ahmad and Talha Ahsan in August 2012 by Birnberg Peirce.

(xiii) The decision of the DPP on the request by Birnberg Peirce and the private prosecution

180. On 1 October 2012, the DPP made a public statement setting out his decision on the request by Birnberg Peirce and the private prosecution; he declined to consent to the private prosecution making clear that the evidential test had not been met.

(xiv) The decision of the District Court on the summons under s.4

181. On 3 October 2012 the Senior District Judge issued a ruling on the application by Mr Watkin for a summons under s.4. The District Judge concluded that there was insufficient evidence and that:

> "In this case I am satisfied that the purpose of these proposed proceedings is to stop or delay extradition of two named proposed defendants to the USA. The application is made many years after the events complained of. It appears to have the co-operation and support of the proposed defendants themselves. It comes as almost all other ways of resisting extradition have been exhausted. The application is an abuse of the process of the court."

B. The argument and our conclusions

(i) The submissions on behalf of Babar Ahmad and Talha Ahsan

182. Ms Kaufmann QC for Babar Ahmad and Talha Ahsan submitted that the Secretary of State should be prevented from fulfilling her duty under s.118 of the Extradition Act 2003 to extradite them to the US because the DPP had given an arguably unlawful decision in refusing to prosecute them in the UK for at least some of the offences for which their extradition was sought. The DPP could lawfully decide that they should be prosecuted in the UK. Were the DPP to reach a lawful decision that they should not be tried here, they could then be extradited. Meanwhile, since the unlawful decision that they should not be prosecuted here might be followed by a lawful decision that they should be tried here, their removal should be stayed. A lawful decision that they should be prosecuted here would be followed by a decision that they should be charged, and the extradition then would be stayed until the conclusion of the criminal proceedings. Conviction or acquittal would prevent extradition on those charges which had been tried here. But extradition might then follow pursuant to another warrant for trial in the US for those offences which had not been tried here. Although Ms Kaufmann QC accepted that some of the offences for which their extradition was sought could not or could not realistically be tried in the UK, she contended that subsequent proceedings might be susceptible of challenge as extradition after a trial here might be unfair or otherwise unlawful.

183. Such an approach would reflect what Ms Kaufmann QC submitted was the primacy of domestic criminal proceedings contained in the 2003 Act. More importantly, where Article 8 of the ECHR was engaged by an extradition decision, as here, the undoubted

duty of the Secretary of State and of the court not to act in breach of human rights, might be breached if extradition took place when the remedying of an unlawful refusal to prosecute could lead to domestic prosecution and hence to the prevention of what would have been shown to be a disproportionate interference with Article 8 rights. The Secretary of State, however, was not in a position to make a lawful decision using her reserve power implicit within s.118 until a lawful decision on prosecution had been made by the DPP.

(ii) The submission on behalf of the Secretary of State and the US Government

184. Mr Eadie QC for the Secretary of State contended that even if the DPP's decision not to prosecute were flawed on public law grounds, and even if it were possible for the DPP to prosecute Babar Ahmad and Talha Ahsan in the United Kingdom for some or all of the extradition offences, it would not be right for this court to stay extradition preventing the Secretary of State fulfilling her duties under the Act.

185. First, the structure of the Extradition Act 2003 provides very limited powers for the Secretary of State once, as here, the statutory extradition process has been concluded. This duty is set out clearly in s.118 which provides that the person must be extradited to the category 2 territory within a period of 28 days, starting on the day on which the decision of the relevant court on the appeal becomes final. Hence there is a very limited basis upon which the Court can intervene to prevent her complying with her duty to extradite Babar Ahmad and Talha Ahsan.

186. Second, there is therefore no more than a residual power in the Secretary of State to intervene or a residual jurisdiction in the court to intervene. It arises only where the extradition would breach human rights by reference to material or circumstances not previously considered and which could not previously have been raised. So any challenge based on the potential for prosecution here cannot be based simply on whether Babar Ahmad and Talha Ahsan could be tried in the United Kingdom for the extradition offences. It has to be put on the basis that the potential for prosecution in the United Kingdom makes extradition a disproportionate interference with human rights, probably under Article 8 ECHR. A very strong case is required for interference with Article 8 rights to be so severe if extradition (especially for offences of this gravity) is to be refused on the grounds that it is a disproportionate interference with Article 8 rights.

187. Ms Dobbin, in agreement, submitted on behalf of the US Government that the only significance of an unlawful decision not to prosecute, and the possibility of a lawful decision to prosecute being made, leading to a charge and to the stay in extradition, and its prevention on those charges which have been tried, is in the possible impact which that might have on Babar Ahmad and Talha Ahsan's human rights, and Article 8 in particular.

188. Third, Mr Eadie submitted that Babar Ahmad and Talha Ahsan overstated the position in saying that the structure of the Act gives primacy to domestic prosecution, such that the possibility of prosecution in this country can or should lead to a stay of extradition. The 2003 Act makes no such general provision. On the contrary, the Act specifically provides for the point at which domestic criminal proceedings will take primacy. Section 88 provides for a stay of extradition proceedings if the requested person is "*charged*" with an offence in the United Kingdom. The bar does not apply

at any earlier stage in the process of a possible prosecution. It would be contrary to the scheme of the Act for a court, merely faced with a challenge to the lawfulness of a refusal by the DPP to prosecute or to the police to provide evidence to the DPP to order the Secretary of State not to extradite a person, and even more so to prevent her from fulfilling her explicit statutory duty under s.118 which has now arisen.

189. Fourth, the question of how a possible domestic prosecution should affect the extradition process has been considered in *R (Bermingham) v DPP* [2006] EWHC 200(Admin) [2007] QB 727. The Divisional Court held that the Extradition Act 2003 did not make the question of which country's courts should try an offence, either an issue for the Secretary of State or for the court considering extradition orders, whether at first instance or on appeal. Indeed, neither court nor the Secretary of State possessed any discretion to further the extradition process or not to do so; if the specified conditions were satisfied, extradition had to be ordered, and if not satisfied, then not; para. 57 per Laws LJ. Whatever might have been the position under the 1989 Act, there was no such power or discretion under the 2003 Act which governs these two cases. Paragraph 59 of the judgment explains that it is only by reference to the impact on a person's human rights that such an issue can arise.

190. The court in *Bermingham*, at paragraph 36 of the judgment, had considerable reservations about judicial review of a decision not to prosecute. We add that it is particularly difficult to see that such a decision would engage the human rights of the person whom it is decided not to prosecute. The court also held in paras. 65 and 74 that there were additionally particular reasons why a court should not review a decision not to investigate. It would constitute the DPP and his decision-making process the decision-maker on forum, and then on judicial review of his decision would introduce issues which the statute leaves only for consideration to the extent that it would breach human rights. It would introduce a possible prosecution in the UK as a new bar to extradition, which is not part of the statute at all, and is indeed contrary to the express statutory regime.

191. In paragraph 71 of its judgment, the court warned against allowing requests to investigate to become the means whereby the statutory extradition process, with its timetable and structures, should be held up at any stage.

192. Ms Kaufmann QC submitted that Mr Eadie QC's arguments did not really take on board how she put her case, that an arguably unlawful decision had been made, and the stay was sought so that a lawful decision to prosecute might be made, with all the consequences which that might have for the avoidance of a disproportionate interference with the Article 8 rights of Babar Ahmad and Talha Ahsan. There was a real distinction between the decision in *Bermingham*, which related to investigation, and the decision to prosecute.

(iii) Our conclusion on the application of Babar Ahmad and Talha Ahsan

193. We accept the submissions of Mr Eadie and Ms Dobbin as to the structure of the Act. There is no sound distinction to be drawn between what was said in *Bermingham* in relation to investigation and the position in relation to prosecution, which was after all the subsequent step to which the claimants in *Bermingham* hoped that investigation would lead. The same applies to allowing challenges to refusals to prosecute or to consent to private prosecutions, to intervene to halt the extradition process. It would

risk late requests to prosecute, and to challenges to a refusal delaying or thwarting the concluded extradition process. The principles and the concerns which late challenges on those grounds to the extradition process create are obviously closely allied.

194. This was also the view of the Divisional Court in *R (Ahsan) v DPP and Government of the United States of America* [2008] EWHC 666 (Admin), to which we have referred briefly at paragraph 169. This court considered a challenge by Talha Ahsan to the decision of the DPP not to discuss and consider with the prosecution authorities in the US whether he should be tried in the UK for these offences on the basis the decision was unlawful. The DPP was said to have ignored the Guidance agreed between the Attorneys-General for the US and England and Wales to which we referred at paragraph 166. Birnberg Peirce, Babar Ahmad's solicitors, had submitted to the CPS that the case was much more suitable for trial in England than in the US. In paragraph 36 Richards LJ pointed to the close parallels between that argument and the arguments in *Bermingham*: and applied what Laws LJ had said at paragraphs 70-71, saying that Talha Ahsan's reliance on the guidance as a means of securing a decision on forum by the DPP was a similarly impermissible attempt to circumvent the statutory extradition process. In *R (McKinnon) v SSHD* [2009] EWHC 2021 (Admin) at paragraphs 50-55. Stanley Burnton LJ also warned against challenges to a refusal to prosecute becoming an impermissible collateral challenge to a decision to extradite.

195. We must emphasise again that the statutory process has concluded. It has been long and thorough. Putting to one side the argument that the factors now relied on are in effect nothing new or substantial in any event, and could not affect the DPP's decision, the court is being asked to exercise what, after the conclusion of that process, is very much a reserve power, since human rights issues should be raised as bars to extradition within the process which has now concluded and not after its conclusion.

196. The scope for abuse of the process is very great. The issue of forum, which is not an extradition consideration as such for the courts or DPP, may be presented through what will be in very many cases the device of a human rights argument. The scope for delay is obvious, especially if a merely arguable case that the DPP has erred in a prosecutor's decision, and that a different decision might be taken which might have an impact on human rights, leads to a stay in the concluded extradition process while judicial review proceedings take their course.

197. The stay would be preventing the fulfilment of the duty to remove, a duty which has not been suspended by any charges being laid against Babar Ahmad and Talha Ahsan or even a positive decision to prosecute. If the stay is not justified in the end, it would have required the Secretary of State to breach her statutory duty, and her international obligations. The exercise of that reserve power therefore requires new and compelling facts and evidence to be presented, which could not have been presented before. The impact on the operation of the extradition process and the statutory duties requires a quality and significance of the evidence and prospects of success which are sufficiently strong to justify the delay. We do not consider this case to be arguable anyway, but a more exacting approach should be required in these circumstances.

198. The new evidence of the potential for a decision to prosecute being reached and of disproportionality in extradition would have to be clear and compelling. The court should be astute to recognise the potential for such challenges to amount to an abuse of process. This more exacting approach is required the more so where the DPP has taken his decision rather than where he is still actively considering it.

199. This case illustrated the ease with which a misunderstanding of the facts, for good reason or bad, can be presented as a basis for late proceedings and for what are in reality quite untenable assertions about what happened in the prosecutor's decision-making process.

(v) Our conclusion on the private prosecution

200. These arguments also effectively address the main points which Mr O'Connor QC for Mr Karl Watkin, the would-be private prosecutor sought to make as an Interested Party to the challenge to the refusal by the DPP to consent to his prosecuting Babar Ahmad and Talha Ahsan for terrorist offences. He submitted that the decision was unlawful since the DPP had to reach a lawful decision on his application, and had failed to do so. Although expressed a little differently, the failings were the same: a failure to consider evidence available in the UK, and to request the US to provide the evidence which it had, a request which he said might or might not be acceded to. He accepted that a lawful decision not to consent and not to prosecute those offences in this country could be made.

201. Mr O'Connor's submission was that the right to undertake a private prosecution where the CPS had failed or refused to do so, or were simply not interested in doing so, was an important right of a citizen: see *R (Gujra) v CPS* [2012] 1 WLR 254, *Gouriet v UPW* [1978] AC 435, *R (Law Society) v Lord Chancellor* [2011] 1 WLR 234. However that right must be rather qualified in a case where statute provides that the consent of the DPP is required in the first place, and where the granting of consent by the DPP would lead to his taking over the prosecution as his policy on private prosecutions requiring his consent makes clear. The fact that his submissions on the DPP's failings in his decision-making process are made on behalf of a private prosecutor does not make them greater failings than when asserted on behalf of the would-be Defendants. In so far as his status goes to discretion, the scope for that to be of assistance to him is much reduced by the need for consent and the consequences of its grant for who would conduct the prosecution. And on the facts, the scope for the exercise of a more favourable discretion is rather limited in view of the plain aim of his intervention, which is to prevent extradition through the holding of a trial in the UK.

202. Although the DPP applies both parts of his test to such a decision (sufficiency of evidence and public interest in prosecution), nothing in his Code for Prosecutors suggests that he is under a duty to approach that issue by seeking disclosure of material held by third parties. The sort of steps which the Code envisages being taken in respect of the reliability of evidence should not be misread as applying to the sort of request for material from the US which Mr O'Connor said the DPP should make. Mr O'Connor was unable to point to any such policy or obligation in the policies he referred to. In reality he relied on no more than the general public law duty that a decision-maker had to take reasonable steps to obtain the material necessary for a rational decision. Those steps have, as we have set out, plainly been taken.

(vi) The failure to raise the point at an earlier stage

203. As we have set out earlier in this judgment, it is incumbent on a party to raise all points which are available to it at one hearing. That is a general principle of universal application and of central importance to the proper administration of justice: see *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260, *BA v Home Office* [2012] EWCA Civ 944 at 26. It is plain, in our view, that the issue of sufficiency of evidence on which to prosecute is based solely upon material that was available to Babar Ahmad and Talha Ahsan in 2004, as the substance of Miss Kaufmann QC's argument has been based upon the evidence submitted in support of the extradition of Babar Ahmad in 2004. It is in our view plain that if there was a point about the failure to prosecute that should have been raised in the case of Babar Ahmad in this court in 2006. In the case of Talha Ahsan, the position is even more compelling. His application for judicial review was based upon issues relating to the DPP's obligations to take domestic prosecutions. This point should have been raised in those judicial review proceedings. It is far, far, far too late to raise it now.

204. We reject the suggestion that the point on evidence only became available at a late stage. The point on evidence was available from 2004; nothing has changed as regards the evidence. The only other factor relied upon as providing a change is the prosecution of a number of further cases which are referred to in the letter of 7 November 2011 from Birnberg Peirce to the DPP. We were very helpfully provided with a note by Ms Hemming setting out the position in each of those cases. Her evidence, which we accept, was that in each case there was an open and active domestic police investigation and the cases referred to the CPS and subsequently prosecuted met the full Code test. In relation to each case the CPS was able to prove possession and attribution, timing (where it was important) and all the other elements of each offence that appeared on the indictment. In some cases computer evidence from abroad was obtained, but that was not necessary in each case as there was sufficient physical or other reliable admissible evidence of attribution and possession. We accept that evidence. There is nothing new.

(vii) The merits of the decision of the DPP

205. We have been provided, as we have set out, with a detailed explanation of why the decision was taken not to prosecute. It is clear that the necessary evidence was not available to the police in this country to link Babar Ahmad and Talha Ahsan to the websites and the other material matters. That information, being available in the United States as the ISPs were based there, enabled the US Prosecutor to put forward the necessary linking evidence

206. In any event, we can see a very powerful case for the DPP to have declined to prosecute in all the circumstances. As we have set out by far the most serious allegation was related to actions taken by the two claimants in respect of the US Navy. In an age where the internet can be used in one country to inflict serious damage upon another country, there are very strong factors favouring prosecution in the country to which the real damage is directed, as it was in this case. In our judgment there can be no possible criticism of the CPS for the decisions that they have taken in this case. The arguments advanced by Miss Kaufmann QC and on behalf of Mr Watkin have no real foundation on the underlying facts.

207. Finally it was suggested by Mr O'Connor QC that the evidential lacuna could be filled by a request made by the DPP to the US authorities to provide the necessary evidence. As we observed in the course of argument, it is, in our judgment, entirely unrealistic to think that the Federal Prosecutor who has been seeking the extradition of these two claimants for eight years and six years respectively would now provide materials which would in effect impede that extradition. The argument is based on a premise that is, in short, entirely unrealistic.

VI CONCLUSION

208. We have therefore concluded that each of the claimants' applications for permission to apply for judicial review or for a re-opening of the statutory appeals must be dismissed. It follows that their extradition to the United States of America may proceed immediately.

209. Permission is given to cite this judgment in court.

210. We are immensely grateful to all members of the many legal teams for very hard and capable work at very short notice.

POST SCRIPT: THE POSITION OF MR KARL WATKIN

211. The Senior District Judge described the issue of proceedings by Mr Karl Watkin as an abuse of process. We have received a detailed explanation of his action.

212. We accept that Mr Watkin appears to have acted as a matter of principle and out of concern for the rule of law. However it remains difficult to understand why he intervened at what was obviously the very end of the proceedings in an attempt to frustrate the due process of law and the extradition that had been considered and approved by so many courts.

213. It is also difficult to understand how many of the steps taken by him or on his behalf could have been taken for a purpose other than to assist Babar Ahmad and Talha Ahsan avoid extradition to face serious charges of terrorism directed at the US. It also remains difficult to understand why the arguments advanced to this court were persisted with when it became clear what had been done by the DPP and the true nature of the extradition.

214. The proceedings were plainly an abuse of process. However in the light of the submissions made as to why he acted in the way he did, we will not comment further. A very much more stringent view will be taken if anyone else seeks to follow his example.