Convention relating to the Status of Refugees

Geneva, 28 July 1951

Article 33 - Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

New York, 10 December 1984

Article 1

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4 November 1950

Article 3 - Prohibition of torture

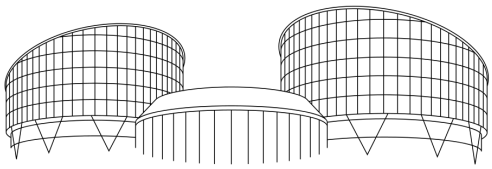
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 15 - Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

[…]



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COURT (PLENARY)

CASE OF SOERING v. THE UNITED KINGDOM

(Application no. 14038/88)

JUDGMENT

STRASBOURG

07 July 1989

[…]

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

11. The applicant, Mr Jens Soering, was born on 1 August 1966 and is a German national. He is currently detained in prison in England pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia.

12. The homicides in question were committed in Bedford County, Virginia, in March 1985. The victims, William Reginald Haysom (aged 72) and Nancy Astor Haysom (aged 53), were the parents of the applicant's girlfriend, Elizabeth Haysom, who is a Canadian national. Death in each case was the result of multiple and massive stab and slash wounds to the neck, throat and body. At the time the applicant and Elizabeth Haysom, aged 18 and 20 respectively, were students at theUniversity of Virginia. They disappeared together from Virginia in October 1985, but were arrested in England in April 1986 in connection with cheque fraud.

13. The applicant was interviewed in England between 5 and 8 June 1986 by a police investigator from the Sheriff's Department of Bedford County. In a sworn affidavit dated 24 July 1986 the investigator recorded the applicant as having admitted the killings in his presence and in that of two United Kingdom police officers. The applicant had stated that he was in love with Miss Haysom but that her parents were opposed to the relationship. He and Miss Haysom had therefore planned to kill them. They rented a car in Charlottesville and travelled to Washington where they set up an alibi. The applicant then went to the parents' house, discussed the relationship with them and, when they told him that they would do anything to prevent it, a row developed during which he killed them with a knife.

On 13 June 1986 a grand jury of the Circuit Court of Bedford County indicted him on charges of murdering the Haysom parents. The charges alleged capital murder of both of them and the separate non-capital murders of each.

14. On 11 August 1986 the Government of the United States of America requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty of

1972 between the United States and the United Kingdom (see paragraph 30 below). On 12 September a Magistrate at Bow Street Magistrates' Court was required by the Secretary of State for Home Affairs to issue a warrant for the applicant's arrest under the provisions of section 8 of the Extradition Act 1870 (see paragraph 32 below). The applicant was subsequently arrested on 30 December at HM Prison Chelmsford after serving a prison sentence for cheque fraud.

[...]

16. On 30 December 1986 the applicant was interviewed in prison by a German prosecutor (Staatsanwalt) from Bonn. In a sworn witness statement the prosecutor recorded the applicant as having said, inter alia, that "he had never had the intention of killing Mr and Mrs Haysom and ... he could only remember having inflicted wounds at the neck on Mr and Mrs Haysom which must have had something to do with their dying later"; and that in the immediately preceding days "there had been no talk whatsoever [between him and Elizabeth Haysom] about killing Elizabeth's parents". The prosecutor also referred to documents which had been put at his disposal, for example the statements made by the applicant to the American police investigator, the autopsy reports and two psychiatric reports on the applicant (see paragraph 21 below).

On 11 February 1987 the local court in Bonn issued a warrant for the applicant's arrest in respect of the alleged murders. On 11 March the Government of the Federal Republic of Germany requested his extradition to the Federal Republic under the Extradition Treaty of 1872 between the Federal Republic and the United Kingdom (see paragraph 31 below). The Secretary of State was then advised by the Director of Public Prosecutions that, although the German request contained proof that German courts had jurisdiction to try the applicant, the evidence submitted, since it consisted solely of the admissions made by the applicant to the Bonn prosecutor in the absence of a caution, did not amount to a prima facie case against him and that a magistrate would not be able under the Extradition Act 1870 (see paragraph 32 below) to commit him to await extradition to Germany on the strength of admissions obtained in such circumstances.

17. In a letter dated 20 April 1987 to the Director of the Office of International Affairs, Criminal Division, United States Department of Justice, the Attorney for Bedford County, Virginia (Mr James W. Updike Jr) stated that, on the assumption that the applicant could not be tried in Germany on the basis of admissions alone, there was no means of compelling witnesses from the United States to appear in a criminal court in Germany. On 23 April the United States, by diplomatic note, requested the applicant's extradition to the United States in preference to the Federal Republic of Germany.

18. On 8 May 1987 Elizabeth Haysom was surrendered for extradition to the United States. After pleading guilty on 22 August as an accessory to the murder of her parents, she was sentenced on 6 October to 90 years' imprisonment (45 years on each count of murder).

19. On 20 May 1987 the United Kingdom Government informed the Federal Republic of Germany that the United States had earlier "submitted a request, supported by prima facie evidence, for the extradition of Mr Soering". The United Kingdom Government notified the Federal Republic that they had "concluded that, having regard to all the circumstances of the case, the court should continue to consider in the normal way the United States request". They further indicated that they had sought an assurance from the United States authorities on the question of the death penalty and that "in the event that the court commits Mr Soering, his surrender to the United States authorities would be subject to the receipt of satisfactory assurances on this matter".

20. On 1 June 1987 Mr Updike swore an affidavit in his capacity as Attorney for Bedford County, in which he certified as follows:

"I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."

This assurance was transmitted to the United Kingdom Government under cover of a diplomatic note on 8 June. It was repeated in the same terms in a further affidavit from Mr Updike sworn on 16 February 1988 and forwarded to the United Kingdom by diplomatic note on 17 May 1988. In the same note the Federal Government of theUnited States undertook to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honoured.

During the course of the present proceedings the Virginia authorities informed the United Kingdom Government that Mr Updike was not planning to provide any further assurances and intended to seek the death penalty in Mr Soering's case because the evidence, in his determination, supported such action.

[...]

26. By a declaration dated 20 March 1989 submitted to this Court, the applicant stated that should the United Kingdom Government require that he be deported to the Federal Republic of Germany he would consent to such requirement and would present no factual or legal opposition against the making or execution of an order to that effect.

[…]

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 3 (art. 3)

80. The applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of Americawould, if implemented, give rise to a breach by the United Kingdom of Article 3 (art. 3) of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Applicability of Article 3 (art. 3) in cases of extradition

81. The alleged breach derives from the applicant's exposure to the so-called "death row phenomenon". This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

[…]

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5 § 1 (f) (art. 5-1-f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition", no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a

Contracting State under the relevant Convention guarantee (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment of 25 May 1985, Series A no. 94, pp. 31-32, §§ 59-60 - in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 (art. 3) can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. Article 1 (art. 1) of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I", sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art. 3) in particular.

In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government - for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3) - the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 27, § 53).

88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he

would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).

89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case (see paragraph 100 below). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) (see paragraph 87 above).

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 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 extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. 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 extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

B. Application of Article 3 (art. 3) in the particular circumstances of the present case

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States authorities (see paragraph 24 above); this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr Soering's return to the United States are such as to attract the application of Article 3 (art. 3). This inquiry must concentrate firstly on whether Mr Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the "death row phenomenon", lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the Court examine whether exposure to the "death row phenomenon" in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3 (art. 3).

1. Whether the applicant runs a real risk of a death sentence and hence of exposure to the "death row phenomenon"

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 (art. 3) into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill (see paragraph 16 above), the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence (see paragraph 21 above) is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law (as to which, see paragraph 50 above).

Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty (see paragraphs 42-47 and 52 above). The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings (see paragraphs 44-47 and 51 above).

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out (see paragraphs 20, 37 and 69 above).

At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr Soering were extradited to the United States there was "some risk", which was "more than merely negligible", that the death penalty would be imposed.

94. As the applicant himself pointed out, he has made to American and British police officers and to two psychiatrists admissions of his participation in the killings of the Haysom parents, although he appeared to retract those admissions somewhat when questioned by the German prosecutor (see paragraphs 13, 16 and 21 above). It is not for the European Court to usurp the function of the Virginia courts by ruling that a defence of insanity would or would not be available on the psychiatric evidence as it stands. The United Kingdom Government are justified in their assertion that no assumption can be made that Mr Soering would certainly or even probably be convicted of capital murder as

charged (see paragraphs 13 in fine and 40 above). Nevertheless, as the Attorney General conceded on their behalf at the public hearing, there is "a significant risk" that the applicant would be so convicted.

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness (see paragraph 43 above). In this connection, the horrible and brutal circumstances of the killings (see paragraph 12 above) would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the "vileness" of the crime (see paragraph 43 above).

Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and a defendant's age (see paragraph 45 above).

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. The Commonwealth's Attorney for Bedford County, Mr Updike, who is responsible for conducting the prosecution against the applicant, has certified that "should Jens Soering be convicted of the offence of capital murder as charged ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out" (see paragraph 20 above). The Court notes, like Lord Justice Lloyd in the Divisional Court (see paragraph 22 above), that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of "assurances satisfactory to the requested Party that the death penalty will not be carried out" (see paragraph 36 above). However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty (see paragraphs 58-60 above).

This being so, Mr Updike's undertaking may well have been the best "assurance" that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms "means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out ... It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances" (see paragraph 37 above). Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice (as to which, see paragraphs 42, 46, 47 and 69 above), and notwithstanding the diplomatic context of the extradition

relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action (see paragraph 20 in fine above). If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon".

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 (art. 3) into play.

2. Whether in the circumstances the risk of exposure to the "death row phenomenon" would make extradition a breach of Article 3 (art. 3)

(a) General considerations

100. As is established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 65, § 162; and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, §§ 29 and 30).

Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" (see the above-mentioned Ireland v. the United Kingdom judgment, p. 66, § 167). 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 punishment (see the Tyrer judgment, loc. cit.). In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.

101. Capital punishment is permitted under certain conditions by Article 2 § 1 (art. 2-1) of the Convention, which reads:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

In view of this wording, the applicant did not suggest that the death penalty per se violated Article 3 (art. 3). He, like the two Government Parties, agreed with the Commission that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under either Article 2 (art. 2) or Article 3 (art. 3). On the other hand, Amnesty International in their written comments (see paragraph 8 above) argued that the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an

inhuman and degrading punishment within the meaning of Article 3 (art. 3).

102. Certainly, "the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (see the above-mentioned Tyrer judgment, Series A no. 26, pp. 15-16, § 31). De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out. This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No. 6 (P6) to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No. 6 (P6) was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 (art. 3) must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 (art. 3) should therefore be construed in harmony with the provisions of Article 2 (art. 2) (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 (art. 3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art. 2-1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (see paragraph 87 above), Article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) The particular circumstances

105. The applicant submitted that the circumstances to which he would be exposed as a consequence of the implementation of the Secretary of State’s decision to return him to the United States, namely the "death row phenomenon", cumulatively constituted such

serious treatment that his extradition would be contrary to Article 3 (art. 3). He cited in particular the delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma; the fact, so he said, that the judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state at the time of the offence; the extreme conditions of his future detention on "death row" in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality; and the constant spectre of the execution itself, including the ritual of execution. He also relied on the possibility of extradition or deportation, which he would not oppose, to the Federal Republic of Germany as accentuating the disproportionality of the Secretary of State's decision.

The Government of the Federal Republic of Germany took the view that, taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be "inhuman" within the meaning of Article 3 (art. 3).

On the other hand, the conclusion expressed by the Commission was that the degree of severity contemplated by Article 3 (art. 3) would not be attained.

The United Kingdom Government shared this opinion. In particular, they disputed many of the applicant's factual allegations as to the conditions on death row inMecklenburg and his expected fate there.

i. Length of detention prior to execution

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years (see paragraph 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see paragraph 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution (see paragraphs 53-54 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

ii. Conditions on death row

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the Court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row (see paragraph 64 above).

The stringency of the custodial regime in Mecklenburg, as well as the services (medical, legal and social) and the controls (legislative, judicial and administrative) provided for inmates, are described in some detail above (see paragraphs 61-63 and 65-68). In this

connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Mecklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

iii. The applicant's age and mental state

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he "was suffering from [such] an abnormality of mind ... as substantially impaired his mental responsibility for his acts" (see paragraphs 11, 12 and 21 above).

Unlike Article 2 (art. 2) of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 (art. 2) of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States Parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 (art. 3) of measures connected with a death sentence.

It is in line with the Court's case-law (as summarised above at paragraph 100) to treat disturbed mental health as having the same effect for the application of Article 3 (art. 3).

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction if it is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage (see paragraphs 44-47 and 50-51 above). Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings (see paragraph 51 above). These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion (see paragraph 48 above). They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3 (art. 3), of the "death row phenomenon" for a given individual once condemned to death.

Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 (art. 3).

iv. Possibility of extradition to the Federal Republic of Germany

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany (see paragraphs 16, 19, 26, 38 and 71-74 above), where the death penalty has been abolished under the Constitution (see paragraph 72 above), is not material for the present purposes. Any other approach, the United Kingdom Government submitted, would lead to a "dual standard" affording the protection of the Convention to extraditable persons fortunate enough to have such an alternative destination available but refusing it to others not so fortunate.

This argument is not without weight. Furthermore, the Court cannot overlook either the

horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 (art. 3) in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case (see paragraphs 89 and 104 above).

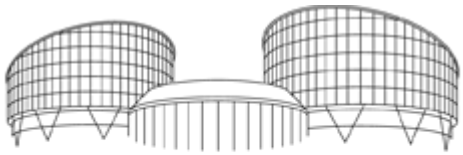
(c) Conclusion

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services (see paragraph 65 above).

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3 (art. 3).

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling (see paragraphs 1, 4, 24 and 77 above).



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COURT (GRAND CHAMBER)

CASE OF CHAHAL v. THE UNITED KINGDOM

(Application no. 22414/93)

JUDGMENT

15 November 1996

[…]

AS TO THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. The applicants

12. The four applicants are members of the same family and are Sikhs. The first applicant, Karamjit Singh Chahal, is an Indian citizen who was born in 1948. He entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to regularise his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. Since 16 August 1990 he has been detained for the purposes of deportation in Bedford Prison.

The second applicant, Darshan Kaur Chahal, is also an Indian citizen who was born in 1956. She came to England on 12 September 1975 following her marriage to the first applicant in India, and currently lives in Luton with the two children of the family, Kiranpreet Kaur Chahal (born in 1977) and Bikaramjit Singh Chahal (born in 1978), who are the third and fourth applicants. By virtue of their birth in the United Kingdom the two children have British nationality.

13. The first and second applicants applied for British citizenship in December 1987. Mr Chahal's request was refused on 4 April 1989 but that of Mrs Chahal is yet to be determined.

B. Background: the conflict in Punjab

14. Since the partition of India in 1947 many Sikhs have been engaged in a political campaign for an independent homeland, Khalistan, which would approximate to the Indian province of Punjab. In the late 1970s, a prominent group emerged under the leadership of Sant Jarnail Singh Bhindranwale, based at the Golden Temple in Amritsar, the holiest Sikh shrine. The Government submit that Sant Bhindranwale, as well as preaching the tenets

of orthodox Sikhism, used the Golden Temple for the accumulation of arms and advocated the use of violence for the establishment of an independent Khalistan.

15. The situation in Punjab deteriorated following the killing of a senior police officer in the Golden Temple in 1983. On 6 June 1984 the Indian army stormed the temple during a religious festival, killing Sant Bhindranwale and approximately 1,000 other Sikhs. Four months later the Indian Prime Minister, Mrs Indira Gandhi, was shot dead by two Sikh members of her bodyguard. The ensuing Hindu backlash included the killing of over 2,000 Sikhs in riots in Delhi.

16. Since 1984, the conflict in Punjab has reportedly claimed over 20,000 lives, peaking in 1992 when, according to Indian press reports collated by the United Kingdom Foreign and Commonwealth Office, approximately 4,000 people were killed in related incidents in Punjab and elsewhere. There is evidence of violence and human rights abuses perpetrated by both Sikh separatists and the security forces (see paragraphs 45-56 below).

C. Mr Chahal's visit to India in 1984

17. On 1 January 1984 Mr Chahal travelled to Punjab with his wife and children to visit relatives. He submits that during this visit he attended at the Golden Temple on many occasions, and saw Sant Bhindranwale preach there approximately ten times. On one occasion he, his wife and son were afforded a personal audience with him. At around this time Mr Chahal was baptised and began to adhere to the tenets of orthodox Sikhism. He also became involved in organising passive resistance in support of autonomy for Punjab.

18. On 30 March 1984 he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge.

He was able to return to the United Kingdom on 27 May 1984, and has not visited India since.

D. Mr Chahal's political and religious activities in the United Kingdom

19. On his return to the United Kingdom, Mr Chahal became a leading figure in the Sikh community, which reacted with horror to the storming of the Golden Temple. He helped organise a demonstration in London to protest at the Indian Government's actions, became a full-time member of the committee of the "gurdwara" (temple) in Belvedere (Erith, Kent) and travelled around London persuading young Sikhs to be baptised.

20. In August 1984 Mr Jasbir Singh Rode entered the United Kingdom. He was Sant Bhindranwale's nephew, and recognised by Sikhs as his successor as spiritual leader. Mr Chahal contacted him on his arrival and toured the United Kingdom with him, assisting at baptisms performed by him. Mr Rode was instrumental in setting up branches of the International Sikh Youth Federation ("ISYF") in the United Kingdom, and the applicant played an important organisational role in this endeavour. The ISYF was established to be the overseas branch of the All India Sikh Students' Federation. This latter organisation was proscribed by the Indian Government until mid-1985, and is reportedly still perceived as militant by the Indian authorities.

21. In December 1984 Mr Rode was excluded from the United Kingdom on the ground that he publicly advocated violent methods in pursuance of the separatist campaign. On his return to India he was imprisoned without trial until late 1988. Shortly

after his release it became apparent that he had changed his political views; he now argued that Sikhs should pursue their cause using constitutional methods, a view which, according to the applicants, was unacceptable to many Sikhs. The former followers of Mr Rode therefore became divided.

22. In the United Kingdom, according to the Government, this led to a split in the ISYF along broadly north/south lines. In the north of England most branches followed Mr Rode, whereas in the south the ISYF became linked with another Punjab political activist, Dr Sohan Singh, who continued to support the campaign for an independent homeland. Mr Chahal and, according to him, all major figures of spiritual and intellectual standing within the United Kingdom Sikh community were in the southern faction.

E. Mr Chahal's alleged criminal activities

23. In October 1985 Mr Chahal was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 ("PTA") on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence.

In 1986 he was arrested and questioned twice (once under the PTA), because he was believed to be involved in an ISYF conspiracy to murder moderate Sikhs in the United Kingdom. On both occasions he was released without charge. Mr Chahal denied involvement in any of these conspiracies.

24. In March 1986 he was charged with assault and affray following disturbances at the East Ham gurdwara in London. During the course of his trial on these charges in May 1987 there was a disturbance at the Belvedere gurdwara, which was widely reported in the national press. Mr Chahal was arrested in connection with this incident, and was brought to court in handcuffs on the final day of his trial. He was convicted on both charges arising out of the East Ham incident, and served concurrent sentences of six and nine months.

He was subsequently acquitted of charges arising out of the Belvedere disturbance.

On 27 July 1992 the Court of Appeal quashed the two convictions on the grounds that Mr Chahal's appearance in court in handcuffs had been seriously prejudicial to him.

F. The deportation and asylum proceedings

1. The notice of intention to deport

25. On 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.

A notice of intention to deport was served on the latter on 16 August 1990. He was then detained for deportation purposes pursuant to paragraph 2 (2) of Schedule III of the Immigration Act 1971 (see paragraph 64 below) and has remained in custody ever since.

2. Mr Chahal's application for asylum

26. Mr Chahal claimed that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees ("the 1951 Convention" - see paragraph 61 below) and applied for political asylum on 16 August 1990. He was interviewed by officials from the Asylum Division of the Home Office on 11 September 1990 and his solicitors submitted written representations on his behalf.

He claimed that he would be subjected to torture and persecution if returned to India, and relied upon the following matters, inter alia:

(a) his detention and torture in Punjab in 1984 (see paragraph 18 above);

(b) his political activities in the United Kingdom and his identification with the regeneration of the Sikh religion and the campaign for a separate Sikh State (see paragraphs 19-22 above);

(c) his links with Sant Bhindranwale and Jasbir Singh Rode; (see paragraphs 17 and 20 above);

(d) evidence that his parents, other relatives and contacts had been detained, tortured and questioned in October 1989 about Mr Chahal's activities in the United Kingdom and that others connected to him had died in police custody;

(e) the interest shown by the Indian national press in his alleged Sikh militancy and proposed expulsion from the United Kingdom;

(f) consistent evidence, including that contained in the reports of Amnesty International, of the torture and murder of those perceived to be Sikh militants by the Indian authorities, particularly the Punjab police (see paragraphs 55-56 below).

27. On 27 March 1991 the Home Secretary refused the request for asylum. In a letter to the applicant, he expressed the view that the latter's known support of Sikh separatism would be unlikely to attract the interest of the Indian authorities unless that support were to include acts of violence against India. He continued that he was

> "not aware of any outstanding charges either in India or elsewhere against [Mr Chahal] and on the account [Mr Chahal] has given of his political activities, the Secretary of State does not accept that there is a reasonable likelihood that he would be persecuted if he were to return to India. The media interest in his case may be known by the Indian authorities and, given his admitted involvement in an extremist faction of the ISYF, it is accepted that the Indian Government may have some current and legitimate interest in his activities".

The Home Secretary did not consider that Mr Chahal's experiences in India in 1984 had any continued relevance, since that had been a time of particularly high tension in Punjab.

[…]

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

72. The first applicant complained that his deportation to India would constitute a violation of Article 3 of the Convention (art. 3), which states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Commission upheld this complaint, which the Government contested.

A. Applicability of Article 3 (art. 3) in expulsion cases

73. As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

74. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, 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 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103).

The Government contested this principle before the Commission but accepted it in their pleadings before the Court.

B. Expulsion cases involving an alleged danger to national security

75. The Court notes that the deportation order against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism (see paragraph 25 above). The parties differed as to whether, and if so to what extent, the fact that the applicant might represent a danger to the security of the United Kingdom affected that State's obligations under Article 3 (art. 3).

76. Although the Government's primary contention was that no real risk of ill-treatment had been established (see paragraphs 88 and 92 below), they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 (art. 3) were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case-law, particularly paragraphs 88 and 89 of its above-mentioned Soering judgment. In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, inter alia, by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. This was the case here: it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr Chahal constituted a serious threat to the security of the United Kingdom justified his deportation.

77. The applicant denied that he represented any threat to the national security of the United Kingdom, and contended that, in any case, national security considerations could not justify exposing an individual to the risk of ill-treatment abroad any more than they could justify administering torture to him directly.

78. The Commission, with whom the intervenors (see paragraph 6 above) agreed, rejected the Government's arguments. It referred to the Court's Vilvarajah and Others judgment (cited at paragraph 73 above, p. 36, para. 108) and expressed the opinion that

the guarantees afforded by Article 3 (art. 3) were absolute in character, admitting of no exception.

At the hearing before the Court, the Commission's Delegate suggested that the passages in the Court's Soering judgment upon which the Government relied (see paragraph 76 above) might be taken as authority for the view that, in a case where there were serious doubts as to the likelihood of a person being subjected to treatment or punishment contrary to Article 3 (art. 3), the benefit of that doubt could be given to the deporting State whose national interests were threatened by his continued presence. However, the national interests of the State could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled.

79. Article 3 (art. 3) enshrines one of the most fundamental values of democratic society (see the above-mentioned Soering judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, and also the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).

80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see paragraph 61 above).

81. Paragraph 88 of the Court's above-mentioned Soering judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged.

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

C. Application of Article 3 (art. 3) in the circumstances of the case

1. The point of time for the assessment of the risk

83. Although there were differing views on the situation in India and in Punjab (see paragraphs 87-91 below), it was agreed that the violence and instability in that region reached a peak in 1992 and had been abating ever since. For this reason, the date taken by the Court for its assessment of the risk to Mr Chahal if expelled to India is of importance.

84. The applicant argued that the Court should consider the position in June 1992, at the time when the decision to deport him was made final (see paragraph 35 above). The purpose of the stay on removal requested by the Commission (see paragraph 4 above) was to prevent irremediable damage and not to afford the High Contracting Party with an opportunity to improve its case. Moreover, it was not appropriate that the Strasbourg organs should be involved in a continual fact-finding operation.

85. The Government, with whom the Commission agreed, submitted that because the responsibility of the State under Article 3 of the Convention (art. 3) in expulsion cases lies in the act of exposing an individual to a real risk of ill-treatment, the material date for the assessment of risk was the time of the proposed deportation. Since Mr Chahal had not yet been expelled, the relevant time was that of the proceedings before the Court.

86. It follows from the considerations in paragraph 74 above that, as far as the applicant's complaint under Article 3 (art. 3) is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article (art. 3). Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.

2. The assessment of the risk of ill-treatment

(a) The arguments

(i) General conditions

87. It was the applicant's case that the Government's assessment of conditions in India and Punjab had been profoundly mistaken throughout the domestic and Strasbourg proceedings. He referred to a number of reports by governmental bodies and by intergovernmental and non-governmental organisations on the situation in India generally and in Punjab in particular, with emphasis on those reports concerning 1994 and 1995 (see paragraphs 49-56 above) and argued that this material established the contention that human rights abuse in India by the security forces, especially the police, remained endemic.

In response to the Government's offer to return him to the part of India of his choice, he asserted that the Punjab police had abducted and killed militant Sikhs outside their home State in the past.

Although he accepted that there had been some improvements in Punjab since the peak of unrest in 1992, he insisted that there had been no fundamental change of regime. On the contrary, what emerged from the above reports was the continuity of the practices of the security agencies. In this respect he pointed to the fact that the director general of the Punjab police, who had been responsible for many human rights abuses during his term of office between 1992 and 1995, had been replaced upon his retirement by his former deputy and intelligence chief.

88. The Government contended that there would be no real risk of Mr Chahal being ill-treated if the deportation order were to be implemented and emphasised that the latter was to be returned to whichever part of India he chose, and not necessarily to Punjab. In this context they pointed out that they regularly monitored the situation in India through the United Kingdom High Commission in New Delhi. It appeared from this information that positive concrete steps had been taken and continued to be taken to deal with human rights abuses. Specific legislation had been introduced in this regard; the National Human Rights Commission, which performed an important function, continued to strengthen and develop; and steps had been taken by both the executive and judicial authorities to deal

with the remaining misuse of power. The situation in India generally was therefore such as to support their above contention.

Furthermore, with reference to the matters set out in paragraphs 45-48 above, they contended that the situation in Punjab had improved substantially in recent years. They stressed that there was now little or no terrorist activity in that State. An ombudsman had been established to look into complaints of misuse of power and the new Chief Minister had publicly declared the government's intentions to stamp out human rights abuses. Legal proceedings had been brought against police officers alleged to have been involved in unlawful activity.

89. Amnesty International in its written submissions informed the Court that prominent Sikh separatists still faced a serious risk of "disappearance", detention without charge or trial, torture and extrajudicial execution, frequently at the hands of the Punjab police. It referred to its 1995 report which documented a pattern of human rights violations committed by officers of the Punjab police acting in under-cover operations outside their home State (see paragraph 55 above).

90. The Government, however, urged the Court to proceed with caution in relation to the material prepared by Amnesty International, since it was not possible to verify the facts of the cases referred to. Furthermore, when studying these reports it was tempting to lose sight of the broader picture of improvement by concentrating too much on individual cases of alleged serious human rights abuses. Finally, since the situation in Punjab had changed considerably in recent years, earlier reports prepared by Amnesty and other organisations were now of limited use.

91. On the basis of the material before it, the Commission accepted that there had been an improvement in the conditions prevailing in India and, more specifically, in Punjab. However, it was unable to find in the recent material provided by the Government any solid evidence that the Punjab police were now under democratic control or that the judiciary had been able fully to reassert its own independent authority in the region.

(ii) Factors specific to Mr Chahal

92. Those appearing before the Court also differed in their assessment of the effect which Mr Chahal 's notoriety would have on his security in India.

In the Government's view, the Indian Government were likely to be astute to ensure that no ill-treatment befell Mr Chahal, knowing that the eyes of the world would be upon him. Furthermore, in June 1992 and December 1995 they had sought and received assurances from the Indian Government (see paragraph 37 above).

93. The applicant asserted that his high profile would increase the danger of persecution. By taking the decision to deport him on national security grounds the Government had, as was noted by Mr Justice Popplewell in the first judicial review hearing (see paragraph 34 above), in effect publicly branded him a terrorist. Articles in the Indian press since 1990 indicated that he was regarded as such in India, and a number of his relatives and acquaintances had been detained and ill-treated in Punjab because of their connection to him. The assurances of the Indian Government were of little value since that Government had shown themselves unable to control the security forces in Punjab and elsewhere. The applicant also referred to examples of well-known personalities who had recently "disappeared".

94. For the Commission, Mr Chahal, as a leading Sikh militant suspected of involvement in acts of terrorism, was likely to be of special interest to the security forces, irrespective of the part of India to which he was returned.

(b) The Court's approach

95. Under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area (see the Cruz Varas and Others judgment mentioned at paragraph 74 above, p. 29, para. 74).

96. However, the Court is not bound by the Commission's findings of fact and is free to make its own assessment. Indeed, in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3) and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Vilvarajah and Others judgment mentioned at paragraph 73 above, p. 36, para. 108).

97. In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3 (art. 3), the Court will assess all the material placed before it and, if necessary, material obtained of its own motion (see the above-mentioned Vilvarajah and Others judgment, p. 36, para. 107). Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case (see paragraph 86 above), it will be necessary to take account of evidence which has come to light since the Commission's review.

98. In view of the Government's proposal to return Mr Chahal to the airport of his choice in India, it is necessary for the Court to evaluate the risk of his being ill-treated with reference to conditions throughout India rather than in Punjab alone. However, it must be borne in mind that the first applicant is a well-known supporter of Sikh separatism. It follows from these observations that evidence relating to the fate of Sikh militants at the hands of the security forces outside the State of Punjab is of particular relevance.

99. The Court has taken note of the Government's comments relating to the material contained in the reports of Amnesty International (see paragraph 90 above). Nonetheless, it attaches weight to some of the most striking allegations contained in those reports, particularly with regard to extrajudicial killings allegedly perpetrated by the Punjab police outside their home State and the action taken by the Indian Supreme Court, the West Bengal State Government and the Union Home Secretary in response (see paragraph 55 above). Moreover, similar assertions were accepted by the United Kingdom Immigration Appeal Tribunal in Charan Singh Gill v. Secretary of State for the Home Department (see paragraph 54 above) and were included in the 1995 United States' State Department report on India (see paragraph 52 above). The 1994 National Human Rights Commission's report on Punjab substantiated the impression of a police force completely beyond the control of lawful authority (see paragraph 49 above).

100. The Court is persuaded by this evidence, which has been corroborated by material from a number of different objective sources, that, until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab.

101. The Commission found in paragraph 111 of its report that there had in recent years been an improvement in the protection of human rights in India, especially in Punjab, and evidence produced subsequent to the Commission's consideration of the case indicates that matters continue to advance.

In particular, it would appear that the insurgent violence in Punjab has abated; the Court notes the very substantial reduction in terrorist-related deaths in the region as indicated by the respondent Government (see paragraph 45 above). Furthermore, other encouraging

events have reportedly taken place in Punjab in recent years, such as the return of democratic elections, a number of court judgments against police officers, the appointment of an ombudsman to investigate abuses of power and the promise of the new Chief Minister to "ensure transparency and accountability" (see paragraphs 46 and 48 above). In addition, the 1996 United States' State Department report asserts that during 1995 "there was visible progress in correcting patterns of abuse by the [Punjab] police" (see paragraph 53 above).

102. Nonetheless, the evidence demonstrates that problems still persist in connection with the observance of human rights by the security forces in Punjab. As the respondent Government themselves recounted, the United Kingdom High Commission in India continues to receive complaints about the Punjab police, although in recent months these have related mainly to extortion rather than to politically motivated abuses (see paragraph 47 above). Amnesty International alleged that "disappearances" of notable Sikhs at the hands of the Punjab police continued sporadically throughout 1995 (see paragraph 56 above) and the 1996 State Department report referred to the killing of two Sikh militants that year (see paragraph 53 above).

103. Moreover, the Court finds it most significant that no concrete evidence has been produced of any fundamental reform or reorganisation of the Punjab police in recent years. The evidence referred to above (paragraphs 49-56) would indicate that such a process was urgently required, and indeed this was the recommendation of the NHRC (see paragraph 49 above). Although there was a change in the leadership of the Punjab police in 1995, the director general who presided over some of the worst abuses this decade has only been replaced by his former deputy and intelligence chief (see paragraph 87 above).

Less than two years ago this same police force was carrying out well-documented raids into other Indian States (see paragraph 100 above) and the Court cannot entirely discount the applicant's claims that any recent reduction in activity stems from the fact that key figures in the campaign for Sikh separatism have all either been killed, forced abroad or rendered inactive by torture or the fear of torture. Furthermore, it would appear from press reports that evidence of the full extent of past abuses is only now coming to light (see paragraph 53 above).

104. Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice (see paragraph 51 above). The NHRC has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India (see paragraph 50 above).

105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem (see paragraph 104 above).

Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.

106. The Court further considers that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise. It is not disputed that Mr Chahal is well known in India to support the cause of Sikh separatism and to have had close links with other leading figures in that struggle (see paragraphs 17 and 20 above). The respondent

Government have made serious, albeit untested, allegations of his involvement in terrorism which are undoubtedly known to the Indian authorities. The Court is of the view that these factors would be likely to make him a target of interest for hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past (see paragraphs 49-56 above).

107. For all the reasons outlined above, in particular the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere, the Court finds it substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 (art. 3) if he is returned to India.

Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3 (art. 3)

[…]

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SAADI v. ITALY

(*Application no. 37201/06*)

JUDGMENT

STRASBOURG

28 February 2008

[…]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1974 and lives in Milan.

10. The applicant, who entered Italy at some unspecified time between 1996 and 1999, held a residence permit issued for "family reasons" by the Bologna police authority (*questura*) on 29 December 2001. This permit was due to expire on 11 October 2002.

A. The criminal proceedings against the applicant in Italy and Tunisia

11. On 9 October 2002 the applicant was arrested on suspicion of involvement in international terrorism (Article 270 *bis* of the Criminal Code), among other offences, and placed in pre-trial detention. He and five others were subsequently committed for trial in the Milan Assize Court.

12. The applicant faced four charges. The first of these was conspiracy to commit acts of violence (including attacks with explosive devices) in States other than Italywith the aim of spreading terror. It was alleged that between December 2001 and September 2002 the applicant had been one of the organisers and leaders of the conspiracy, had laid down its ideological doctrine and given the necessary orders for its objectives to be met. The second charge concerned falsification "of a large number of documents such as passports, driving licences and residence permits". The applicant was also accused of receiving stolen goods and of attempting to aid and abet the entry into Italian territory of an unknown number of aliens in breach of the immigration legislation.

13. At his trial the prosecution called for the applicant to be sentenced to thirteen years' imprisonment. The applicant's lawyer asked the Assize Court to acquit his client of international terrorism and left determination of the other charges to the court's discretion.

14. In a judgment of 9 May 2005, the Milan Assize Court altered the legal classification of the first offence charged. It took the view that the acts of which he stood accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four

years and six months' imprisonment for that offence, and for the forgery and receiving offences. It acquitted the applicant of aiding and abetting clandestine immigration, ruling that the acts he stood accused of had not been committed.

15. As a secondary penalty, the Assize Court banned the applicant from exercising public office for a period of five years and ordered that after serving his sentence he was to be deported.

[…]

C. The diplomatic assurances requested by Italy from Tunisia

51. On 29 May 2007 the Italian embassy in Tunis sent a *note verbale* to the Tunisian government, requesting diplomatic assurances that if the applicant were to be deported to Tunisia he would not be subjected to treatment contrary to Article 3 of the Convention and would not suffer a flagrant denial of justice.

[…]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

95. The applicant submitted that enforcement of his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

96. The Government rejected that argument.

[…]

B. Merits

[…]

1. The parties' submissions

[…]

2. The third-party intervener

117. The United Kingdom Government observed that in *Chahal* (cited above, § 81) the Court had stated the principle that, in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures. The Government observed in that connection that it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community.

118. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond a reasonable doubt, since it was frequently impossible to use confidential sources

or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement, provided only partial protection.

119. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights. According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 § 1 (f) of the Convention authorised the arrest of a person "against whom action is being taken with a view to deportation", and thus recognised the right of States to deport aliens.

120. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations, the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

121. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

122. In the light of the foregoing considerations, the United Kingdom argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was "more likely than not" that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

123. Lastly, the United Kingdom Government emphasised that Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in the above-mentioned *Chahal* case, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable, as had been shown by the opinions of the majority and the minority of the Court in that case, that identical assurances could be interpreted differently.

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*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

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*, 7 July 1989, §§ 90-91, Series A no. 161; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *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*, 18 January 1978, § 163, Series A no. 25; *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, §§ 115-16, ECHR 2006-IX).

[…]

(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, ECHR 2006-IX).

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 *Aydın v. Turkey*, 25 September 1997, § 82, *Reports* 1997-VI, 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 *Shamayev 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 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 127 above). It must therefore reaffirm the principle stated in *Chahal* (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 one 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.

143. In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia (see paragraphs 65-79 above), which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US Department of State (see paragraphs 82-93 above). In particular, these reports mention numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported – said to be often inflicted on persons in police custody with the aim of extorting confessions – include hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Article 3. It is reported that allegations of torture and ill-treatment are not investigated by the competent Tunisian authorities, that they refuse to follow up complaints and that they regularly use confessions obtained under duress to secure convictions (see paragraphs 68, 71, 73-75, 84 and 86 above). Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources (see paragraph 94 above), the Court does not doubt their reliability. Moreover, the Government have not adduced any evidence or reports capable of rebutting the assertions made in the sources cited by the applicant.

144. The applicant was prosecuted in Italy for participation in international terrorism and the deportation order against him was issued by virtue of Legislative Decree no. 144

of 27 July 2005 entitled “urgent measures to combat international terrorism” (see paragraph 32 above). He was also sentenced in Tunisia, in his absence, to twenty years’ imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. The existence of that sentence was confirmed by Amnesty International’s statement of 19 June 2007 (see paragraph 71 above).

145. The Court further notes that the parties do not agree on the question whether the applicant’s trial in Tunisia could be reopened. The applicant asserted that it was not possible for him to appeal against his conviction with suspensive effect, and that, even if he could, the Tunisian authorities could imprison him as a precautionary measure (see paragraph 154 below).

146. In these circumstances, the Court considers that in the present case substantial grounds have been shown for believing that there is a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention if he were to be deported to Tunisia. That risk cannot be excluded on the basis of other material available to the Court. In particular, although it is true that the International Committee of the Red Cross has been able to visit Tunisian prisons, that humanitarian organisation is required to maintain confidentiality about its fieldwork (see paragraph 80 above) and, in spite of an undertaking given in April 2005, similar visiting rights have been refused to the independent human rights protection organisation Human Rights Watch (see paragraphs 76 and 90 above). Moreover, some of the acts of torture reported allegedly took place while the victims were in police custody or pre-trial detention on the premises of the Ministry of the Interior (see paragraphs 86 and 94 above). Consequently, the visits by the International Committee of the Red Cross cannot exclude the risk of subjection to treatment contrary to Article 3 in the present case.

147. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian government asked the Tunisian government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51-52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second *note verbale*, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions” (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.

149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

[…]

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1

Supreme Court of Canada (2002)

Manickavasagam Suresh (Appellant)

v.

The Minister of Citizenship and Immigration and the Attorney General of Canada (Respondents)

and

The United Nations High Commissioner for Refugees,

Amnesty International,

the Canadian Arab Federation,

the Canadian Council for Refugees,

the Federation of Associations of Canadian Tamils,

the Centre for Constitutional Rights,

the Canadian Bar Association and

the Canadian Council of Churches

(Interveners)

Indexed as: Suresh v. Canada (Minister of Citizenship and Immigration)

Neutral citation: 2002 SCC 1.

File No.: 27790.

2001: May 22; 2002: January 11.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Constitutional law — Charter of Rights — Fundamental justice — Immigration — Deportation — Risk of torture — Whether deportation of refugee facing risk of torture contrary to principles of

fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Vagueness — Whether terms "danger to the security of Canada" and "terrorism" in deportation provisions of immigration legislation unconstitutionally vague — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Freedom of expression — Freedom of association — Whether deportation for membership in terrorist organization infringes freedom of association and freedom of expression — Canadian Charter of Rights and Freedoms, ss. 2 (b), 2 (d) — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Procedural safeguards — Immigration — Convention refugee facing risk of torture if deported — Whether procedural safeguards provided to Convention refugee satisfy requirements of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Administrative law — Judicial review — Ministerial decisions — Standard of review — Immigration — Deportation — Approach to be taken in reviewing decisions of Minister of Citizenship and Immigration on whether refugee's presence constitutes danger to security of Canada and whether refugee faces substantial risk of torture upon deportation — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

The appellant is a Convention refugee from Sri Lanka who has applied for landed immigrant status. In 1995, the Canadian government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security Intelligence Service that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka. The Federal Court, Trial Division upheld as reasonable the deportation certificate under s. 40.1 of the Immigration Act and, following a deportation hearing, an adjudicator held that the appellant should be deported. The Minister of Citizenship and Immigration, after notifying the appellant that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(b) of the Act, issued such an opinion on the basis of an immigration officer's memorandum and concluded that he should be deported. Although the appellant had presented written submissions and documentary evidence to the Minister, he had not been provided with a copy of the immigration officer's memorandum, nor was he provided with an opportunity to respond to it orally or in writing. The appellant applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7 , 2 (b) and 2 (d) of the Canadian Charter of Rights and Freedoms .

The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed. The appellant is entitled to a new deportation hearing. The impugned legislation is constitutional.

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the Charter . Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture.

Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The Charter affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12 . Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Article 33 of the Convention Relating to the Status of Refugees, which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to everyone. International law generally rejects deportation to torture, even where national security interests are at stake.

In exercising the discretion conferred by s. 53(1)(b) of the Immigration Act, the Minister must conform to the principles of fundamental justice under s. 7 . Insofar as the Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. Applying these principles, s. 53(1)(b) does not violate s. 7 of the Charter .

The terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. The term "danger to the security of Canada" in deportation legislation must be given a fair, large and liberal interpretation in accordance with international norms. A person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm. Properly defined, the term "danger to the security of Canada" gives those who might come within the ambit of s. 53 fair

notice of the consequences of their conduct, while adequately limiting law enforcement discretion. While there is no authoritative definition of the term “terrorism” as found in s. 19 of the Immigration Act, it is sufficiently settled to permit legal adjudication. Following the International Convention for the Suppression of the Financing of Terrorism, “terrorism” in s. 19 of the Act includes any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

Section 19 of the Immigration Act, defining the class of persons who may be deported because they constitute a danger to the security of Canada, as incorporated into s. 53 of the Act, does not breach the appellant’s constitutional rights of free expression and association. The Minister’s discretion to deport under s. 53 is confined to persons who pose a threat to the security of Canada and have been engaged in violence or activities directed at violence. Expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter under the Charter . Provided that the Minister exercises her discretion in accordance with the Act, the guarantees of free expression and free association are not violated.

Section 7 of the Charter does not require the Minister to conduct a full oral hearing or judicial process. However, a refugee facing deportation to torture under s. 53(1) (b) must be informed of the case to be met. Subject to privilege and other valid reasons for reduced disclosure, the material on which the Minister bases her decision must be provided to the refugee. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister’s information. The refugee is entitled to present evidence and make submissions on: whether his or her continued presence in Canada will be detrimental to Canada under s. 19 of the Act; the risk of torture upon return; and the value of assurances of non-torture by foreign governments. The Minister must provide written reasons for her decision dealing with all relevant issues. These procedural protections apply where the refugee has met the threshold of establishing a prima facie case that there may be a risk of torture upon deportation. The appellant has met this threshold. Since he was denied the required procedural safeguards and the denial cannot be justified under s. 1 of the Charter , the case is remanded to the Minister for reconsideration.

Although it is unnecessary in this case to review the Minister’s decisions on deportation, where such a review is necessary the reviewing court should generally adopt a deferential approach to the Minister’s decision on whether a refugee’s presence constitutes a danger to the security of Canada. This discretionary decision may only be set aside if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. Likewise, the Minister’s decision on whether a refugee faces a substantial risk of torture upon deportation should be overturned only if it is not supported on the evidence or fails to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.