European Court of Human Rights, Grand Chamber, Case of Saadi v. Italy, 28 February 2008

(*Application no. 37201/06*)

Summary and context

The logic of the absolute prohibition on returns to risk of torture was first articulated in the landmark European Court decision of *Chahal v. UK*. In that case, the court ruled that the UK could not return Karamjit Singh Chahal, an alleged Sikh militant, to India in reliance on diplomatic assurances against torture from New Delhi, no matter what crimes he was suspected of or his status in the UK.

In an ill-fated attempt to encourage the court to revisit the *Chahal* decision, the British government intervened in *Saadi* to argue that the right of a person to be protected from ill-treatment abroad should be balanced against the risk he posed to the deporting state. The government had intervened in an earlier case, *Ramzy v. Netherlands*, with the same arguments, and requested that the court include its intervention in *Ramzy* for consideration in *Saadi*. The intervention went on to request a reconsideration of the *Chahal* decision and the establishment of a new test in removal cases that would balance national security considerations against other relevant factors.

The *Saadi* court rejected this argument outright. As the court explained, «[T]he argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not.» (*Saadi v. Italy*, para. 139)

The UK is currently leading an effort, through the G6 group of interior ministers (France, Germany, Italy, Poland, Spain, and UK), for broader EU endorsement of its "deportation with assurances" policy. The public conclusions of the October 2007 G6 meeting were considerably more definitive. They said in no uncertain terms that the G6 governments "will initiate and support continued exploration of the expulsion of terrorists and terrorist suspects, seeking assurances through diplomatic understandings and other policies. In relation to the EU, the governments will seek to build consensus on these issues.

Judgement

(...)

3. The Court's assessment

(a) General principles

i. Responsibility of Contracting States in the event of expulsion

124. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 102, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38).

125. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 34; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

126. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

127. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 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 (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3

(see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

ii. Material used to assess the risk of exposure to treatment contrary to Article 3 of the Convention

128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal*, cited above, § 96).

129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no.°53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moayad v. Germany* (dec.), no.°35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Müslim*, cited above, § 68).

132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-149).

133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85 and 86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is

true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

iii. The concepts of "torture" and "inhuman or degrading treatment"

134. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

135. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

136. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydin v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 82, and *Selmouni*, cited above, § 96).

(b) Application of the above principles to the present case

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see *Chahal*, cited above, § 79, and S*hamayev and Others*, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 130 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) 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, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, § 80 and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the

Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

141. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.

142. Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment (see *Jabari*, cited above, § 39) in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof (see paragraphs 128 and 132 above) before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion.

(...)

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7

171. The applicant submitted that his expulsion would be neither "necessary in the interests of public order" nor "grounded on reasons of national security". He alleged a violation of Article 1 of Protocol No. 7, which provides:

“1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

172. The Government rejected that argument.

A. Admissibility

173. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

174. The applicant submitted that he was lawfully resident in Italian territory. He argued that the condition of “lawful residence” should be assessed by reference to the situation at the time of the deportation decision. When arrested he had a valid residence permit, which expired only because he was in prison. He had subsequently attempted to regularise his situation, but had been prevented from doing so on account of his internment in the temporary holding centre.

175. The applicant's situation could now be regularised, since the terrorism charges had not led to his conviction, he was cohabiting with his Italian partner and son and was able to work. However, any administrative step he might take was blocked by the fact that he had no document which could prove his nationality and could never obtain one from the Tunisian authorities (see paragraph 45 above).

176. The applicant submitted that he was being prevented from exercising the rights listed in paragraph 1 (a), (b) and (c) of Article 1 of Protocol No. 7, whereas his expulsion could not be regarded as “necessary in the interests of public order” or “grounded on reasons of national security”. In that connection, he observed that the considerations of the Minister of the Interior were contradicted by the Milan Assize Court, which had acquitted him of international terrorism. In any event, the Government had not adduced any evidence of the existence of dangers to national security or public order, so that the decision to take him to a temporary holding centre with a view to his expulsion had been “unlawful”.

(b) The Government

177. The Government observed that, according to the explanatory report accompanying Article 1 of Protocol No. 7, the word “lawfully” referred to the domestic legislation of the State concerned. It was therefore domestic legislation which should determine the conditions a person had to satisfy in order for his or her presence within the national territory to be considered “lawful”. In particular, an alien whose admission and stay had been made subject to certain conditions, for example a fixed period, and who no longer complied with those conditions could not be regarded as being still “lawfully” present in the State's territory. Yet after 11 October 2002, a date which preceded the deportation order, the applicant no longer had a valid residence permit authorising his presence in Italy. He was therefore not “an alien lawfully resident in the territory” within the meaning of Article 1 of Protocol No. 7, which was accordingly not applicable.

178. The Government further observed that the deportation order had been issued in accordance with the rules established by the relevant legislation, which required a simple administrative decision. The law in question was accessible, its effects were foreseeable and it offered a degree of protection against arbitrary interference by the public authorities. The applicant had also had the benefit of “minimum procedural safeguards”. He had been represented before the justice of the peace and the Regional Administrative Court by his lawyer, who had been able to submit reasons why he should not be deported. A deportation order had also been issued against the applicant when he was sentenced to four years and six months' imprisonment, and hence after adversarial judicial proceedings attended by all the safeguards required by the Convention.

179. In any event, the Government submitted that the applicant's deportation was necessary in the interests of national security and the prevention of disorder. They argued that these requirements were justified in the light of the information produced in open court during the criminal proceedings against the applicant and pointed out that the standard of proof required for the adoption of an administrative measure (a deportation order issued by the Minister of the Interior by virtue of Legislative decree no. 144 of 2005) was lower than that required to ground a criminal conviction. In the absence of manifestly arbitrary conclusions, the Court should endorse the national authorities' reconstruction of the facts.

2. The Court's assessment

180. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 1 of Protocol No. 7.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention;

3. *Holds* that it is not necessary to examine whether enforcement of the decision to deport the applicant to Tunisia would also be in breach of Articles 6 and 8 of the Convention and Article 1 of Protocol No. 7;

4. *Holds* that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant (...)

CONCURRING OPINION OF JUDGE MYJER, JOINED BY JUDGE ZAGREBELSKY

I voted with the other judges that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention. I also fully agree with the reasoning which is contained in paragraphs 124-148 of the judgment.

Still, I would like to add the following remarks.

As far as the procedure is concerned:

The question of principle in the case of *Saadi v. Italy*, as raised by the intervening Government (is there reason to alter and modify the approach followed by the Court in the *Chahal* case in cases concerning the threat created by international terrorism), was earlier raised in some other cases which are at present still pending before a Chamber of the Third Section (*Ramzy v. the Netherlands* (25424/05) and *A. v. the Netherlands* (4900/06). In these cases against the Netherlands leave to intervene as a third party was granted to the Governments of Lithuania, Portugal, Slovakia and the United Kingdom and to some non-governmental organisations. These Governments submitted a joint third-party intervention; separate third-party submissions and a joint third-party submission were filed by some non-governmental organisations.

It then happened that the case of *Saadi v. Italy* (earlier referred to as N.S. v. Italy) was ready for decision while the cases against the Netherlands were not. In the case *Saadi* case the Chamber of the Third Section relinquished jurisdiction on 27 March 2007 in favour of the Grand Chamber. In Case-law report 95 of March 2007 (the provisional version, which appeared in April 2007) mention was made on p. 38 of the *N.S. v. Italy* case (relinquishment in favour of the Grand Chamber), indicating that this was a case concerning the expulsion of the applicant to Tunisia on grounds of his alleged participation in international terrorism. The same appeared in the final version of Information Note No. 95 on the case-law of the Court, March 2007, which appeared some time later. The Government of the United Kingdom requested leave to intervene as a third party in good time.

As far as the question itself is concerned:

Paragraph 137 of the judgment gives the answer in a nutshell: *"the Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3."*

I would not be surprised if some readers of the judgment– at first sight - find it difficult to understand that the Court by emphasising the absolute nature of Article 3 seems to afford more protection to the non-national applicant who has been found guilty of terrorist related crimes than to the protection of the community as a whole from terrorist violence. Their reasoning may be assumed to run as follows: it is one thing not to expel non-nationals – including people who have sought political asylum – where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country (see for instance the judgment of 11 January 2007 in the case of *Salah Sheek v. the Netherlands*) or even not to expel non-nationals who fall in the category of Article 1F of the Convention on the Status of Refugees of 28 July 1951 (decision of 15 September 2005 in the

case of *Teshome Goraga Bonger v. the Netherlands*) as long as these people pose no potential danger for the lives of the citizens of the State, but it makes a difference to be told that a non-national who has posed (and maybe still poses) a possible terrorist threat to the citizens cannot be expelled.

Indeed, the Convention (and the protocols thereto) contain legal human rights standards which must be secured to everyone within the jurisdiction of the High Contracting Parties (Article 1). Everyone means everyone: not just terrorists and the like. The States also have a positive obligation to protect the life of their citizens. They should do all that could be reasonably expected from them to avoid a real and immediate risk to life of which they have or ought to have knowledge (judgment of 28 October 1998 in the *Osman v. the United Kingdom* case, §§ 115-116). They have, as was laid down in the preamble of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (adopted on 11 July 2002), "*the imperative duty"* to protect their populations against possible terrorist acts. I even daresay that the Convention obliges the High Contracting States to ensure as far as possible that citizens can live without fear that their life or goods will be at risk. In that respect I recall that *Freedom from Fear* ranks among the Four Freedoms mentioned in Roosevelt's famous speech.

However, States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those "absolute" rights from which no derogation may be made even in times of emergency (Article 15). During a high level seminar on *Protecting human rights while fighting terrorism* (Strasbourg 13-14 June 2005) the former French Minister of Justice Robert Badinter rightly spoke of a dual threat which terrorism poses for human rights; a direct threat posed by acts of terrorism and an indirect threat because anti-terror measures themselves risk violating human rights. Upholding human rights in the fight against terrorism is first and foremost a matter of upholding our values, even with regard to those who may seek to destroy them. There is nothing more counterproductive than to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards. Such a course of action would only serve to create fertile breeding grounds for further radicalisation and the recruitment of future terrorists.

After the events of 11 September 2001 the Committee of Ministers of the Council of Europe reaffirmed in the preamble of the abovementioned guideline the States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member States in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. Guideline 14.2 makes it clear that it is the duty of a State that intends to expel a person to his or her country of origin or to another country, not to expose him or her to the death penalty, to torture or to inhuman or degrading treatment or punishment.

The Court found that in this case substantial grounds have been shown for believing that the applicant would risk being subjected to treatment contrary to Article 3 of the Convention, if he were to be deported to Tunisia.

Then there is only one (unanimous) answer possible.