IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application Nos 24027/07, 11949/08 and 36742/08

B E T W E E N:

BABAR AHMAD AND OTHERS

Applicants

-v-

THE UNITED KINGDOM

Respondent Government

WRITTEN COMMENTS
BY

AMERICAN CIVIL LIBERTIES UNION, NATIONAL LITIGATION PROJECT, INTERIGHTS AND REPRIEVE

Pursuant to Article 36§2 of the European Convention on Human Rights and Rule 44§2 of the Rules of the European Court of Human Rights

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I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of the American Civil Liberties Union, National Litigation Project, INTERIGHTS and Reprieve ("Intervenors") pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of the Court.[1] Brief details of each of the Intervenors are set out in an annex to this letter.

2. This case concerns the principle of non-refoulement and the protection of persons against extradition to a state where they face the real risk of inhuman and degrading treatment, contrary to Article 3 of the European Convention on Human Rights ('Article 3 ECHR' and 'ECHR', respectively), because of the measures imposed during their imprisonment. Where an applicant seeks protection against refoulement, it is for the court to assess whether the Government has dispelled all doubts the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR.[2] The Government must do so by providing evidence that specifically and sufficiently rebuts the applicant's claim.[3]

3. Pursuant to the leave granted by the President of the Chamber, these comments do not address the claims by the applicants that they face a real risk of treatment contrary to Article 3 ECHR. Instead, these comments contend that if the Court were to accept the submissions of the applicants that post-conviction detention at ADX Florence poses a real risk of treatment contrary to Article 3 ECHR, that risk is not rebutted by protections afforded by the Eighth Amendment to the U.S. Constitution ('Eighth Amendment') as applied by the relevant U.S. courts.

4. These comments focus on three principal distinctions between the protections provided in U.S. law and those required by Article 3 ECHR. First, the Intervenors describe distinctions between the protections provided under Article 3 ECHR and the Eighth Amendment *per se* and in relation to imprisonment. Second, the Intervenors outline the requirements for the proof of ill-treatment under U.S. law which do not exist in this Court's case law, including a subjective component of ill-treatment (deliberate indifference), attribution of the ill-treatment to a prison official, and demonstration of a sufficiently serious physical (i.e., non-mental) harm. Third, the Intervenors explain that U.S. law renders impracticable and ineffective any theoretical ability to challenge adverse discretionary decisions that maintain a prisoner's solitary confinement.

5. More than a century ago, U.S. courts understood that solitary confinement was a severe punishment that negatively affected the physical and mental health of those subjected to it. *See In re Medley,* 134 U.S. 160, 168 (1890) (noting that as a result of solitary confinement as practiced in the early days of the United States, many "prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and others became violently insane; others still, committed suicide; while those who stood the ordeal better . . . [often] did not recover sufficient mental activity to be of any subsequent service to the community"); *see also Chambers v. Florida,* 309 U.S. 227, 237 (1940) (characterizing solitary confinement as "torture" and comparing it to "[t]he rack, the thumbscrew, [and] the wheel").

6. Today, however, U.S. prisons routinely subject prisoners to prolonged solitary confinement, sometimes for years or decades, and U.S. domestic law has largely inoculated these practices from effective judicial review. The Eighth Amendment to the U.S. Constitution, which prohibits "cruel and unusual punishments," provides only limited protection. As interpreted by the U.S. Supreme Court, the Eighth Amendment is violated only if prison conditions deprive prisoners of "the minimal civilized measure of life's necessities" and prison officials have imposed those conditions with a culpable state of mind. *Wilson v. Seiter,* 501 U.S. 294, 297-99 (1991) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981)). As a result of this latter requirement, even conditions that cause catastrophic harm may not violate the Eighth Amendment. Prisoners must

[1] Court letter, reference ECHR-LE14.8bP3, dated 5 November 2010.
[2] *See, e.g., Saadi v. Italy* [GC], no. 37201/06, ECHR 2008 (Judgment of 28 February 2008), para. 129.
[3] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), para. 129.

also contend with laws that complicate and often eliminate their ability to challenge prison conditions in court by imposing significant procedural and substantive obstacles. Moreover, as presently interpreted, the Fifth Amendment of the U.S. Constitution affords prisoners little to no procedural protections regarding their initial assignment or continued presence in solitary confinement. Consequently, prisoners at Florence ADX face the distinct possibility of prolonged and indefinite solitary confinement without access to meaningful legal remedies.

II. ARTICLE 3 ECHR PROTECTIONS

A. General principles

7. Article 3 ECHR, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. The prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct and the state's other compelling legal or policy commitments.[4]

8. Inhuman treatment must "cause either actual bodily harm or intense physical or mental suffering."[5] Unlike torture, the ill-treatment does not have to be intended to cause suffering,[6] and there is no need for it to have been inflicted for a purpose.[7] Treatment has been held by the Court to be "inhuman" because, inter alia, it was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering.[8]

9. Degrading treatment occurs where a measure is "such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them,"[9] significantly "adversely affects [an individual's] personality",[10] or "humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance."[11] A measure which does not involve physical ill-treatment but lowers a person in rank, position, reputation or character may also constitute degrading treatment.[12]

10. Whether or not any kind of ill-treatment is prohibited by Article 3 ECHR depends on the objective nature of the treatment, its effects on the persons subjected to it and the purpose of the authority which resorted to the measure.[13] The question whether the purpose of the treatment was to humiliate or debase the victim is a factor further to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3 ECHR.[14]

B. The Absolute and Indivisible Principle of Non-Refoulement

11. The principle of non-refoulement is implicit in the prohibition of torture and other ill-treatment[15] in Article 3 ECHR and other human rights conventions, as made clear by consistent

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[4] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at para. 127.
[5] *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI, at para. 92
[6] *Ireland v. the United Kingdom* – 25 (18.1.78), para. 167.
[7] *Denizci and Others v. Cyprus*, nos. 25316-25321/94 and 27207/95 (Sect. 4), ECHR 2001-V, at para. 384
[8] *Kudła v. Poland* [GC], no. 30210/96, at para. 92.
[9] *Kudła v. Poland* [GC], no. 30210/96, at para. 92
[10] *See Albert and Le Compte v. Belgium* – 58 (10.2.83), para. 22.
[11] *Pretty v. the United Kingdom*, no. 2346/02 (Sect. 4), ECHR 2002-III, para. 52
[12] *Raninen v. Finland* – Rep. 1997-VIII, fasc. 60 (16.12.97), para. 50; *see East African Asians v. the United Kingdom*, Comm. Rep. 14.12.73, 78-A D.R. 5, paras 195 and 208.
[13] *Raninen v. Finland*, at para. 52.
[14] *See, e.g., Peers v. Greece*, no. 28524/95 (Sect. 2), ECHR 2001-III (Judgment of 19 April 2001), para. 74; *Kalashnikov v. Russia*, no. 47095/99 (Sect. 3), ECHR 2002-VI – (15.7.02), para. 101.
[15] "Other ill-treatment" refers to inhuman or degrading treatment or punishment under Article 3 ECHR of the Convention and to similar or equivalent formulations under other international instruments. "Non-

authoritative interpretations of these provisions. This Court has held that non-refoulement is an inherent obligation under Article 3 ECHR in cases where there is a real risk of exposure to inhuman or degrading treatment or punishment.[16] Other international human rights bodies have followed suit.[17]

12. Case law therefore makes clear that the prohibition on refoulement is an inherent and indivisible part of the prohibition on torture or other ill-treatment. It constitutes an essential way of giving effect to the Article 3 ECHR prohibition, which not only imposes on states the duty not to themselves subject people to torture or other ill-treatment, but also requires them to "prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."[18] This is consistent with the approach to fundamental rights adopted by this Court, and increasingly by other bodies, regarding the positive duties incumbent on the state.[19] Any other interpretation, enabling states to circumvent their obligations on the basis that they themselves did not carry out the ill-treatment would, as this Court noted when it first considered the matter, 'plainly be contrary to the spirit and intention of [Article 3 ECHR].'[20]

13. The non-refoulement prohibition enjoys the same status and essential characteristics as the prohibition on torture and ill-treatment itself, and consequently may not be subject to any limitations or exceptions.[21] In its case law, this Court has firmly established and re-affirmed the absolute nature of the prohibition of non-refoulement under Article 3 ECHR.[22] In *Chahal*, this Court made clear that the obligations of the State under Article 3 ECHR are "equally absolute in expulsion cases" once the 'real risk' of torture or ill-treatment is shown.[23] The UN Committee Against Torture ('CAT') has followed suit in confirming the absolute nature of the prohibition of refoulement in the context of particular cases.[24] Likewise, other regional bodies have also interpreted the prohibition on torture and ill-treatment as including an absolute prohibition of refoulement.[25]

14. The relativist approach espoused by the UK House of Lords in *R (Wellington) v Secretary of State for the Home Department*[26] and relied upon by the Respondent,[27] is therefore incompatible

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refoulement" is used to refer to the specific legal principles concerning the prohibition of transfer from a Contracting State to another State where there is a risk of such ill-treatment, developed under human rights law in relation to Article 3 ECHR of the Convention and similar provisions. The term "transfer" is used to refer to all forms of removal, expulsion or deportation, including extradition.

[16] *Chahal v. the United Kingdom* – Rep. 1996-V, fasc. 22 (15.11.96), para. 80*, Soering v. the United Kingdom* – 161 (7.7.89), para. 91*; Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at paras 124-127; *A. v. the Netherlands*, no. 4900/06 (Sect. 3) (Eng) – (20.7.10)*,* paras 141-143.

[17] See HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12). For individual communications, *see*, *e.g.*, *Chitat Ng v. Canada*, (1994, § 14.1); Cox v. Canada (1994); G.T. v. Australia (1997); African Commission on Human Rights, Modise v. Botswana, and I-A Comm. HR Report on Terrorism and Human Rights (2004).

[18] Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).

[19] *See* Special Rapporteur on Torture Report (1986, § 6) and Report (2004, § 27); HRC General Comments No. 7 (1982) and No. 20 (1992); Articles 40-42 and 48 of the ILC Draft Articles; ICTY Furundzija judgment (1998, § 148).

[20] *Soering v. the United Kingdom*, (1989), para. 88.

[21] Manfred Nowak, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 9 February 2010, A/HRC/13/39, paras 65-67 (stating that there are no exceptions or limitations to non-refoulement principle under article 3 of CAT and article 7 of ICCPR).

[22] *Soering v. the United Kingdom*, (1989), para 88; Ahmed v. Austria (1996 § 41); *Chahal v. the United Kingdom*.

[23] *Chahal v. the United Kingdom*, at para. 80.

[24] *See* CAT Tapia Paez v. Sweden, (1997, at § 9.8) and Pauline Muzonzo Paku Kisoki v. Sweden (1996).

[25] See*, e.g.*, *Modise v. Botswana*, 97/93_14AR, 6 November 2000.

[26] *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2008] WLR (D) 380 ('*Wellington*'). *See also Ahmad and Ors v. United Kingdom*, (Admissibility Decision), Application no. 24027/07, (6 July 2010 Decision), paras 57-61 (quoting *Wellington*).

with the absolute and indivisible nature of the prohibition against refoulement, including in the context of extradition to inhuman and degrading detention conditions.[28] This Court has repeatedly stated that there is no room for balancing the risk against reasons for expulsion, removal or extradition when it comes to subjecting someone to the risk of ill-treatment prohibited by Article 3 ECHR.[29] It has recently "reaffirmed the principle that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3 ECHR."[30] Nor does this Court permit States to determine whether ill-treatment violates Article 3 ECHR in light of the State's legitimate competing policy commitments.[31] This conclusion is further required by the Court's consistent case law holding that the victim's conduct and the nature of any offence allegedly committed by the applicant are irrelevant for the purposes of Article 3.[32]

15. In the extradition context, where a prima facie case of a real risk has been established, the government has the burden to rebut the risk of ill-treatment.[33] This Court applies rigorous criteria and exercises close scrutiny when assessing the government's submissions.[34] The government's submissions must specifically address the substantial grounds for believing that the individual faces a risk of ill-treatment.[35] Further, national laws in the receiving State which purport to ensure adequate protection against ill-treatment must be subjected to close scrutiny to determine whether they provide *de facto* protection against the full scope of alleged ill-treatment.[36] The mere existence of "domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle" will not be sufficient to ensure adequate protection.[37]

III. ARTICLE 3 ECHR AS APPLIED TO IMPRISONMENT

A. General Principles

16. Article 3 ECHR protects against ill-treatment that attains a minimum level of severity. The assessment of this minimum level is relative and depends on the circumstances of the case, taking into account the duration of the treatment, its physical and mental effects, and in some cases the personal characteristics of the victim; their sex, age, and state of health.[38]

17. When assessing conditions of detention for the purposes of Article 3 ECHR, account must be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant.[39] Whether conditions will be considered to violate Article 3 ECHR often depends on an assessment of the extent to which the individual was personally affected.[40] This Court has outlined clear principles that apply where an individual is deprived of his or her liberty: "…Article 3

[27] *See, e.g., Ahsan v. United Kingdom*, no. 11949/08, 'Observations of the Government of the United Kingdom on Admissibility and Merits', 24 April 2009, paras. 33-34.
[28] *Chahal v. the United Kingdom*, at paras. 103-104; *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008).
[29] *Chahal v. the United Kingdom; Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008). *N v. Sweden, A v. Netherlands.*
[30] *N. v. Sweden*, no. 23505/09 (Sect. 3)– (20.7.10).
[31] *See, e.g.,* Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08 (Sect. 4), ECHR 2010 (Judgment of 2 March 2010); *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008).
[32] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at para. 127; *Al-Saadoon v. United Kingdom*, para. 122 (Judgment of 2 March 2010).
[33] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at para. 142.
[34] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at para. 142.
[35] *See, e.g.*, *Kaboulov v. Ukraine*, no. 41015/04, paras 113, 34; *Muminov v. Russia*, no. 42502/06, para. 122.
[36] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at paras 142, 147.
[37] *A. v. the Netherlands*, no. 4900/06 (Judgment of 20 July 2010), para. 142 (citing *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008), at para. 137-141).
[38] *Ireland v. the United Kingdom* A.25 (1978) 2 EHRR 25, para. 162; *Tekin v. Turkey*, no. 22496/93 (Judgment of 9 June 1998) *Reports of Judgments and Decisions* 1998-IV, p. 1517, § 52.
[39] *Dougoz v. Greece*, no. 40907/98 (Sect. 3), ECHR 2001-II (Judgment of 6 March 2001), para. 46.
[40] *Keenan v. United Kingdom*, Application no. 27229/95 (Judgment of 3 April 2001), para. 110.

requires the State to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured."[41] Any measures taken must therefore be necessary to achieve the legitimate aim pursued.[42]

18. The protection of a prisoner's health and well-being requires, amongst other things, provision of the requisite medical assistance,[43] which must be qualified and timely[44] including psychiatric and specialist treatment where appropriate,[45] Particular attention should be given to a prisoner's individual circumstances and vulnerabilities, whether in relation to mental health or illness that affects the physical condition.[46] Forced feeding can violate Article 3 ECHR.[47]

19. Objective conditions of detention *per se* may reach the minimum level of severity required to violate Article 3 ECHR. In determining whether there has been a breach, this Court considers cumulatively a number of factors, including: overcrowding and cramped conditions;[48] the degree of natural light and ventilation available;[49] insufficient sanitary conditions;[50] whether meals are dietetically appropriate;[51] and access to exercise[52] and educational facilities.[53] This Court also considers the findings and standards outlined by the European Committee for the Prevention of Torture and other Inhuman or Degrading Treatment or Punishment (the 'CPT'),[54] and the European Prison Rules (Council of Europe Committee of Ministers Recommendation No. R (87) 3).[55]

20. A comparison of this Court's jurisprudence on the scope of Article 3 ECHR protections against ill-treatment in detention with the *de jure* protections offered by U.S. law as applied by U.S. courts reveals substantial gaps in the protections against the types of ill-treatment relevant to this case.

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[41] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), para. 119.
[42] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), para. 119.
[43] *Enea v. Italy* [GC], no. 74912/01, (Judgment of 17 September 2009), para. 57; *Poltoratskiy v. Ukraine*, no. 38812/97 (Sect. 4), ECHR 2003-V (Judgment of 29 April 2003), para. 132,; *Aerts v. Belgium*, (judgment of 30 July 1998), Reports 1998-V, p. 1966, §§ 64; *Kudła v. Poland* [GC], no. 30210/96, at para. 94.
[44] *Istrath and Others v. Moldova*, Application nos. 8721/05, 8705/05, 8742/05 (Judgment of 27 June 2007, para. 54; *Khudobin v. Russia* [GC], Application no. 59696/00 (Judgment of 26 October 2006).
[45] *Dybeku v. Albania*, Application no. 41153/06 (Judgment of 18 December 2007); *Mouisel v. France*, Application no. 67263/01 (Judgment of 14 November 2002).
[46] *Assenov and Others v. Bulgaria*, (Judgment of 28 October 1998), *Reports of Judgments and Decisions* 1998-VIII, p. 3296, § 135; *Kudła v. Poland* [GC], no. 30210/96, at para. 94 and *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 119; *Price v. the United Kingdom*, no. 33394/96, ECHR 2001-VII.
[47] This will depend on the circumstances, taking into account the manner of the force feeding; whether there is a medical necessity; and whether procedural safeguards have been met. *Nevmerzhitsky v. Ukraine*, Application no. 54825/00 (Judgment of 12 October 2005); paras. 93-94.
[48] *Peers v. Greece*, no. 28524/95 (Judgment of 19 April 2001); *Kalashnikov v. Russia*, no. 47095/99.
[49] *Peers v. Greece*, no. 28524/95 (Judgment of 19 April 2001).
[50] *Dougoz v. Greece*, no. 40907/98 (Judgment of 6 March 2001).
[51] *Ilascu and Others v. Moldova and Russia,* [GC] Application no. 48787/99 (Judgment of 8 July 2004), para. 438.
[52] *Dougoz v. Greece*, no. 40907/98 (Judgment of 6 March 2001), para. 45.
[53] *Peers v. Greece*, no. 28524/95 (Judgment of 19 April 2001).
[54] *Mouisel v. France*, above; *Khudobin v. Russia*, Application no. 59696/00 (Judgment of 26 January 2007), para. 83.
[55] This Court has relied upon evidence from international NGOs, government reports and international organizations in its assessment of conditions which applicants are likely to encounter if transferred. *See, e.g., A v. the Netherlands*, no. 4900/06 (Judgment of 20 July 2010), paras. 38, 63, 90, 104, 105-110; *N. v Sweden*, no. 23505/09 (Judgment of 20 July 2010), paras. 34-37, 57-60; *Mathew v. The Netherlands*, above, para. 127; *Babar Ahmad and Others v. UK*, (Partial Decision as to the Admissibility) Application no. 24027/07, 11949/08 and 36742/08 para. 76.

B. Solitary Confinement and Enhanced Measures

21. As outlined by this Court, there is a real risk the applicants in this case will be detained at ADX Florence and their conditions of detention may be made stricter by the imposition of Special Administrative Measures.[56] What those conditions may entail have been outlined by the applicants and the Government.[57]

22. Solitary confinement is a generic term used to describe circumstances where prisoners are held separately from other prisoners, often with additional restrictions. It is imposed for a number of reasons, including as a form of punishment; for security grounds; in the interests of a criminal investigation; or at the request of a prisoner.[58] Solitary confinement may include sensory and or social isolation, with restrictions on correspondence; reading materials; access to family, friends and lawyers; and increased restrictions on movement within prison.

23. Solitary confinement does not *per se* violate Article 3 ECHR,[59] although certain forms of it can, depending on the circumstances. Complete sensory isolation when combined with total social isolation can destroy the personality, amounting to inhuman or degrading treatment.[60] For other less severe forms of solitary confinement, this Court considers whether Article 3 ECHR has been violated by taking into account: the stringency, duration and purpose;[61] the physical and psychological effect;[62] and whether such treatment exceeds the unavoidable level of suffering inherent in detention.[63]

24. When considering the stringency of the confinement, the European Committee on the Prevention of Torture (CPT) has noted, "[t]he principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned."[64] In *Iorgov v. Bulgaria*, finding a violation of Article 3 ECHR, this Court noted the particularly stringent regime to which the applicant was subjected, and the importance of appropriate mental and physical stimulation in order to prevent long term detrimental effects to a prisoner's mental faculties and social abilities.[65] Having been sentenced to death, the applicant in that case spent 23 hours a day alone in his cell; had limited interaction with other prisoners; and was only allowed two visits per month. In contrast, in *Ramirez Sanchez v. France* the applicant was allowed a doctor's visit twice a week, a monthly visit from a priest, and frequent legal visits, all of which amounted to partial and relative isolation as opposed to complete sensory or social isolation.[66]

25. In *Matthews v. The Netherlands* this Court concluded that Article 3 ECHR had been violated where the applicant was subjected to stringent solitary confinement conditions for over two years.[67] In contrast, the Court found no violation of Article 3 ECHR in *Ramirez Sanchez v. France* where the applicant faced relative social isolation for over eight years; concern was however expressed at the lengthy period, and the need for a rigorous examination of whether it was in fact justified.[68]

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[56] *Barbar Ahmad and Others v. the United Kingdom*, above, paras. 146 and 147.
[57] *Ibid*, paras. 87-97.
[58] *European Committee on the Prevention of Torture 2nd General Report*, CPT/Inf (92) 3, para. 56.
[59] *Messina v. Italy,* Application no. 25498/94, ECHR 1999-V; *Valasinas v. Lithuania*, Application no. 44558/98 ECHR 2001; *Peers v. Greece*, no. 28524/95 (Judgment of 19 April 2001).
[60] *Yurttas v. Turkey*, nos. 25143/94 and 27098/95 (Judgement of 27 May 2004), para. 47.
[61] *Rasch v. Denmark*, no. 10263/83, (Decision of 11 March 1985).
[62] *Mathew v. the Netherlands*, no. 24919/03 (Judgment of 15 February 2006).
[63] *Rohde v. Denmark*, no. 69332/01 (Judgment of 21 October 2005), para. 91.
[64] CPT 2nd General Report, CPT/Inf (92) 3, para. 56.
[65] *Iorgov v. Bulgaria*, no. 40653/98 (Judgment of 11 March 2004), paras. 83-87.
[66] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at paras. 131-135.
[67] *Mathew v. the Netherlands*, no. 24919/03 (Judgment of 15 February 2006).
[68] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 136.

26. There is no specific timeframe after which solitary confinement will violate Article 3 ECHR. According to the CPT it should be imposed for as short a period as possible.[69] Prolonged solitary confinement is undesirable[70] as excessively long detention in complete isolation and in particularly difficult circumstances can violate Article 3 ECHR.[71] The State is therefore required to constantly review whether less restrictive measures are appropriate.[72] Where confinement for a protracted period is extended, substantive reasons must be provided which outline the State's reassessment of the prisoner's circumstances; the more time that passes, the more detailed and compelling the reasons will need to be.[73] Accordingly, "solitary confinement even in cases entailing only relative isolation cannot be imposed on the prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."[74]

27. Certain periods of solitary confinement may comply with Article 3 ECHR when imposed on security grounds[75] or to prevent criminal activity,[76] but are less likely to when used because a prisoner is unable to adapt to an ordinary prison setting.[77] In any event, according to this Court: "such measures, which are a form of "imprisonment within the prison", should be resorted to only exceptionally and after every precaution has been taken."[78] Further: "it would also be desirable for alternative solutions to solitary confinement to be sought for persons considered dangerous and for whom detention in an ordinary prison under the ordinary regime is considered inappropriate."[79]

28. The impact which solitary confinement has on a prisoner's mental and physical health must also be taken into account. In *Messina v. Italy* and in *Ramirez Sanchez v. France* the applicants suffered no psychological or physical harm from periods of solitary confinement; in both cases no Article 3 ECHR violations were found.[80] A violation was however found in *Mathew v. the Netherlands* where a period of solitary confinement caused the applicant "unusual distress" and "hardship of an intensity considerably exceeding the unavoidable level of suffering inherent in detention."[81] To protect against mental and physical harm occurring, the European Prison Rules recommend prisoners subjected to solitary confinement be visited daily by a medical practitioner or qualified nurse.[82]

C. No Required Showing of a Subjective Component of Ill-Treatment, or Attribution of Ill-Treatment to an Official

29. The availability and scope of Article 3 ECHR protections are determined in part by the burdens of proof placed upon the applicant. While this Court requires the applicant to support allegations of ill-treatment with appropriate evidence,[83] there is no requirement that the applicant show purpose, intent or recklessness on the part of a prison official in order to establish that conditions of detention violate Article 3 ECHR.[84] "While it is true that Article 3 has been more

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[69] CPT 2nd General Report, CPT/Inf (92) 3, para. 56. The Court agreed in *Mathew v. the Netherlands*, no. 24919/03 (Judgment of 15 February 2006), at para. 199.
[70] *R v. Denmark,* no. 10263/83 (Decision of 11 March 1985), p.153.
[71] *Yurttass v. Turkey*, above, para. 47.
[72] *Dhoest v. Belgium*, no. 10448/83, (Decision of 14 May 1987).
[73] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 139.
[74] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 145.
[75] *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, para. 191.
[76] *Messina v. Italy (No. 2)*, no. 25498/94 (Judgment of 28 December 2000).
[77] *Mathew v. the Netherlands*, no. 24919/03 (Judgment of 15 February 2006), at para. 202.
[78] *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 139.
[79] *Ibid,* para. 146.
[80] *Messina v. Italy*, above, p.15; *Ramirez Sanchez v. France,* no. 59450/00 (Judgment of 4 July 2006), at para. 144.
[81] *Mathew v. The Netherlands*, above, paras. 202 and 205.
[82] European Prison Rules, above, Rule 43.2.
[83] *Enea v. Italy* [GC], no. 74912/01, (Judgment of 17 September 2009), at para. 55.
[84] *Alver v Estonia,* application no. 64812/01, (2006) 43 E.H.R.R. 40, para. 55 ("as regards the Government's submissions that the authorities had no desire to cause physical or mental suffering to the applicant, the

commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country, the Court has, in light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise."[85] To limit the application of Article 3 ECHR to cases in which the applicant can demonstrate a subjective component of an official's conduct "would be to undermine the absolute character of its protection."[86] Thus, even where this Court has found "no evidence" that prison officials intended to humiliate or debase an applicant, and where it has found officials undertook "substantial and progressive" measures to improve "the general conditions of the applicant's detention and [] the regime applied within the prison," it nonetheless has found a violation of Article 3 ECHR because the conditions *as such* "must have caused [the applicant] considerable mental suffering, diminishing his human dignity."[87]

D. Mental Effects

30. According to the Court's summary of relevant objective information, the applicants submitted evidence that conditions at ADX Florence "tended to induce a range of psychological symptoms ranging from panic to psychosis and emotional breakdown."[88]

31. Article 3 ECHR, like the Eighth Amendment, does not expressly include mental and psychological suffering. However, Article 3 ECHR provides much greater protection against mental suffering and psychological harms arising from conditions of detention than is available under U.S. law: This Court recognizes that psychological suffering alone is sufficient to engage Article 3 ECHR,[89] whereas U.S. courts do not consider that even a "significant deterioration" of a detainee's mental condition, including depression and other forms of emotional and mental injury and impairment can engage the Eighth Amendment unless there is also a deprivation of basic physical needs such as food, shelter, clothing and warmth.[90]

32. This distinction is critical to the scope of protections against degrading treatment, which consists of subjective psychological elements such as humiliation and debasement.[91] For example,

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Court reiterates that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of a violation of Art.3."); *Peers v. Greece*, no. 28524/95 (Judgment of 19 April 2001), at paras 74-75 (the absence of purpose to humiliate or debase the individual cannot conclusively rule out a finding of a violation of article 3..."the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.")

[85] *Bensaid v. the United Kingdom*, no. 44599/98 (Sect. 3), ECHR 2001-I (Judgement of 6 February 2001), at para. 34.

[86] *Bensaid v. the United Kingdom*, no. 44599/98 (Judgment of 6 February 2001), para. 34; *See also* *Opuz v. Turkey,* no. 33401/02 (Sect. 3), ECHR 2009 (Judgment of 9 June 2009), para. 154 (the applicant only alleged negligence, which the Court found to violate Article 3 ECHR); *İlhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VI (Judgment of 27 June 2000), paras C233, 86 (the Commission was "not persuaded that this treatment, characterised by indifference and negligence rather than intentional infliction of pain for the purposes of coercion or punishment" and found the treatment therefore only amounted to inhuman and degrading treatment. This Court did not find the treatment was carried out with recklessness or intent, but nonetheless considered it sufficiently grave to be characterised as torture).

[87] *Poltoratskiy v. Ukraine*, no. 38812/97 (Judgment of 29 April 2003), at paras 145-149.

[88] *Babar Ahmad and Others v. the United Kingdom*, Admissibility Decision, Application nos. 24027/07, 11949/08 and 36742/08, para. 91.

[89] *See, e.g., Lorsé and Others v. the Netherlands,* no. 52750/99 (Judgment of 4 February 2003) ("Lorsé submitted that the detention regime had serious damaging effects on Mr Lorsé's mental health as to bring it within the scope of Art.3 of the Convention, as evidenced by reports relating to examinations of Mr Lorsé's psychological condition."*); see also Van der Ven v Netherlands*, no. 50901/99.

[90] *See, infra*, paras 39-40.

[91] *See, e.g.*, *V v United Kingdom*, Application No. 24888/94; *Van der Ven v Netherlands*, Application no. 50901/99; etc.

this Court found in *Matthews v. Netherlands* that even where a prisoner is "not subjected to sensory or total social isolation but rather to relative social isolation" and where the duration of relative isolation was considered short, the conditions nonetheless caused an applicant psychological distress that amounted to inhuman treatment in violation of Article 3 ECHR.[92] In *Hummatov v. Azerbaijan*, this Court found that notwithstanding that a prisoner's lack of adequate medical assistance had no significant affect on his physical well-being, it "must have caused the applicant considerable mental suffering diminishing his human dignity, which amounted to degrading treatment within the meaning of Article 3 of the Convention."[93] Article 3 ECHR cases unrelated to the detention context further demonstrate that psychological suffering is considered sufficient to give rise to a violation of Article 3 ECHR.[94]

E. Strip Searches

33. According to the Court's description of relevant objective facts, prisoners at ADX Florence are strip-searched every time they leave their cells for exercise.[95] This Court requires that strip searches must be carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose.[96] Where the search has debasing elements which significantly aggravate the inevitable humiliation of the procedure, Article 3 ECHR will be engaged.[97] Strip searches intended to provoke feelings of humiliation and inferiority, necessarily show a lack of respect for a prisoner's human dignity and have been found to violate Article 3 ECHR.[98] However, even where no such intent was found, this Court has found that the combination of routine strip-searching and other stringent security measures carried out for a period of years are degrading.[99]

[92] *Mathew v. the Netherlands*, no. 24919/03 (Judgment of 15 February 2006), paras 197-205.
[93] *Hummatov v Azerbaijan*, Application no. 9852/03, (2009) 49 E.H.R.R. 36, para. 121.
[94] *See cases of relatives of* disappearance victims: *Cakici v. Turkey*, (Application no. 23657/94), 8 July 1999, ECHR 1999-IV, para. 98 (enumerating specific objective factors for evaluating whether the mental suffering of a family member of a disappeared person is a victim of treatment contrary to Article 3 ECHR); uncertainty, doubt and apprehension suffered by the applicant for a long period of time caused severe mental distress and anguish. *Timurtas v. Turkey*, no. 23531/94 (Judgment of 13 June 2000), ECHR 2000-VI, para. 94; *see also Kurt v. Turkey*, (Judgment of 25 May 1998) Rep. 1998-III, fasc. 74, para. 131. Similarly, in *Taş v. Turkey*, the Court referenced the applicant's suffering of acute anguish and uncertainty as a violation of Article 3 ECHR. *Taş v. Turkey*, no. 24396/94 (Judgment of 14 November 2000), para. 80; In *Kurt v. Turkey* the Court made reference to the anguish of a mother who witnessed her son's detention. *Kurt v. Turkey*, 25 May 1998, Reports of Judgments and Decisions 1998-III, para. 134.
[95] *Babar Ahmad and Others v. the United Kingdom*, Admissibility Decision, Application nos. 24027/07, 11949/08 and 36742/08, para. 90.
[96] *Wainwright v. the United Kingdom*, no. 12350/04 (Judgment of 26 September 2006), (Sect. 4), ECHR 2006-X.
[97] *Valašinas v. Lithuania*, no. 44558/98 (Judgment of 27 July 2001), (Sect. 3), ECHR 2001-VIII, para. 117 (prisoner obliged strip in the presence of a female officer, and his sexual organs and food were touched with bare hands); *Iwańczuk v. Poland*, no. 25196/94 (Judgment of 15 November 2001), para. 59 (strip search in detention accompanied by verbal abuse).
[98] *Iwańczuk v. Poland*, no. 25196/94 (Judgment of 15 November 2001); *Valašinas v. Lithuania*, no. 44558/98 (Judgment of 24 July 2001) (particular way in which search was carried out showed lack of respect for applicant, and "in effect diminished his human dignity." Constituted degrading treatment under Article 3 ECHR); *Frérot v. France*, no. 70204/01 (Judgment of 12 June 2007) (life sentence, strip searched every time left visiting room, if refused then disciplined. Court acknowledged "strip searches imposed in order to maintain security or prevent criminal offences" but found that the procedure appeared arbitrary – it applied in some facilities and not others, and could be applied with discretion by prison governor.
[99] *Lorsé and Others v. the Netherlands,* no. 52750/99 (Judgment of 4 February 2003), at para. 74. ("In the situation where Mr Lorsé was already subjected to a large number of control measures, and in the absence of convincing security needs, the practice of weekly strip-searches that was applied to him for over six years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. In conclusion, the combination of routine strip-searching and the other stringent security measures amounted to inhuman or degrading treatment in violation of Article 3.")

34. Superfluous or arbitrary strip searches, especially those that include a body cavity search (anal inspection) cause humiliation and diminished human dignity and violate Article 3 ECHR.[100] There must be compelling reasons for an order to strip naked before the prison guards such that each intrusion was necessary and justified for security reasons.[101]

IV. THE EIGHTH AMENDMENT AS APPLIED TO SOLITARY CONFINEMENT

35. The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. Courts have applied that standard to judicially-imposed punishments, such as the death penalty,[102] as well as to conditions of confinement in prisons.[103]

36. As interpreted by the U.S. Supreme Court, a prisoner challenging conditions of confinement under the Eighth Amendment must establish two things. First, he must demonstrate that he is subject to conditions of confinement that are "sufficiently serious," *Farmer v. Brennan,* 511 U.S. 825, 837 (1994); *Wilson v. Seiter,* 501 U.S. 294, 298 (1991) (the "objective component" of the Eighth Amendment). Second, he must establish that prison administrators are *deliberately indifferent* to the risk of harm posed by those conditions and possess a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 298 (the "subjective component").

37. To succeed on an Eighth Amendment claim, a prisoner must satisfy both the objective and the subjective components of the test: he must show that sufficiently serious conditions exist *and* that prison officials have acted with deliberate indifference in imposing or tolerating those conditions. A showing of serious conditions alone – no matter how deplorable, cruel, or harmful – will never violate the Eighth Amendment absent proof of deliberate indifference by prison officials. *See Wilson*, 501 U.S. at 299-300.

A. Objective Component: Sufficiently Serious Conditions

38. The Eighth Amendment protects prisoners' access to the "minimal civilized measure of life's necessities." *Wilson,* 501 U.S. at 298. Although courts have recognized that these necessities include the basic physical requirements of food, clothing, shelter, medical care, and personal safety, *Farmer*, 511 U.S. at 832 (*citing Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)), they have often refused to subject social isolation and sensory deprivation to the same scrutiny, despite mounting scientific evidence of the harm such conditions can cause.[104]

39. In many cases, prisoners seeking to challenge prolonged isolation have been unable to surmount the high standard set forth in *Wilson*. In 2003, the Tenth Circuit[105] affirmed the dismissal

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[100] *Lorsé and Others v. the Netherlands,* no. 52750/99 (Judgment of 4 February 2003), at paras 73-75*; Van der ven v. Netherlands*, application no. 50901/99, para. 63; *Iwańczuk v. Poland*, no. 25196/94, paras 58-59.

[101] *Lorsé and Others v. the Netherlands,* no. 52750/99 (Judgment of 4 February 2003), at paras 70-74 (finding a "weekly strip-search [that] was carried out as a matter of routine and was not based on any concrete security need or Mr Lorsé's behaviour", and which caused suffering, amounted to inhuman or degrading treatment in violation of Article 3 ECHR)*; Iwańczuk v. Poland*, application no. 25196/94, para. 59 (involving one occasion of strip-search, which was found to amount to a violation of Article 3 ECHR because it was accompanied by verbal abuse).

[102] *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008) (holding that the death penalty is an unconstitutional punishment where defendant is guilty of aggravated rape of a minor); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that "the death penalty cannot be imposed upon juvenile offenders").

[103] *See, e.g., Rhodes v. Chapman,* 452 U.S. 337, 347-48 (1981) (holding that, while the constitution forbids "the wanton and unnecessary infliction of pain," overcrowding and double-celling of prisoners was not in the circumstances unconstitutional).

[104] *See generally* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,* 34 CRIME & JUST. 441 (2006) (showing that historical and contemporary studies reveal that prisoners suffer substantial mental and emotional damage as a result of solitary confinement).

[105] The American federal judicial system has three levels. The trial courts, with original jurisdiction, are called District Courts. The intermediate appellate courts are the Circuit Courts of Appeals, and jurisdiction is divided

of an Eighth Amendment claim by a prisoner at ADX Florence on the ground that isolation and sensory deprivation as implemented there were not sufficiently harmful to violate the Eighth Amendment's objective component:

> The objective component of the Eighth Amendment test requires allegations that a prisoner was deprived of "the minimal civilized measure of life's necessities." "To the extent that [a prisoner's] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." "Mere 'inactivity, lack of companionship and a low level of intellectual stimulation do not constitute cruel and unusual punishment.'"
>
> We cannot conclude that Mr. Hill's Eighth Amendment allegations state a claim upon which relief may be granted. He contends that ADX conditions are cruel and unusual in that he is isolated in his cell twenty-three hours a day for five days a week and twenty-four hours the remaining two days. He asserts that the resulting sensory deprivation amounts to cruel and unusual punishment. He admits, however, that "his minimal physical requirements - food, shelter, clothing and warmth" have been met. The situation described . . . shows neither an "unquestioned and serious deprivation of basic human needs," nor intolerable or shocking conditions.[106]

40. Citing *Hill*, the United States District Court for the District of Colorado dismissed a prisoner's Eighth Amendment claim regarding solitary confinement at ADX Florence in 2009. This court, too, found that the plaintiff had failed to satisfy the objective component of the Eighth Amendment:

> Plaintiff alleges that conditions at ADX (solitary confinement and severe restrictions on interactions with other prisoners) has [sic] led to a "significant deterioration of [his] mental condition, a worsening of his depression, and other forms of emotional and mental injury and impairment." However, he provides no allegations to demonstrate how the conditions at ADX, even if lonely or uncomfortable, fail to provide basic human necessities. All Plaintiff can muster to support his claim that the conditions at ADX violate the Eighth Amendment is that they are the most harsh and uncomfortable of any penitentiary in the federal system. However, these facts alone do not state a plausible claim under the Eighth Amendment. ADX is a prison, after all, and confinement is intended to punish inmates, not coddle them.[107]

41. Some courts have found the objective component satisfied by claims involving solitary confinement, but only when the confinement was extraordinarily prolonged or involved particularly vulnerable prisoners. For example, a magistrate judge recently held that three prisoners who each had been in solitary confinement for between 29 and 35 years met the Eighth Amendment's objective standard. The judge found that:

> [T]he plaintiffs have introduced sufficient evidence for a reasonable fact finder to determine that the cumulative effect of over 28 years of confinement in lockdown . . . constitutes a sufficiently serious deprivation of at least one basic human need, including but not limited to sleep, exercise, social contact and environmental stimulation. It is obvious that being housed in isolation in a tiny cell

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between twelve Circuits, each with jurisdiction over a different geographic area. The highest court is the U.S. Supreme Court. The District Court of Colorado and the 10th Circuit Court of Appeals have jurisdiction over cases arising at ADX Florence. Judicial opinions arising in other circuits, therefore, are not binding on the judges of these courts.

[106] *Hill v. Pugh*, 75 Fed. Appx. 715, 721 (10th Cir. 2003) (citations omitted).

[107] *Magluta v. United States Fed. Bureau of Prisons*, No. 08-cv-00404-CMA-MJW, 2009 U.S. Dist. LEXIS 49170 (D. Colo. May 29, 2009) (citations omitted).

for 23 hours a day for over three decades results in serious deprivations of basic human needs.[108]

42. In addition, some courts have ruled that solitary confinement of prisoners with pre-existing serious mental illness can be sufficiently harmful to violate the Eighth Amendment's objective component. *See, e.g., Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001) ("Most inmates have a difficult time handling these conditions of extreme social isolation and sensory deprivation, but for seriously mentally ill inmates, the conditions can be devastating."); *Ruiz v. Johnson*, 37 F. Supp. 2d. 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d. 975 (S.D. Tex. 2001) ("Conditions in [the prison's] administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners."). However, these same courts have not extended this ruling to prisoners without serious mental illness. *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66, 1280 (N.D. Cal. 1995) (ruling that conditions in solitary confinement are sufficiently serious to satisfy the Eighth Amendment's objective component with regard to prisoners with serious mental illness, but not with regard to "those with normal resilience").

43. These few exceptions provide little protection for Petitioners. First, none of these judicial decisions are binding on officials at ADX Florence because they do not arise in the Tenth Circuit. Moreover, *Wilkerson* applied only after nearly thirty years of isolated confinement, and there is no evidence that the decision has influenced prison administrators at ADX Florence to minimize long-term isolation.

B. Subjective Component: Deliberate Indifference

44. The Supreme Court has held that because the Eighth Amendment bars "cruel and unusual 'punishments,'" *Farmer v. Brennan,* 511 U.S. 825, 837 (1994), rather than cruel and unusual conditions, it is not enough for a prisoner to demonstrate that he is subjected to inhumane conditions of confinement. *Id*. To establish an Eighth Amendment violation a prisoner must also prove that prison officials "possessed a sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

45. The requisite culpability is established only by proving that prison officials exhibited "deliberate indifference" to the risk of harm posed by conditions of confinement. *Wilson*, 501 U.S. at 303. The test for deliberate indifference is "subjective recklessness." *Farmer*, 511 U.S. at 839-40. A prison official must "know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. at 837.

46. "Because . . . prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment," *Farmer*, 511 U.S. at 844, the Supreme Court has held that "it remains open to [prison] officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id*. Moreover, "[i]t is not enough merely to find that a reasonable person would have known, or that the defendant should have known" to establish liability. *Id.* at 843, n. 8. The deliberate indifference test therefore turns on the personal knowledge and state of mind of the prison officials involved. This subjective standard creates an often insurmountable barrier for prisoners who can prove that they have been subjected to dangerous or harmful conditions but cannot show that the responsible prison officials personally "kn[ew] of and disregard[ed]" the risk posed by those conditions. *Id*. at 837.

47. Under *Farmer*, prison officials can defeat Eighth Amendment liability by showing that "they did not know of the underlying facts indicating a sufficiently substantial danger and that they were

[108] *Wilkerson v. Stalder*, 639 F. Supp. 2d 654 (M.D. La. 2007) (Dalby, M.J.), adopted by *Wilkerson v. Stalder*, 639 F. Supp. 2d 654 (M.D. La. 2007).

therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id*. at 844. Thus, a prisoner's Eighth Amendment claim may fail – independent of the harm shown – if prison officials make unreasonable assumptions regarding risk. *See, e.g.*, *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("Even if the conclusion [the official drew] was erroneous or negligent, it does not rise to the level of an Eighth Amendment violation based on deliberate indifference."); *Rich v. Bruce*, 129 F.3d 336, 339-40 (4th Cir. 1997) (finding no deliberate indifference in a prison guard's failure to protect prisoner from stabbing, when the guard was "too stupid" to understand the risk his actions created).

48. Even the most vulnerable groups of prisoners – such as the seriously mentally ill – may be deprived of a remedy by the deliberate indifference standard. For example, in *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006), the court found that a delusional schizophrenic prisoner subjected to solitary confinement could not establish the requisite deliberate indifference to sustain an Eighth Amendment claim, even though prison conditions "aggravated the symptoms of [his] mental illness and by doing so inflicted severe physical and especially mental suffering." *Id.* at 975. Scarver was confined in a small, windowless cell with no air conditioning in the summer, and the severe heat interacted with his antipsychotic drugs to cause him "extreme discomfort," *id.* at 974; the constant illumination of the cell aggravated his psychosis; and the lack of sound prevented him from blocking out the voices in his head. *Id.* at 974-75. Though the court found that prison officials "realized that Scarver was in serious distress because of his mental illness," *id.* at 975, because there was no evidence that the officials attributed this distress to Scarver's conditions of confinement, the officials were not deliberately indifferent to his welfare. The court added that the officials "probably … should have known" of the risk of harm to Scarver, "but that would make them guilty merely of negligence and not of deliberate indifference." *Id.* Accordingly, there was no violation of the Eighth Amendment.

49. The deliberate indifference standard, therefore, has significant implications: objectively harmful or even lethal conditions will not violate the Eighth Amendment if the prisoner fails to demonstrate sufficient mental culpability on the part of prison officials.

C. Judicial Deference to Prison Administrators

50. The Supreme Court has held that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Consistent with this admonition, U.S. courts generally defer to prison officials' decisions on the treatment of prisoners.[109] Therefore, any case brought by prisoners will be heavily influenced by the prison administration's interpretation of the reasonableness of its confinement practices or the indifference of its staff. *See* Christopher Smith, *Prisoners' Rights, supra*, at 461-62. The evidentiary burden will fall on plaintiffs to refute the prison administration's assertions, which are granted deference as authoritative. *See* Reinert, *supra*, at 71 (noting that the judges' "discourse . . . relies heavily on agency 'expertise.'").

V. AVAILABILITY OF U.S. LEGAL REMEDIES

A. *De jure* and *de facto* protections

51. The previous section indicates that specific substantive protections available under Article 3 ECHR are not recognized by U.S. courts interpreting the Eighth Amendment. In the following sections the Intervenors submit that were the Court to consider that the Eighth Amendment *de jure* protections are coextensive with Article 3 ECHR, the Court is also required to ascertain with

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[109] Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 Fordham Urb. L.J. 53, 71 (2009); Christopher E. Smith, *Prisoners' Rights and the Rehnquist Court Era*, 87 Prison J. 457, 461 (2007).

"certainty that the safeguards which [the applicants] would enjoy are as effective as the Convention standard,"[110] that is, that the government submissions have rebutted any sufficiently evidenced risk.[111] The national law protections must provide *de jure* and *de facto* protection against ill-treatment prohibited by Article 3 ECHR.[112] This Court is particularly sceptical of government assertions that asserted *de jure* prohibitions on ill-treatment will provide *de facto* protection where there is evidence of contrary practice, no effective monitoring of conditions or the *de jure* protections are *de facto* unavailable or ineffective.[113]

52. U.S. law places significant limitations on the ability of prisoners to challenge their subjection to indefinite solitary confinement. First, the Prison Litigation Reform Act imposes a number of procedural and jurisdictional hurdles that make it difficult for prisoners to challenge the conditions of their confinement. Second, as presently interpreted by U.S. courts, prisoners are entitled to virtually no real procedural protections in their initial and ongoing assignment to ADX. Thus, despite the promise of the Fifth and Eighth Amendments of the United States Constitution, most ADX prisoners find themselves essentially without remedy, despite the very real threat of a lifetime sentence to solitary confinement.

B. The Prison Litigation Reform Act

53. Prisoners who wish to challenge their conditions of confinement in federal court face a number of procedural and substantive legal obstacles. The Prison Litigation Reform Act (PLRA),[114] enacted by the U.S. Congress in 1996, creates significant procedural hurdles and eliminates judicial remedies for prisoners in many circumstances. The PLRA's restrictions on remedies, which apply only to prisoners, have drawn the criticism of the UN Committee Against Torture.[115] Chief among the PLRA's provisions are (1) procedural bars that limit the claims a prisoner may bring due to an exhaustion requirement; (2) requirements for a showing of physical—in addition to emotional or psychological—harm; and (3) limits on a court's power to grant effective remedies for ongoing constitutional violations.

54. The PLRA bars prisoners from bringing claims if all administrative remedies have not first been exhausted. 42 U.S.C. § 1997e(a). The Supreme Court has interpreted this law strictly, requiring prisoners to exhaust all administrative remedies created by the state before commencing an action in federal court.[116] Applying this standard, a court dismissed claims by a group of female prisoners who claimed they had been sexually assaulted in prison, on the ground that they had not first complained to prison officials through the proper channels. *Amador v. Superintendents of Dep't of Corr. Services*, No. 03 Civ. 0650(KTD)(GWG), 2007 U.S. Dist. LEXIS 89648 (S.D.N.Y., Dec. 4, 2007).

55. The PLRA's exhaustion requirements have prevented otherwise compelling cases from proceeding. In some cases, the administrative procedure itself forces the prisoner into an unsafe

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[110] *R (on the application of Bary & Anor) v Secretary of State for the Home Department,* [2009] EWHC 2068 (Admin) (7 August 2009), *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2009/2068.html (citing *Soering v. the United Kingdom*, (1989), para. 82).

[111] *Saadi v. Italy* [GC], no. 37201/06 (Judgment of 28 February 2008).

[112] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009 (Judgment of 19 February 2009), paras 128-135; *Kafkaris v Cyprus*, Application no. 21906/04, (2009) 49 E.H.R.R. 35, para. 99 (finding *irreducible* life sentence may violate Article 3 ECHR, but no violation if the life sentence is de jure and de facto reducible).

[113] *Gasayev v. Spain*, no. 48514/06 (Judgment of 17 February 2009).

[114] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. §3626, 28 U.S.C. §1915, 28 U.S.C. §1346, 42 U.S.C. §1997e, and other scattered sections).

[115] U.N. Committee Against Torture, *Report of the Committee against Torture*, ¶ 37(29), U.N. Doc. A/61/44 (2006); *see also* Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* 38 (June 2009), *available at*: http://www.hrw.org/sites/default/files/reports/us0609web.pdf.

[116] *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) ("Prisoners must now exhaust all `available' remedies, not just those that meet federal standards. Indeed . . . a prisoner must now exhaust administrative remedies even where the relief sought—monetary damages—cannot be granted by the administrative process.").

situation. For example, a court dismissed a lawsuit by a prisoner who had been threatened and assaulted by a corrections officer on the ground that he had failed to exhaust administrative remedies, because he did not first discuss the issue with the officer who had allegedly assaulted him. *Sanders v. Bachus*, No. 1:07-cv-360, 2009 U.S. Dist. LEXIS 114545, at *5, 12-13 (W.D. Mich. Aug. 18, 2009). In other cases, the requirements are technical and impractical. One federal court dismissed a case in which the prisoner missed the administrative remedy filing deadline because he was hospitalized, *Steele v. New York State Dep't of Corr. Services*, No. 99 Civ. 6111(LAK), 2000 WL 777931, at *1 (S.D.N.Y. June 19, 2000); in another case, a prisoner missed the deadline because he was in solitary confinement and guards refused to give him the necessary forms. *Latham v. Pate*, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007).

56. In addition, prisoners are barred by the PLRA from recovering compensation for mental and emotional injuries they suffer unless they also show physical injury. 42 U.S.C. § 1997e(e). Thus, some courts have held that claims involving sexual assault cannot be heard because, according to those courts, it does not necessarily rise to the level of a physical injury.[117] In the case of solitary confinement, where injuries are often mental or emotional,[118] this limitation can deprive prisoners of a remedy even for conduct that is deliberately and maliciously intended to harm them. For example, in *Pearson v. Welborn*, a federal appellate court ruled that this provision of the PLRA barred an award of damages to a prisoner who was wrongfully held in a supermax prison for more than a year based on a false and retaliatory disciplinary charge. *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006). In 2006, the United Nations Committee Against Torture recognized that this provision of the PLRA contravenes Art. 14 of the Convention Against Torture (requiring redress for victims of torture) and called for its repeal. *Report of the Committee against Torture*, *supra*, ¶ 37(29).

57. The PLRA also limits the kinds of remedies that courts can grant when prisoners establish an ongoing violation of their constitutional rights. For example, prison officials can seek to terminate court orders benefiting prisoners after only two years, and every year thereafter. 18 U.S.C. § 3626(b)(1)(A). Once a motion to terminate court-ordered relief is filed, the relief is automatically suspended after thirty days. 18 U.S.C. § 3626(e)(2)(A); *see also Miller v. French*, 530 U.S. 327, 331 (2000). While the statute provides that relief shall not terminate if there remains "a current and ongoing violation of the Federal right," 18 U.S.C. § 3626(b)(3), courts have interpreted the statute to allow termination even if prison officials are poised to violate the Constitution as soon as the relief terminates.[119]

C. Fifth Amendment Procedural Due Process Claims

58. U.S. prisoners receive virtually no procedural protections either upon their initial assignment or for their ongoing detention at ADX and similarly restrictive facilities. Courts have interpreted the Fifth Amendment of the U.S. Constitution—which assures that no one's liberty will be deprived without due process of law—to provide little to no protection for ADX prisoners.

59. The United Kingdom Government has submitted that the existence of ADX Florence's "step-down programs" and the possibility that a prisoner may eventually be removed from the

[117] *Hancock v. Payne*, No. 1:03cv671-JMR-JMR, 2006 U.S. Dist. LEXIS 1648, at *10 (S.D. Miss. Jan. 4, 2006) (Roper, M.J.) ("In their Amended Complaint, the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault."); Deborah Golden, *The Prison Litigation Reform Act – A Proposal for Closing the Loophole for Rapists*, 1 Advance 95, 98-99 (2007) (noting that only the Second Circuit has held that rape is inherently a physical injury).

[118] *See generally* Scharff Smith, *supra* note 4.

[119] *See*, *e.g.*, *Para-Professional Law Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 305 (3d Cir. 2003) (holding that the fact that defendants were poised to close a court-ordered law clinic and to again violate federal rights "does not make the injunction necessary to correct a current and ongoing violation.").

harsh conditions of administrative segregation (solitary confinement) are sufficient to overcome challenges to Petitioners' extradition based upon their Article 3 ECHR rights.[120]

60. That position is premised on a theory that adequate procedures exist that provide for the Petitioners' removal to less restrictive confinement or that provide for effective remedies against wrongful confinement or excessively cruel conditions. The facts do not bear out that theory in practice.[121] The mere speculation that Petitioners might be allowed to participate in the step-down program, or that Petitioners may eventually win an administrative remedy, should not be thought sufficient to overcome these threats to Petitioners' Article 3 rights. The United States has provided no guarantee – and cannot provide any such guarantee – that Petitioners in this case will not be subjected to prolonged, possibly permanent, administrative segregation in ADX Florence.

61. Should Petitioners be subjected to such prolonged or perhaps permanent confinement, current interpretations of the U.S. Constitution will provide them with few avenues for recourse. To establish a Due Process challenge to the procedures used to confine a prisoner to solitary confinement, the prisoner must first, as a threshold issue, show that he has "a liberty interest in avoiding particular conditions of confinement." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *see also Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (holding that due process is only required when a liberty interest is at stake). The prisoner must then show that he was denied adequate review before and periodically during his incarceration under the adverse conditions of confinement. *Wilkinson*, 545 U.S. at 224, 226-27, 228-29 (holding that non-adversarial review before confinement, once thirty days later, and then annually thereafter is adequate).

1. Limited Liberty Interest and the Atypical and Significant Hardship Standard

62. The Supreme Court has recognized only a limited liberty interest in avoiding conditions of confinement that "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). It has cautioned that "the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement . . . . [though] a liberty interest . . . may arise from state policies or regulations." *Wilkinson*, 545 U.S. at 221-22. To satisfy the liberty interest requirement, then, prisoners must show that their conditions of confinement deviate substantially from the baseline accepted treatment of prisoners. *Estate of DiMarco v. Wyoming Dep't of Corr.*, 473 F.3d 1334, 1341 (10th Cir. 2007).

63. The Tenth Circuit has identified four factors to consider when determining whether a prisoner's isolation satisfies the atypical and significant standard: "whether (1) the segregation relates to and furthers a legitimate penological interest . . . (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate." *Id*. at 1342. In *DiMarco*, the court held that a plaintiff had no liberty interest in avoiding the solitary confinement to which she was subject for the entire fourteen months of her prison sentence because, although she was "denied interaction with other inmates, and certain amenities" available to other inmates, *id.* at 1343, and "[w]hile her confinement was isolating, it provided the ordinary essentials of prison life." *Id.* at 1342; *see also* Recommendation of United States Magistrate Judge at *19, *Rezaq v. Nalley*, No. 07-cv-02483-LTB-KLM, (D. Colo. Aug. 17, 2010) (Mix, M.J.) (also relying on a finding that the prisoner "was not deprived of these basic necessities" in rejecting his claim that he had a liberty interest in avoiding thirteen years in solitary confinement at ADX Florence).

64. The Tenth Circuit's construction of the liberty interest test appears to collapse that test into the Eighth Amendment standard so that the two are one and the same. *See DiMarco*, 473 F.3d at

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[120] *See* Observations of the Government of the United Kingdom on Admissibility and Merits, *Ahsan v. United Kingdom, European Court of Human Rights*, No. 11949/08, 13-16 (Apr. 24, 2009).

[121] *See* Laura L. Rovner, *Supplemental Report Regarding "Supermax" Confinement at the United States Penitentiary-Administrative Maximum, Florence, Colorado, United States of America* (April 20, 2009).

1343 (noting, in support of its decision that DiMarco's conditions of confinement were not sufficiently extreme to establish a liberty interest, that "[t]he district court found as much in rejecting DiMarco's equal protection and cruel and unusual punishment claims."). In practice, prisoners must show that they have been deprived of "the basic essentials of life*," id.*, which parallels the objective component of the Eighth Amendment. In other words, it appears that prisoners will not be entitled to any procedural protections in the decision to place them in solitary confinement unless their conditions of confinement are so severe as to independently violate the objective component of the Eighth Amendment. The Tenth Circuit is employing an incorrectly stringent standard in its liberty interest analysis, which substantially limits prisoners' ability to challenge the inadequate procedures that govern their confinement in administrative segregation.

65. For example, the Tenth Circuit has held that the fourth factor turns on whether a prisoner *may* be released from segregation under administrative review, but does not impose any actual limit on the length of isolation, nor do procedural protections increase with the length of isolation. *DiMarco*, 473 F.3d at 1343-44. Thus, isolation for up to fourteen years at ADX Florence has been held insufficient to meet the atypical and significant hardship standard so as to trigger procedural protections.[122] Despite the fact that the Supreme Court considered the "duration and degree of restriction," *Sandin*, 515 U.S. at 486, the Tenth Circuit has held that prisoners do not have a liberty interest in avoiding atypically long periods of solitary confinement, if the conditions are not found to be restrictive enough to independently raise a liberty interest. *Jordan v. Fed. Bureau of Prisons*, 191 Fed. Appx. 639, 653 (10th Cir. 2006); *see also Rezaq* at *22. Therefore, although other circuits have held that "the duration of prison discipline bears on whether a cognizable liberty interest exists," *Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008), the Tenth Circuit seems to suggest that there is no difference between spending a few days or months in solitary confinement, and spending over ten years in solitary confinement. The Supreme Court has not settled this issue.

66. Because the Due Process standard requires plaintiffs to show that their conditions of confinement are "atypical," it fails in practice to provide a constitutional floor for the mistreatment of prisoners. To the contrary, as it becomes more routine to subject prisoners to longer and harsher periods of segregation, those conditions themselves become viewed as "typical" and therefore progressively more difficult to challenge. *See, e.g.*, *Matthews*, at *13, *adopted by Matthews*, No. 09-cv-00978-PAB-CBS (noting that "[t]he conditions at ADX have previously been determined not to give rise to a protected liberty interest" and citing all the conditions of confinement for which the courts have refused to find due process violations as reason to dismiss the case). For example, the court in *Rezaq* relied heavily on *DiMarco* and *Jordan* to find that because the prisoners in those cases were not found to have met the liberty interest threshold, the prisoner in *Rezaq* did not meet the liberty interest threshold either, even if the facts of the case – at least with regard to duration of solitary confinement – are arguably worse. *Rezaq* at *19, 22. The court in *Jordan*, in turn, determined that it was reasonable to segregate the prisoner for five years during an ongoing investigation by relying on prior circuit court cases, even though those cases involved conditions of confinement and duration of confinement that were less egregious. *Jordan*, 191 Fed. Appx. at 652-53.

67. The courts have occasionally held that prisoners had a liberty interest in avoiding prolonged isolation where there were aggravating factors.[123] The Supreme Court did not hold that the conditions set forth in *Wilkinson* must be present in every case in order for a liberty interest to be found, but some courts, including the Tenth Circuit, appear to treat the case as so holding. Thus, the Tenth Circuit has held that because the facts presented in a case are "lesser" than those presented in successful prior cases, the prisoner does not have a cognizable liberty interest. *See DiMarco*, 473 F.3d at 1342; *see also Rezaq* at *12. As a result, successful but exceptional cases

[122] *Georgacarakos v. Wiley*, No. 07-cv-01712-MSK-MEH, 2010 WL 1291833 (D. Colo. Mar. 30, 2010); see *also Rezaq* at *22; *Matthews v. Wiley*, No. 09-cv-00978-PAB-CBS, at *14 (D. Colo. Aug. 16, 2010) (Shaffer, M.J.), *adopted by Matthews v. Wiley*, No. 09-cv-00978-PAB-CBS (D. Colo. Sept. 13, 2010).

[123] *See, e.g., Wilkinson v. Austin*, 545 U.S. 209 (2005); *Williams v. Norris,* 277 Fed. Appx. 647 (8th Cir. 2008); *Wilkerson v. Stalder*, 329 F.3d 431, 435-36 (5th Cir. 2003) (holding that a prisoner may have a liberty interest in avoiding thirty years in solitary confinement, but remanding the case for resolution).

may in practice establish a threshold, leaving subsequent plaintiffs who have experienced distinguishable but nonetheless egregious harms without any effective remedy.

68. Courts reviewing ADX Florence cases also have placed inappropriate weight on two of the *DiMarco* factors for establishing whether a liberty interest exists. First, courts erroneously rely on the "legitimate penological interest" factor. The Supreme Court has held that even if the prison officials find it necessary to subject prisoners to segregation, "[t]hat necessity . . . does not diminish [the] conclusion that the conditions give rise to a liberty interest in their avoidance." *Wilkinson*, 545 U.S. at 224. Despite this holding, lower courts reviewing confinement at ADX Florence have held that even evidence of extreme, harsh, and long-term conditions of solitary confinement must "yield" to a finding that the prison has a legitimate penological interest in maintaining those conditions. *Rezaq* at *22 note 13; *see also Matthews* at *12-13. Second, courts inappropriately place great weight on the question of whether the segregation may increase the total duration of confinement. Federal prisoners are greatly disadvantaged under this system because they are not eligible for parole.[124] Although loss of parole eligibility is relevant to a finding of a liberty interest, *see Wilkinson*, 545 U.S. at 215, the fact that a prisoner is not eligible for parole should not prejudice courts against finding a liberty interest, given other evidence of extreme conditions of confinement.

2. Standards of Reviewing Placement in Administrative Segregation

69. Furthermore, even if a prisoner can establish a liberty interest in avoiding prolonged solitary confinement, he or she is only entitled to the barest of administrative review. *Wilkinson*, 545 U.S. at 224. The government need only show that its policy adequately safeguards the prisoner's liberty interests in light of a) "the private interest that will be affected by the official action"; b) "the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and c) "the Government's interest." *Wilkinson*, 545 U.S. at 224-25 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

70. The Supreme Court does not require anything more than "informal, nonadversary procedures" to satisfy the review requirement. *Wilkinson*, 545 U.S. at 229. In *Wilkinson*, it held that the *Mathews* test is satisfied when the Supermax prison reviews a prisoner's confinement in solitary confinement only one time per year. The prison is not required to establish at the outset what factors or behavior would result in continued segregation. Under the nonadversary procedures, prisoners need not be allowed to present witnesses, and the reviews need not be heard by a judge or other neutral arbiter. *Wilkinson*, 545 U.S. at 225-26; *see also DiMarco*, 473 F.3d at 1344-45. The Tenth Circuit explicitly allows prisons to rely on the initial reasons for placement to justify ongoing segregation. *DiMarco*, 473 F.3d at 1337. While a prison may have to provide some reason for a prisoner's segregation, there is no requirement that the reasons be substantive[125] and the prison's decision is ultimately afforded great deference. *Id.* at 1342; *Rezaq* at *26.

71. While, in theory, a prisoner may be entitled to "meaningful review[]," *Williams v. Norris*, 277 Fed. Appx. 647, 649 (8th Cir. 2008), *DiMarco*, 473 F.3d at 1344,[126] that standard affords very little

[124] Sentencing Reform Act of 1984, 18 U.S.C. § 3582(c), Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[125] *See Wilkinson*, 545 U.S. at 219-21 (reversing the District Court's orders that the prisons provide prisoners "with an exhaustive list of grounds believed to justify placement," and with specific advice as to what conduct is necessary to reduce their classification).

[126] Furthermore, only some of the circuits have amplified the determination that the required review must be "meaningful." *Williams v. Norris*, 277 Fed. Appx. 647, 649 (8th Cir. 2008); *McKeithan v. Beard*, 322 Fed. Appx. 194, 199 (3d Cir. 2009) (requiring that the inmate have a "meaningful opportunity" to contest placement in solitary confinement). Others, including the Tenth Circuit, have not required meaningfulness. *DiMarco*, 473 F.3d at 1344; *Iqbal v. Hasty*, 490 F.3d 143, 163-4 (2d Cir. 2006) (holding only that "some process was required," and that the case must proceed in order to determine whether the process granted the plaintiffs met "the requirements of the Due Process Clause as interpreted in *Mathews* and subsequent cases."), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

real process. For example, in *DiMarco*, the Tenth Circuit upheld the prisoner's review as "meaningful" because she was allowed to attend the meetings in which her status was reviewed, and each time she signed the classification form, which stated "the reasons for the custody level had been explained to her." *Id*. at 1344. She was not allowed to present witness testimony, and there were no "other trappings of the adversarial process [because] these are not required to satisfy due process." *Id*. at 1345. The court did not otherwise elaborate on the requirements of meaningful review, or hold that reviews *must* be meaningful. *DiMarco*, 473 F.3d at 1344. In practice, the courts have been highly deferential to the prison's decision that ongoing segregation is warranted. *See id.* at 1342; *Keck v. Zenon,* 240 Fed. Appx. 815 (10th Cir. 2007); *Rezaq* at *26.

72. ADX policies at best provide that prisoners must be granted periodic review of their confinement. *Matthews v. Wiley*, No. 09-cv-00978-PAB-CBS, at *16 (D. Colo. Aug. 16, 2010) (Shaffer, M.J.), *adopted by Matthews v. Wiley*, No. 09-cv-00978-PAB-CBS (D. Colo. Sept. 13, 2010). ADX policies cannot guarantee that prisoners will be transferred out of prolonged solitary confinement, nor do clear written standards govern how transfer decisions ought to be made. Criteria for ADX placement include the crime for which the prisoner was convicted and may require no additional evidence to justify ongoing confinement at ADX. *Rezaq* at *14 n.6. Prisoners have no legal recourse to challenge the Bureau of Prisons' decision to keep them in solitary confinement, even if this decision overrules a classification team's explicit recommendation that a prisoner be placed in less restrictive confinement. *Id*. at *16.

73. Furthermore, the Warden of ADX admits that a prisoner's eligibility for the step-down programs may be indefinitely deferred for "security reasons," a vague term that provides very little insight to when and how review will occur or under what circumstances it will be withheld or for how long. Decl. of R. Wiley, *United States v. al Fawwaz*, No. S(10) 98 Cr. 1023 (S.D.N.Y. Dec. 6, 2009). These policies allow prisoners to be subjected to prolonged or indefinite solitary confinement without meaningful review.

VI. CONCLUSION

74. As outlined above, U.S. legal protections against ill-treatment in imprisonment fall short of those provided under Article 3 ECHR. The respective tests applied by U.S. courts and this Court differ significantly: a violation of the Eighth Amendment requires the showing of a State official's deliberate indifference, a subjective component, which contrasts with this Court's view that Article 3 ECHR may be violated where no subjective component arises. The approach taken by the respective Courts in relation to specific detention issues, such as solitary confinement and the mental effects of measures, also reflects distinct scopes of protection.

75. Further, it is submitted that any protection the applicants will receive under U.S. law is speculative at best. The past two decades have seen a strong trend of limiting prisoner access to courts overall and restricting judicial oversight, particularly in the absence of overt physical harm. Moreover, the U.S. Constitution affords little in the way of real protections against the documented harms of prolonged sensory and social deprivation. Only the most egregious cases involving pre-existing mental illness, paired with a showing of the personal wrongdoing of prison officials, are likely to succeed. To the extent the United States suggests that Petitioners will be adequately protected by administrative review, the record in cases involving ADX Florence is that such procedures are largely illusory.

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ANNEX

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the United States Constitution and U.S. civil rights laws. Throughout its 90-year history, the ACLU has been deeply involved in protecting the rights of prisoners, and in 1972 created the National Prison Project to further this work. The ACLU has appeared before the United States Supreme Court in numerous cases involving the rights of prisoners, both as direct counsel and as *amicus curiae*.

For more than twenty years, the Lowenstein International Human Rights Clinic at Yale Law School has promoted human rights globally, and since 2002, its **National Litigation Project** (NLP) has addressed human rights violations in the United States, particularly through U.S. courts. The NLP represents individuals detained in highly restrictive settings, including at Florence ADX, and has pending civil actions challenging the subjection of individuals to prolonged solitary confinement and sensory deprivation.

INTERIGHTS is an international human rights law centre, based in London, which has held consultative status with the Council of Europe since 1993. It works to promote the effective realisation of international human rights standards through law. To this end, INTERIGHTS provides advice on the use of international and comparative law, assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law and undertakes capacity building activities for lawyers and judges. A critical aspect of INTERIGHTS' litigation work involves the selective filing of third party interventions before international courts and tribunals on points of law of key importance to human rights protection, and on which our knowledge of international and comparative practice might assist the Court.[127] Ensuring legal protections in the context of counter-terrorism measures and national security is a thematic priority for INTERIGHTS.[128]

Reprieve is a London-based legal action charity that uses the law to enforce the human rights of prisoners, from death row to Guantánamo Bay. Established in 1999, Reprieve has litigated penalty cases in the United States, including on Eighth Amendment grounds (the prohibition of cruel and unusual punishment). Reprieve has been extensively involved in much of the litigation stemming from Guantanamo Bay, both in the UK and the USA. Reprieve has long advised United States capital defence attorneys and European governments on United States and international human rights standards relating to the treatment of prisoners.

[127] INTERIGHTS has intervened as a third party before this Court in a number of cases, most recently in *Kiyutin v Russia* (Appl. 2700/10), *Vejdeland v Sweden* (Appl. 183/07), *Jones v the United Kingdom and Mitchell & Ors v the United Kingdom* (Appl. 34356/06 and 40528/06), *Rantsev v Cyprus and Russia* (Appl. 25965/04), *Opuz v. Turkey* (Appl. 33401/02). It has also intervened before the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and domestic courts in Africa, the Americas and Europe, in a number of cases on issues relating to security and the rule of law.

[128] INTERIGHTS has intervened as a third party before this Court in recent relevant cases: *Jones v the United Kingdom and Mitchell & Ors v the United Kingdom* (Appl. 34356/06 and 40528/06)_(concerning official immunities for torture); *Al-Skeini and Others v the United Kingdom* (Appl. 55721/07) (concerning the extrajudicial application of the Convention in the case of the deaths of six Iraqi civilians in Basra in 2003 where the UK was an occupying power); *Ramzy v The Netherlands* (Appl. 25424/05) (concerning the absolute nature of the Article 3 prohibition, the nature of the risk required to trigger the prohibition, and factors relevant to its assessment).