



**Centre for the Response to
Radicalisation and Terrorism**

At The Henry Jackson Society

Extradition to the United States: A Long Road to Justice

Centre for the Response to Radicalisation and Terrorism
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Summary

- Human rights laws are being used to fight deportation and extradition proceedings. This report analyses the cases of six men who spent years fighting extradition from the United Kingdom to the United States to face trials on terror charges.
- This report addresses claims that the extradition between the United Kingdom and United States is biased against the United Kingdom, and finds that the extradition arrangements between the two countries are fair and work reasonably well.
- The cases of the six suspected terrorists demonstrate the high level of care taken in the British and European Courts, and by British and American law enforcement authorities, to respect the human rights of the suspects.
- The report makes recommendations to shorten the current lengthy process. States requesting extradition should attempt to anticipate and pre-empt the challenges they might face, including concerns about methods of interrogation, evaluation of physical and mental health, duration and conditions of detention pre-trial, fairness of trial, mode of prison conditions and duration of imprisonment post-conviction, whether a conviction might carry the death penalty, and procedures for resolving problems.
- As far as is practicable, states should obtain all relevant assurances in accordance with relevant domestic, European and other international law to present to the extraditing court at the earliest opportunity.

Introduction

For many years human rights laws have been used by persons hoping to avoid deportation from the UK.¹ However, these laws have also been relied on as a means to fight extradition sought for the purposes of criminal prosecution abroad.

This report analyses the cases of six men who were extradited from the UK to the US in order to stand trial on various terror charges: Abu Hamza, Adel Abdel Bary, Babar Ahmad, Syed Talha Ahsan, Haroon Aswat and Khaled Al Fawwaz. It also examines the extradition arrangements between the UK and the US; and the claims that the law is biased against the UK because it allows more extraditions from it to the US than vice versa.²

1. Legal Framework of Extradition between UK and US

Extradition arrangements between the two countries are currently governed by two instruments: Parts 2 and 3 of the UK's Extradition Act 2003,³ and the Extradition Treaty between the two countries, which has been in force since 2007.⁴ Part 1 of the Extradition Act 2003 relates to twenty-seven countries that are partners in the European Arrest Warrant scheme, and Part 2 of the Extradition Act deals with extradition from the UK to ninety-two countries, including the US. Part 3 deals with extradition to the UK.⁵

For extraditions between the UK to the US, a request must be made that the person concerned is accused of an extradition offence, which is conduct that would constitute an offence in both countries punishable with a term of imprisonment of at least twelve months.⁶

Under the Extradition Treaty, all requests have to be supported by an accurate description of the person sought, a statement of facts concerning the offence, the text of the law describing the essential elements of the offence and the prescribed punishment, the arrest warrant, and charging document if any. In addition, requests made to the United States have to be supported by "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested."⁷

¹ Robert Mendick, *Human Rights Act has helped 28 terrorists to stay in UK*, SUNDAY TELEGRAPH, (31 Jan., 2015), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11381944/Human-Rights-Act-has-helped-28-terrorists-to-stay-in-UK.html>.

² See e.g. Stefano Ambrogi, *UK extradition review to scrutinize US requests*, REUTERS, (8 Sep. 2010), <http://uk.reuters.com/article/2010/09/08/uk-britain-extradition-review-idUKTRE68728M20100908>; Dina Rickman, *Britons Hope Obama Will Address Controversial US-UK Extradition Treaty*, HUFFINGTON POST, (21 Jan. 2013), http://www.huffingtonpost.co.uk/2013/01/18/obama-uk-extradition_n_2437886.html.

³ Extradition Act 2003, c.41.

⁴ Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, Treaty Series No. 13 (2007), signed in Washington D.C. on 31 March 2003. Instruments of Ratification were exchanged on 26 April 2007 and the Treaty entered into force on 26 April 2007, available at <http://www.statewatch.org/news/2007/jun/uk-usa-extradition-treaty.pdf>, ("Extradition Treaty").

⁵ HOME OFFICE, *Extradition: Processes and Review*, (31 Mar. 2013), <https://www.gov.uk/extradition-processes-and-review>, (last accessed 22 Mar. 2015).

⁶ Extradition Act 2003, note 3 *supra* at §137; Extradition Treaty, note 5 *supra* at Art. 2(1).

⁷ Extradition Treaty, note 4 *supra* at Art. 8.

EXTRADITION TO THE UNITED STATES: A LONG ROAD TO JUSTICE

Complaints have been voiced in the UK about the perceived unfairness of this treaty.⁸ Commonly cited reasons include the evidentiary requirements to support an extradition request; and because many more people appeared to be extradited to the US than to the UK.

However, the US has consistently maintained that the treaty is fair and balanced.⁹ Yet the controversy as to whether the arrangements between the US and UK were unbalanced generated a review headed by a retired Court of Appeal judge, the Rt. Hon. Sir Scott Baker.¹⁰

On the evidential issue, the report demonstrated that extradition treaties had been in place between the two countries since 1794.

These treaties had always required that for an extradition arrest, the supporting evidence would have to justify a committal for trial. In the case of the US, the probable cause test applied both historically and currently, in order to comply with the Fourth Amendment of the Constitution.

In the UK, the *prima facie* test had to be satisfied.¹¹ This was a “requirement to adduce evidence to make a case requiring an answer by the requested person as if the proceedings were a summary trial of an information against him.”¹² In the Extradition Act 2003, the *prima facie* requirement has been removed for all partners to the European Arrest Warrant scheme listed in Part 1 and twenty non-European countries listed in Part 2; instead it is necessary to provide information that would justify the issue of an arrest warrant. That standard is the “reasonable suspicion test,”¹³ which is a lower standard than *prima facie*.¹⁴ The extradition judge may issue an arrest warrant if:

- There are reasonable grounds for believing that the offence for which the extradition is requested is an extradition offence.
- There is information that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge’s discretion.¹⁵

Furthermore, the British extradition judge must take into account the human rights implications of any requested extradition.¹⁶

The Baker review concluded that there was no significant difference between the British reasonable suspicion test and the American probable cause test because (i) both tests are based on

⁸ See e.g. EU-US EXTRADITION TREATY STILL FLAWED ON HUMAN RIGHTS, AMNESTY INTERNATIONAL, (Jun. 2003), <http://www.amnesty.org/en/news/press-releases/cu/death-penalty/cu-us-extradition-agreement-still-flawed-on-human-rights-amnesty-international-releases-legal-a-0168/#:VSubCxpL-A>; EXTRADITION, LIBERTY, <https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/extradition>.

⁹ See e.g. Louis Susman, *US - UK extradition treaty is fair and balanced*, THE TELEGRAPH, (5 Dec. 2011), <http://www.telegraph.co.uk/comment/personal-view/8934847/US-UK-extradition-treaty-is-fair-and-balanced.html>; EMBASSY OF THE UNITED STATES, LONDON, FREQUENTLY ASKED QUESTIONS ON THE US-UK EXTRADITION RELATIONSHIP, (last updated Apr. 2013), <http://london.usembassy.gov/gb176.html>.

¹⁰ A REVIEW OF THE UNITED KINGDOM’S EXTRADITION ARRANGEMENTS, (Following Written Ministerial Statement by the Secretary of State for the Home Department on 8 September 2010), presented to the Home Secretary on 30 November 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

¹¹ *Id.*, at 231-8, ¶7.4-32.

¹² *Id.*, at ¶7.33, citing *R (Harkins) v. Secretary of State for the Home Department*, [2007] EWHC 639.

¹³ *Id.*, at ¶7.29.

¹⁴ *Id.*, at ¶7.39.

¹⁵ *Id.*, at ¶7.40.

¹⁶ Extradition Act 2003, note 3 *supra* at §87.

reasonableness, (ii) both tests are supported by the same documentation, and (iii) both tests represent the standard of proof that police must achieve in their home countries.¹⁷

As to the complaint that more extraditions take place to, rather than from the US, an analysis of extradition patterns in 2012 revealed that between January 2004 and April 2012, the UK sent 83 persons to the United States and refused nine applications, while the US sent 41 persons to the UK and refused no applications.¹⁸ The discrepancy in numbers has been explained by two things: (i) the US is a larger country and statistically prosecutes more people than the UK; and twice as many Britons visit the US annually as Americans visit the UK.¹⁹

Thus the Baker review and other groups have concluded that the extradition arrangements are fair and working,²⁰ albeit rather slowly because of the length of time taken between the first request for extradition and the last appeal, particularly if an application is made to the European Court of Human Rights. Of the cases analysed in this report, the shortest extradition process took six years for Syed Ahsan. More recently, the extradition process for Abid Naseer²¹ took three years, between 2010 and 2013.²²

2. Extradition Laws in Action

All of the terrorists mentioned in this report tried to fight extradition over the years by raising different issues in the British courts, but ultimately the complaints were joined in a petition to the European Court of Human Rights (ECtHR) and distilled down to one common concern.

The suspected terrorists claimed that the prison conditions they might face at a federal high security prison, ADX (Administrative Maximum Facility) Florence in Colorado, would violate the prohibition on torture or inhuman or degrading treatment or punishment enshrined in Article 3 of the European Convention for the protection of Human Rights and Fundamental Freedoms, (ECHR).²³ The facts described in this report relating to each suspect are drawn from that ECtHR case,²⁴ which is analysed below.

From the outset the US Government gave various assurances relating to treatment to the UK in respect of each claimant. It was not until additional assurances were given in response to the

¹⁷ A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS, note 10 *supra* at ¶7.42-44.

¹⁸ *Shipping them over*, THE ECONOMIST (22 Sep. 2012), <http://www.economist.com/node/21563331>.

¹⁹ Ted Bromund, *The numbers behind the extradition controversy*, THE COMMENTATOR, (15 Oct. 2012), http://www.thecommentator.com/article/1817/the_numbers_behind_the_extradition_controversy.

²⁰ A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS, note 10 *supra* at ¶7.69, 7.81, 7.89; and *see e.g.* Theodore R. Bromund & Andrew Robert James Southam, *The US-UK Extradition Treaty: Fair, Balanced, and Worth Defending*, HERITAGE FOUNDATION, (4 Sept. 2012), <http://www.heritage.org/research/reports/2012/09/the-us-uk-extradition-treaty-fair-balanced-and-worth-defending>.

²¹ Abid Naseer was convicted in March 2015 of an international terror plot of conspiring with al-Qaeda to bomb a shopping center in Manchester, *see* Stephanie Clifford, *US Jury Convicts Man Charged in a Britain Bomb Plot*, N.Y. TIMES (4 Mar. 2015) <http://www.nytimes.com/2015/03/05/nyregion/abid-naseer-terror-suspect-found-guilty-on-all-counts-in-2009-bomb-plot.html>.

²² Mosi Secret, *Pakistani in Terror Cases is Extradited to New York*, N.Y. TIMES, (3 Jan. 2013), http://www.nytimes.com/2013/01/04/nyregion/abid-naseer-extradited-on-terror-charges-to-new-york-from-britain.html?_r=0.

²³ European Convention for the protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S., entered into force 3 Sep. 1953. Art. 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

²⁴ Babar Ahmad & Others v. United Kingdom, Appls. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Eur. Ct. H.R., Fourth Section (10 Apr. 2012), Final Judgment (24 Sept. 2012).

ECtHR ruling in April 2012, that the legal cases were dismissed (in September 2012). Shortly thereafter, in October 2012, the suspects were extradited to face trials in the US.

2.1 Abu Hamza - British national

The US requested the extradition of this well-known radical cleric, and former imam of Finsbury Park mosque, on 21 May, 2004. This was based on a US indictment alleging eleven offences covering three different sets of facts. The first set related to the taking of hostages in Yemen in 1998; the second set related to the conduct of violent jihad in Afghanistan in 2001; and the third set related to a conspiracy to establish a jihad training camp in Bly, Oregon between 2000 and 2001. In October 2004 he was charged with fifteen offences, including a number under the UK Terrorism Act 2000. He was found guilty of eleven counts²⁵ and sentenced to seven years imprisonment in February 2006. Whilst he was in prison, the City of Westminster Magistrate dismissed his challenge to the extradition in November 2007, and the Home Secretary signed his extradition order on February 7, 2008.

In his 2008 appeal to the High Court against extradition, Hamza claimed that the United States would not honour its assurances (1) that it would not seek the death penalty if Hamza were convicted, and (2) that Hamza would be prosecuted in a federal court and be afforded all the rights available to other defendants. The High Court ruled that it was satisfied that such assurances would be honoured.²⁶ Hamza also claimed that conditions at ADX Florence would contravene rights protected by Article 3 of the European Convention.

Although the High Court expressed some concerns about the conditions in ADX Florence, it proceeded on the basis that Hamza's health and physical condition would be evaluated on arrival, and he would have the right to challenge conditions. His appeals were subsequently dismissed.²⁷ Hamza was refused leave to appeal to the House of Lords and, together with the other five suspects, petitioned the ECtHR.²⁸

In August 2008, the ECtHR ruled that he should not be extradited until they heard his case.²⁹ On 10 April 2012, the ECtHR ruled his extradition was lawful, as analysed below.³⁰ That judgment became final on 24 September 2012 and Hamza was extradited on 5 October 2012.

On 19 May 2014, he was found guilty of eleven terrorism charges in a federal court in New York,³¹ and on 9 January 2015 he was sentenced to life imprisonment with no possibility of release.³² The trial judge denied his application to serve his sentence in a medical facility, and Hamza was sent to ADX Florence, Colorado.³³

²⁵ He was found guilty of six charges of soliciting to murder, four charges related to stirring up racial hatred and one charge of possessing a "terrorist encyclopaedia." See *Abu Hamza jailed for seven years*, BBC NEWS, (7 Feb. 2006), http://news.bbc.co.uk/2/hi/uk_news/4690224.stm.

²⁶ *Mustafa Kamel Mustafa (aka Abu Hamza) v Government of the United States of America and Secretary of State for the Home Department*, [2008] EWHC 1357 (Admin), at ¶62.

²⁷ *Id.*, ¶¶67, 69.

²⁸ *Babar Ahmad & Others v. United Kingdom*, note 24 *supra*.

²⁹ *Abu Hamza v. United Kingdom*, Appl. No. 34762/08, Eur. Ct. H.R. (18 Sept. 2008)

³⁰ *Babar Ahmad & Others v. United Kingdom*, note 24 *supra*.

³¹ Karen McVeigh, *Abu Hamza found guilty of 11 terrorism charges*, THE GUARDIAN, (20 May, 2014), <http://www.theguardian.com/world/2014/may/19/abu-hamza-found-guilty-terrorism-charges>.

³² Nicky Woolf, *Abu Hamza sentenced to life in prison on US terrorism conviction*, THE GUARDIAN, (9 Jan. 2015), <http://www.theguardian.com/world/2015/jan/09/abu-hamza-sentenced-life-impisonment-terrorism-conviction>.

³³ *Id.*

2.2 Adel Abdel Bary, Egyptian national, granted asylum in the U.K.

Bary was suspected of involvement in the bombing of US Embassies in Nairobi and Dar es Salaam in 1998. He was also allegedly in charge of the London cell of al-Qaeda from April 1996. Bary was arrested in connection with a US request for extradition on 11 July 1999, in respect of conspiring with Osama bin Laden to kill US citizens, diplomats and others and bomb the two US Embassies. He has remained in custody ever since.

The extradition was sought under the Extradition Act 1989,³⁴ (which was superseded by the Extradition Act 2003.)³⁵ Under the 1989 Act, extradition was possible if the suspect was accused of offences which, had they occurred in the UK, would have constituted the offence of conspiracy to murder within US jurisdiction. Bary petitioned for habeas corpus together with Ibrahim Eidarous (who was released from custody and placed under house arrest after he received a diagnosis of leukaemia; he died in July 2008.)³⁶ They challenged the use of evidence from confidential informants and whether the acts complained of had occurred within the jurisdiction of the United States. The High Court dismissed the applications on 2 May 2001.³⁷

Bary and Eidarous, together with Khaled al Fawwaz, appealed to the House of Lords. The decision of the High Court was upheld and the habeas corpus petitions were dismissed on 17 December 2001.³⁸ On 13 April 2004, the United States government gave assurances that they would not seek the death penalty for Bary, that he would be tried in a federal court, that he would not be designated an enemy combatant (carrying a risk of indefinite detention) and that he would not be tried by a military commission. Bary contended that the assurances would not be honoured, that he would not receive a fair trial and that and if he were detained at ADX Florence, Colorado and placed in special administrative measures (SAMs), this would violate his rights under Article 3 of the ECHR. On 12 March 2008, the Home Secretary accepted the assurances given by the United States government, and decided that the conditions of his detention would not violate Article 3.

Bary and Fawwaz sought judicial review of the Home Secretary's decision in the High Court. After reviewing a large amount of evidence concerning conditions at ADX Florence, the Court ruled that although it was reasonably likely that the petitioners would be sent to ADX Florence and placed in administrative measures, those measures would not cross the Article 3 threshold. Although the measures came near to the borderline, the very harsh prison conditions at ADX Florence, did not amount to inhuman or degrading treatment, either on their own or in combination with SAMs, and in the context of a whole life sentence.³⁹ Furthermore, the Court

³⁴ Extradition Act 1989, c.33.

³⁵ Extradition Act 2003 note 3 *supra*.

³⁶ See Craig Whitlock, *Britain Pays to Keep Suspects from US Hands*, WASH. POST, (2 May 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050102919.html>.

³⁷ *Eidarous and Abdelbary v. Governor of H.M. Prison Brixton, and Government of the United States of America* [2001] EWHC Admin 298 (2nd May, 2001). Eidarous died of cancer in 2008 in the United Kingdom.

³⁸ *In re Al Fawwaz and others*, [2001] UKHL 69 (17 Dec. 2001).

³⁹ *R. (on the Application of Adel Abdel Bary and Khaled al Fawwaz) v. Secretary of State for the Home Department*, [2009] EWHC 2068 (Admin) at ¶97.

concluded that all assurances provided by the United States government could be relied upon with complete confidence.⁴⁰

Leave to appeal to the Supreme Court was refused but the Court did certify as a question of general public importance whether prison conditions at ADX Florence were compatible with Article 3. The next step for Bary was to petition the ECtHR with the other suspects, as analysed below, to claim various breaches of human rights.⁴¹

After thirteen years in custody, Bary was extradited to the United States on 5 October 2012. After pleading guilty to conspiring to kill Americans, he was sentenced to 25 years imprisonment on 6 February 2015. He could be eligible for release in eight years, if the periods of incarceration in the United Kingdom and United States pre-trial are taken into account.⁴² He will be permitted by the terms of his plea deal to return to the UK after serving his sentence. Bary was also ordered to pay over \$33 million restitution to the families of the victims.⁴³

2.3 Babar Ahmad, British national

Ahmad was accused in the United States of conspiracy to provide material support to terrorists, providing material support to terrorists; conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country and money laundering between 1997 and 2004. He was arrested in London on 5 August 2005. On 23 March 2006, the United States issued Diplomatic Notes giving assurances that if extradited, the death penalty would not be sought, and that Ahmad would be tried in a federal court and not by a military commission.

From the outset Ahmad argued that he did not believe that the assurances would be honoured by the United States, that he feared he would be rendered to a third country and that he would undergo very harsh special administrative measures in a federal prison, all of which would violate his human rights. His claims were rejected by the Senior District Judge at Bow Street Magistrates Court on 17 May 2005. Ahmad failed in his appeal against that decision to the High Court on 30 November 2006 and he was refused permission to appeal to the House of Lords.⁴⁴ On 10 April 2012, the ECtHR rejected his case, as analysed below. That decision became final on 24 September 2012.⁴⁵

After seven years in custody Ahmad was extradited to the United States on 5 October 2012. He pleaded guilty on 10 December 2013 to conspiracy to provide material support and providing material support to the Taliban, and was sentenced on 16 July 2014 to 12.5 years in prison, with

⁴⁰ *Id.*, at ¶99.

⁴¹ Babar Ahmad & Others v. United Kingdom, note 24 *supra*.

⁴² Benjamin Weiser, *Egyptian Gets 25-Year Term in 1998 Embassy Bombings; Judge Calls Plea Deal Generous*, N.Y. TIMES, (6 Feb. 2015), http://www.nytimes.com/2015/02/07/nyregion/egyptian-sentenced-to-25-years-for-bombings-at-us-embassies-in-africa.html?_r=0

⁴³ THE UNITED STATES ATTORNEYS OFFICE, SOUTHERN DISTRICT OF NEW YORK, PRESS RELEASES, International Terrorism Defendant Sentenced In Manhattan Federal Court To 25 Years In Prison, (6 Feb. 2015), <http://www.justice.gov/usao/nys/pressreleases/February15/BaryAdelAbdelSentencingPR.php>.

⁴⁴ Babar Ahmad and Haroon Aswat v. Government of the United States, [2006] EWHC 2927 (Admin).

⁴⁵ Babar Ahmad & Others v. United Kingdom, note 24 *supra*.

credit for time served.⁴⁶ Because of the length of time he has spent in prison, he could be released this spring.⁴⁷

2.4 Syed Ahsan, British national

Ahsan was accused in the United States of conspiracy to provide material support to terrorists, providing material support to terrorists; conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country between 1997 and 2004. The United States requested his extradition on 6 September 2006. The Secretary of State ordered his extradition on 14 June 2007.

Ahsan appealed to the High Court⁴⁸ on a number of grounds, including whether the district judge was right to send the case to the Secretary of State without assurances of the kind given to the court by the US Government in Ahmad's case (the assurances in Ahsan's case having been given after, rather than before, the case was sent to the Secretary of State) and whether the assurances subsequently given provided adequate protection of Ahsan's human rights. In view of the High Court in November 2006,⁴⁹ these aspects of Ahsan's appeal were dismissed.

In Ahsan's case, the UK Director of Public Prosecutions had considered whether to prosecute him domestically rather than extradite him to the US. Guidance on how to deal with cases involving concurrent criminal jurisdiction of the two countries is set out in a January 2007 document agreed by the two countries.⁵⁰ As the request for extradition pre-dated the signing of the guidance, the Crown Prosecution Service (CPS) had determined that the guidance did not apply to Ahsan's case and was not retrospective. Ahsan also appealed against that decision. The High Court dismissed this part of the appeal because the British police had not undertaken a criminal investigation, and none was contemplated. He was refused leave to appeal to the House of Lords, and then joined with the other suspects to petition the ECtHR,⁵¹ as analysed below.

After the human rights claim was rejected in September 2012, Ahsan was extradited to the United States on 5 October 2012. He pleaded guilty to charges of material support of terrorism on 10 December 2013, and was sentenced on July 16 2014 to 8 years imprisonment, with credit for time served.⁵² As he had been in custody since 19 July 2006, he was released.

2.5 Haroon Aswat, British national

Aswat was accused in the United States of conspiring with Abu Hamza to establish a jihad training camp in Bly, Oregon between June 2000 and December 2001. He was arrested in the UK on 7 August 2005 following a request from the US. An extradition order was made on 1 March 2006. He appealed together with Babar Ahmad to the High Court on various human rights grounds, as mentioned above. The High Court found that solitary confinement did not in itself constitute

⁴⁶ FEDERAL BUREAU OF INVESTIGATION, PRESS RELEASE, BRITISH NATIONALS WHO SUPPORTED TERRORISTS ARE SENTENCED, (16 Jul. 2014), <http://www.fbi.gov/newhaven/press-releases/2014/british-nationals-who-supported-terrorists-are-sentenced>

⁴⁷ British cyber-jihadist Babar Ahmad jailed in US, BBC NEWS, (16 Jul. 2014), <http://www.bbc.com/news/uk-28335976>.

⁴⁸ R (on the application of Ahsan) v. Director of Public Prosecutions and the Government of the United States of America, [2008] EWHC 666 (Admin).

⁴⁹ Babar Ahmad and Haroon Aswat v. Government of the United States, note 44 *supra*.

⁵⁰ ATTORNEY GENERAL'S DOMESTIC GUIDANCE FOR HANDLING CRIMINAL CASES AFFECTING BOTH ENGLAND, WALES OR NORTHERN IRELAND AND THE UNITED STATES, (17 Jan. 2007), <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>.

⁵¹ Babar Ahmad & Others v. United Kingdom, note 24 *supra*.

⁵² FEDERAL BUREAU OF INVESTIGATION, PRESS RELEASE, BRITISH NATIONALS WHO SUPPORTED TERRORISTS ARE SENTENCED, note 46 *supra*.

inhuman or degrading treatment. They decided that the evidence before it – which included an affidavit from a Department of Justice official outlining the operation of special administrative measures – did not “begin to establish a concrete case under Article 3”.⁵³ He was refused permission to appeal to the House of Lords.

He petitioned the ECtHR with the other suspects. As he was suffering from severe mental problems and had been moved from a detention centre to Broadmoor, his claim was adjourned.⁵⁴ On 16 April 2013 the ECtHR ruled that there would be a violation of Article 3 of the Convention in the event of Aswat’s extradition on account of the current severity of his mental condition.⁵⁵ This decision was based on an absence of information about how long he would be on remand, about how or even whether he would be assessed for competency to stand trial, about the consequences of being found unfit to stand trial, and about whether he would be sent to ADX Florence in Colorado.

On 13 July 2013 the Secretary of State received a letter from the US government giving assurances that Aswat would not be in pre-trial detention for more than 18 months, he would be hospitalized for assessment for up to four months and if convicted and determined unable to manage daily living by himself, it was highly unlikely that he would be sent to ADX Florence, and would be sent to a medical facility. The Secretary of State pronounced that she was satisfied that Aswat’s extradition would not violate Article 3 of the ECHR and issued a decision that the extradition should proceed. Aswat sought judicial review of that decision.

On 16 April 2014 the High Court adjourned its consideration of the judicial review until the US offered assurances to the Secretary of State that, upon arrival, Aswat would immediately be transferred to a Psychiatric Referral Centre and kept there unless and until the equivalent of his treating clinician determines that he could be transferred to another institution without compromising his health and safety; and if not, that he would be kept at a Psychiatric Referral Centre until trial. His extradition would have to be preceded by detailed discussions and the exchange of information between Aswat’s treating clinician and the receiving psychiatrist.⁵⁶

The United States issued further assurances that satisfied the High Court, which ruled on 4 September 2014 that there was no risk of an Article 3 violation.⁵⁷ On 15 September Aswat petitioned the ECtHR for an interim measure to block his extradition. The ECtHR requested certain assurances from the United Kingdom government. These were subsequently provided, which lifted the interim measures on 23 September.

Aswat was extradited to the United States on 21 October 2014, but that was not the end of this saga. Aswat made a further complaint to the ECtHR that the assurances given in September by the UK government did not meet the concerns expressed in the April 2013 ruling by the ECtHR. On 6 January 2015 the ECtHR ruled that complaint inadmissible on the grounds that it was

⁵³ Babar Ahmad and Haroon Aswat v. Government of the United States, note 44 *supra*.

⁵⁴ Babar Ahmad & Others v. United Kingdom, note 24 *supra*.

⁵⁵ Aswat v. United Kingdom, Appl. No. 17299/12 Eur. Ct. H.R. (16 Apr. 2013).

⁵⁶ R (on the Application of Haroon Aswat) v. Secretary of State for the Home Department and the Government of the United States, [2014] EWHC 1216 (Admin) at ¶¶38, 40.

⁵⁷ No official transcript is available of this ruling.

satisfied that the concerns raised in its earlier judgment had been directly addressed.⁵⁸ Aswat pleaded guilty to terrorism charges on 30 March 2015,⁵⁹ and will be sentenced on 31 July 2015.⁶⁰

2.6 Khaled al Fawwaz, Saudi Arabian national

Fawwaz was accused in the United States of 285 counts of criminal conduct which included conspiring with Osama bin Laden to murder American citizens and being involved in or supporting the bombing of the United States embassies in Nairobi and Dar es Salaam in 1998. The United States requested his extradition in September 1998. On 8 September 1999 the District Judge found a case to answer.

Fawwaz appealed to the High Court on a writ of habeas corpus, challenging his extradition on jurisdictional grounds, and evidential grounds by disputing the legality of admitting evidence from anonymous confidential informants. After a close examination of the facts, the High Court dismissed his application.⁶¹ His appeal to the House of Lords (together with Adel Abdel Bary and Ibrahim Eidarous) was dismissed on 17 December 2001, as referred to above.⁶²

On 13 April 2004, the US government gave assurances that they would not seek the death penalty for Fawwaz, that he would be tried in a federal court, that he would not be designated an enemy combatant carrying a risk of indefinite detention, and that he would not be tried by a military commission. Fawwaz contended that the assurances would not be honoured, that he would not receive a fair trial and that if he were detained at ADX Florence, Colorado and placed in special administrative measures, this would violate his rights under Article 3 of the European Convention. On 12 March 2008, the Home Secretary accepted the assurances given by the US government, and decided that the conditions of his detention would not violate Article 3.

Together with the other suspects, Fawwaz appealed this decision by seeking judicial review with Adel Abdel Bary in 2009⁶³ (as described above). After that appeal was dismissed, he petitioned the ECtHR. Following the dismissal of his case on 24 September 2012 (as analysed below),⁶⁴ he was extradited to the United States on 5 October 2012. He was convicted in New York on 26 February 2015 of conspiring to kill Americans and other terrorism charges and faces life imprisonment.⁶⁵

2.7 Analysis of Babar Ahmad and others v. United Kingdom

All six suspects petitioned the ECtHR, alleging that they would experience a number of human rights violations if they were sent to ADX Florence, Colorado, either in pre-trial or post-conviction

⁵⁸ Aswat v. United Kingdom, Appl. No. 62176/14 Eur. Ct. H.R. (6 Jan. 2015) at ¶31.

⁵⁹ FEDERAL BUREAU OF INVESTIGATION, PRESS RELEASE, HAROON ASWAT, ABU HAMZA CO-CONSPIRATOR, PLEADS GUILTY TO TERRORISM CHARGES IN FEDERAL COURT, (30 Mar. 2015), <http://www.fbi.gov/newyork/press-releases/2015/haroon-aswat-abu-hamza-co-conspirator-pleads-guilty-to-terrorism-charges-in-federal-court>

⁶⁰ Haroon Aswat Pleads Guilty to US Terror Charges, BBC NEWS, (30 Mar. 2015), <http://www.bbc.com/news/uk-32124991>.

⁶¹ Khaled al Fawwaz v. The Governor of Brixton Prison, [2000] EWHC 424 (Admin), (30 Nov. 2000).

⁶² In re Al Fawwaz and others, note 38 *supra*.

⁶³ R. (on the Application of Adel Abdel Bary and Khaled al Fawwaz) v. Secretary of State for the Home Department, note 39 *supra*.

⁶⁴ Babar Ahmad & Others v. United Kingdom, note 24 *supra*.

⁶⁵ FEDERAL BUREAU OF INVESTIGATION, PRESS RELEASE, MANHATTAN US ATTORNEY ANNOUNCES CONVICTION OF HIGH-RANKING AL QAEDA TERRORIST FOR CONSPIRING TO KILL AMERICANS AND OTHER TERRORISM OFFENSES, (2 Mar. 2015), <http://www.fbi.gov/newyork/press-releases/2015/manhattan-US-attorney-announces-conviction-of-high-ranking-al-qaeda-terrorist-for-conspiring-to-kill-americans-and-other-terrorism-offenses>

detention. They submitted a vast amount of evidence including that relating to harsh conditions of detention, the facilities at ADX prisons, and the effect of solitary confinement on the inmates.

The Court examined details relating to:

- the size of cells;
- the amount of permitted recreational time;
- the amount of time spent in solitary confinement;
- whether the inmates had television and radio in their cells (they do);
- how much communication is permitted with other inmates and family in terms of telephone calls and visits;
- how prisoners were evaluated on entry and throughout their stay both in the general populations, and for those placed under special administrative measures.⁶⁶

Once at ADX Florence, the ECtHR would offer no protection to these suspects. Therefore, the purpose of the application was a means to prevent being sent outside the jurisdiction of the ECHR. Once in the US, the only human rights protection that they might be afforded could be derived from the International Covenant on Civil and Political Rights (ICCPR),⁶⁷ the Convention Against Torture (CAT),⁶⁸ as limited by jurisprudence interpreting the Fifth and Eighth Amendments of the U.S Constitution.⁶⁹

The international law approach is a little different from that found in American law, because the latter affords more discretion to the prison authorities. Solitary confinement for twenty-three hours a day has been held to violate Article 7 ICCPR,⁷⁰ and the United Nations Special

⁶⁶ Babar Ahmad & Others v. United Kingdom, note 24 *supra* at ¶¶81-103.

⁶⁷ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States has made a reservation to Article 7: "(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

⁶⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1),

Article 1 (1): "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Article 2 (1): "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." The United States made several relevant reservations to this treaty:

Article 11: Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

Article 16(1): "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

The United States has made some reservations to various Articles: "(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

⁶⁹ US Const. Am. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Am. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁷⁰ Babar Ahmad & Others v. United Kingdom, note 24 *supra* at ¶118, (citing *Polay Campos v. Peru*, CCPR/C/61/D/577/1994, 6 November 1997 [\[2000\] IACommHR 14](#)).

Rapporteur for Torture opined that “isolation for twenty-two to twenty-four hours per day may amount to ill-treatment and, in certain instances, torture.”⁷¹

The Fifth Amendment protects against deprivation of life or liberty without due process of law. In the prison context, “due process rights are triggered by an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”⁷²

The prohibition on cruel and unusual punishment in the Eighth Amendment requires:

[...] prison officials to provide humane conditions of confinement, to ensure inmates receive adequate food, clothing shelter and medical care, and to take reasonable measures to guarantee their safety.⁷³ Only those deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment violation.⁷⁴

The US courts do not accept that indeterminate periods of solitary confinement necessarily amount to cruel and unusual treatment, but will look at each case on its own facts.⁷⁵

Conditions at ADX Florence have been under judicial scrutiny, but a review of the decisions reveals that great deference is afforded to the prison authorities, with the result that complaints about length of solitary confinement and conditions almost always fail.⁷⁶

In the case of the six suspects facing extradition, the ECtHR noted that it has very “rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law,”⁷⁷ i.e. the United States. For conditions of detention to rise to the level of an Article 3 violation, “the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”⁷⁸ After reviewing all the evidence and assurances, the Court ruled that the conditions at ADX Florence would not violate Article 3,⁷⁹ nor was there any real risk that the length of prison sentences would trigger a violation of Article 3.⁸⁰ Thus, with the exception of Aswat, whose case was adjourned as described above, all the other claims were dismissed.

⁷¹ *Id.*, at ¶120, (citing Interim Report of 28 July 2008, A/63/175, at paragraphs 77-85).

⁷² *Id.*, at ¶109, (citing *Sandin v. Conner*, 515 US 472 (1995)).

⁷³ *Id.*, at ¶105, (citing *Farmer v. Brennan*, 511 US 825 (1994)).

⁷⁴ *Id.*, at ¶105, (citing *Wilson v. Seiter*, 501 US 294, 304 (1991)).

⁷⁵ *Id.*, at ¶¶106-8.

⁷⁶ See e.g. *Silverstein v. Federal Bureau of Prisons*, 559 Fed. Appx. 739 (22 May, 2014), where Silverstein lost his complaint relating to over 30 years in solitary confinement.

⁷⁷ *Babar Ahmad & Others v. United Kingdom*, note 24 *supra* at ¶179.

⁷⁸ *Id.*, at ¶202.

⁷⁹ *Id.*, at ¶¶216-24.

⁸⁰ *Id.*, at ¶¶233-4.

3. Policy Recommendations

The cases of the six suspected terrorists demonstrate the high level of care taken in the British and European Courts, and by British and American law enforcement authorities, to respect the human rights of the suspects. Each of them used every legal means available to fight extradition over periods ranging from six to fourteen years, at vast expense to the British taxpayer.⁸¹ Each of these suspects ultimately failed in their attempts to avoid extradition, and all have now been criminally prosecuted in the United States.

All the suspects have been brought to justice with all the rights and due process possible. The Courts and governments took all possible steps to respect the human rights of those who chose not to respect the rights of their actual and potential victims. However, often the length of the process was significantly extended because of the number of proceedings brought by the suspects exercising their rights according to the law, sometimes adding new concerns as the appeals progressed.

Part 12 of the Anti-social Behaviour, Crime and Policing Act 2014⁸² has amended certain provisions of the Extradition Act 2003, with the aim of improving some of the problems of the extradition process. One controversial amendment carrying some impact on the length of the process, removes the current automatic right of appeal, replacing it with a right of appeal that lies only within the discretion of the High Court.⁸³ This is not yet in force.

From the cases of the six suspects above, it can be seen that the majority of the challenges related to fear of the death penalty, prison conditions in the destination state and concerns about due process. A lot of time was taken obtaining evidence about conditions and practices, as well as assurances to allay those concerns.

This report therefore makes the following recommendations:

- States requesting extradition should attempt to anticipate and pre-empt the challenges they might face, including concerns about methods of interrogation, evaluation of physical and mental health, duration and conditions of detention pre-trial, fairness of trial, mode of prison conditions and duration of imprisonment post-conviction, whether a conviction might carry the death penalty, and procedures for resolving problems.
- As far as is practicable, states should obtain all relevant assurances in accordance with relevant domestic, European and other international law to present to the extraditing court at the earliest opportunity.

⁸¹ Reports vary. A 2009 report suggests the \$900,000 had been spent at that time on the extradition of three of the suspects mentioned in this report. See Craig Whitlock, *Britain Pays to Keep Suspects from US Hands*, WASHINGTON POST, (2 May 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050102919.html>. Cf. Abu Hamza's legal aid costs alone to fight extradition amounted to more than £165,000, see Wesley Johnson, *Justice Secretary Chris Grayling orders 'immediate' investigation of legal aid system*, THE INDEPENDENT, (7 Nov. 2012) <http://www.independent.co.uk/news/uk/politics/justice-secretary-chris-grayling-orders-immediate-investigation-of-legal-aid-system-8293974.html>

⁸² Anti-Social Behaviour, Crime and Policing Act 2014, c.12, Part 12.

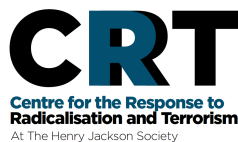
⁸³ *Id.*, §160, amending §26 Extradition Act 2003 relating to extraditions to states within territory 1 - within European Union, and amending §§1034 and 105 relating to states within territory 2- outside Europe.

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- This will ensure that the extradition process respects the human rights of the individuals, and accords with all relevant laws and treaties. This may well shorten the entire process.

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