Saadi v Italy: the rules of the game have not changed

Moeckli, D
Since 11 September 2001 it has become almost a mantra that the legal parameters need to be adapted to the new threat situation. The debate on the response to international terrorism has been dominated by calls for 'striking a new balance' in the face of 'new and different dangers' and for '[f]itting the law to this unwanted new world'. It was in this vein that, after the London bombings of 7 July 2005, the then-British Prime Minister announced, 'Let no-one be in any doubt, the rules of the game are changing.' Whilst this was primarily a reference to a change in the rules on the deportation of suspected terrorists and other new domestic legislation, the Prime Minister also suggested that there was a need for a different interpretation of the international legal framework ‘in view of the changed conditions in Britain’.

His Home Secretary spelled out this argument more clearly in a speech to the European Parliament, held in September 2005:

[O]n behalf of the UK Government I also want to say that we believe that it is necessary to look very carefully at the way in which the jurisprudence around application of the European Convention on Human Rights is developing. This Convention, established over 50 years ago in a quite different international climate, has led to great advances in human rights across the continent. … But I believe that in developing these human rights it really is necessary to balance very important rights for individuals against the collective right for security against those who attack us through terrorist violence. … The view of my Government is that this balance is not right for the circumstances which we now face – circumstances very different from those faced by the founding fathers of the European Convention on Human Rights – and that it needs to be closely examined in that context.

The main target of the British government’s efforts to ‘rebalance’ the European Convention on Human Rights (ECHR), it turned out, was Article 3, the prohibition of torture and inhuman or degrading treatment. According to the long-established case-

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3 Prime Minister’s press conference, 5 August 2005.
4 Ibid.
law of the European Court of Human Rights (ECtHR or Court), this prohibition is absolute. In *Saadi v Italy*, the Court had to decide whether it should change its interpretation of Article 3 in view of the ‘quite different international climate’.

1. **The Chahal Principle**

Given that *Saadi* concerned the claim that the ‘rules of the game’, in particular those under Article 3 of the ECHR, need to be amended, it is appropriate to first briefly recall what these rules are.

In *Soering v United Kingdom*, decided in 1989, the ECtHR established the principle that a contracting state is in violation of its obligations under the ECHR if it exposes a person to the likelihood of treatment contrary to Article 3 in a place outside its own jurisdiction. The case concerned the planned extradition of a German national to the United States where he might have faced ‘death row phenomenon’. The Court held:

> [T]he decision by a Contracting State to extradite a fugitive 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 extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.

In coming to this conclusion, the ECtHR referred to the need to ensure the effectiveness of the safeguard provided by Article 3. Two years later, the Court extended the *Soering* principle to cases of expulsion and deportation.

In 1996, in *Chahal v United Kingdom*, the ECtHR made it clear that the prohibition of deportation to face treatment contrary to Article 3 is absolute. The fact that Chahal was alleged to be a Sikh terrorist whose deportation to India was required to protect the security of the United Kingdom was held to be an irrelevant factor in the application of the *Soering* principle:

> [T]he 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, 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. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. … In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.

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6 See below, Section 1.
7 Judgment of 28 February 2008, Application No. 37201/06.
9 Ibid. at para. 91.
10 Ibid. at para. 90.
11 Cruz Varas and others v Sweden (1992) 14 EHRR 1 at para. 70.
12 (1997) 23 EHRR 413.
13 Ibid. at paras 79-80.
The Court has since reaffirmed the absolute nature of Article 3, including in the context of expulsions, in several cases. The principle that the prohibition against return to ill-treatment is absolute is equally part of the settled case-law of other regional and international human rights bodies.

As in recent years the question of how to deal with foreign nationals who may be involved in terrorist activities has attracted increasing public attention, several states, foremost among them the United Kingdom, have tried to overcome the restraints of *Chahal*. They have done this in two ways.

First, they have adopted a policy of seeking diplomatic assurances from states notorious for practising torture that the terrorist suspects to be deported will not be subjected to ill-treatment. The United Kingdom has concluded agreements that systematise the use of such diplomatic assurances with Jordan, Libya, Lebanon and Algeria, negotiations to conclude similar agreements with other states are proceeding. Diplomatic assurances have also been relied on by other states, for instance, Sweden. To give further support to this policy, the British government, together with several other states, launched an initiative within the Council of Europe to develop an international instrument that would set minimum standards for the use of diplomatic assurances. The Council of Europe’s Group of Specialists on Human Rights has prepared a “Draft Instrument to Protect Persons Subject to Deportation from Ill-Treatment”.

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19 *Hansard*, HL Vol. 696, Col. WA 181 (4 December 2007) (The Minister of State, Foreign and Commonwealth Office (Lord Malloch-Brown)).

20 Ibid.


Rights and the Fight against Terrorism, however, rejected this proposal because, among other reasons, it believed that 'such an instrument could be seen as weakening the absolute nature of the prohibition of torture or as a Council of Europe legitimisation of the use of diplomatic assurances.’23 The United Kingdom has now turned to the European Union in its efforts to receive international endorsement of its diplomatic assurances policy.24

Second, as indicated in the introduction, the British government and its allies mounted an attack on the Chahal ruling itself. The Prime Minister made it clear after the London bombings that he would be prepared to introduce legislation requiring British judges to interpret Article 3 of the ECHR more restrictively than the ECtHR has.25 However, since this would of course involve the risk of a challenge in Strasbourg, the government also initiated a concerted attempt to persuade the ECtHR to change its case-law on Article 3. Together with the governments of Lithuania, Portugal and Slovakia, it intervened as a third party, in accordance with Article 36(2) of the ECHR, in two cases involving planned deportations by the Netherlands: Ramzy v the Netherlands26 and A v the Netherlands.27 Before these cases could be heard, another case raising the same issue, which had in fact been filed later, was ready for decision: Saadi v Italy.28 This time, only the United Kingdom intervened, submitting the same written observations as in the Dutch cases.29

2. Facts of the Case

Nassim Saadi is a Tunisian national who entered Italy at some unspecified time between 1996 and 1999. He married an Italian woman with whom he has a child. In 2001 he was granted a residence permit for family reasons.

In October 2002 Saadi was arrested on suspicion of involvement in international terrorism. He was charged with conspiracy to commit acts of violence (including attacks with explosive devices) in states other than Italy with the aim of spreading terror and a number of other offences. In a judgment of 9 May 2005 the Milan Assize Court altered the legal classification of the first offence from international terrorism to criminal conspiracy. It sentenced Saadi to four years and six months’ imprisonment for that offence, for forgery and for receiving stolen goods, while acquitting him of aiding and abetting clandestine immigration. The court ordered that, after serving his sentence, Saadi was to be deported. Two days later, on 11 May 2005, a military court in Tunis sentenced Saadi in his absence to 20 years’ imprisonment for membership of a terrorist organisation operating abroad and for incitement to terrorism. According to Saadi, he did not learn of his conviction until, the judgment having become final, it was served on his father on 2 July 2005.

25 Supra n. 3.
26 Application No. 25424/05.
27 Application No. 4900/06.
28 See Saadi v Italy, supra n. 7, Concurring Opinion of Judge Myjer, Joined by Judge Zagrebelsky.
In August 2006, after having been imprisoned uninterruptedly since October 2002, Saadi was released. The Minister of the Interior immediately ordered him to be deported to Tunisia because ‘it was apparent from the documents in the file’\(^{30}\) that he was disturbing public order and threatening national security. Saadi was taken to a temporary holding centre in Milan. His deportation order was confirmed by the Milan justice of the peace. On 14 September 2006 Saadi lodged an application with the ECtHR and asked the Court, as an interim measure according to Rule 39 of the Rules of Court, to suspend or annul the decision to deport him to Tunisia. On 5 October 2006 the Court asked the Italian government to stay Saadi’s expulsion until further notice. In March 2007 a Chamber of the Court’s Third Section, which had been allocated the case, relinquished jurisdiction in favour of the Grand Chamber.

In May 2007 the Italian government asked the Tunisian government for diplomatic assurances that if Saadi were to be deported to Tunisia, he would not be subjected to treatment contrary to Article 3 of the ECHR and would not suffer a flagrant denial of justice. In particular, the Italian government asked for assurances that Saadi has a right to appeal against the judgment of the Tunis military court and that, if he were sent to prison, he would be able to receive visits from his lawyers and family members. The Italian government stressed that ‘this case forms a precedent (in relation to numerous other pending cases) and – we are convinced – a positive response by the Tunisian authorities will make it easier to carry out further expulsions in future.’\(^{31}\) The Tunisian Minister of Foreign Affairs replied as follows:

The Minister of Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.\(^{32}\)

3. Submissions of the Parties

Saadi submitted that enforcement of the deportation order would expose him to the risk of being subjected to treatment contrary to Article 3 of the ECHR. He argued that terrorist suspects, in particular those connected with Islamist fundamentalism, are frequently tortured in Tunisia. His family in Tunisia had received a number of visits from the police and was constantly subject to threats and provocations. A mere reminder of the treaties signed by Tunisia was not sufficient to ensure protection against the risk of ill-treatment. Furthermore, he asserted that his expulsion would expose him to the risk of a flagrant denial of justice in violation of Article 6 of the ECHR. The criminal proceedings against him before the Tunisian military court had not been fair and an appeal was no longer possible. Finally, he argued that his deportation to Tunisia would disrupt his family life in Italy and thus violate Article 8 of the Convention.

The submissions of the Italian government mainly dealt with the specific circumstances of Saadi’s case, in particular the question of whether he was at risk of ill-treatment. The more fundamental arguments for a change in the ECtHR’s case-law were put forward by the United Kingdom, joined in this respect by Italy. Italy argued that Saadi had only described an allegedly general situation in Tunisia but not

\(^{30}\) Saadi v Italy, supra n. 7 at para. 32.

\(^{31}\) Ibid. at para. 52.

\(^{32}\) Ibid. at para. 55.
supplied appropriate evidence or precise information corroborating that he would be exposed to a risk of ill-treatment if deported. The reports of human rights organisations and the US State Department that the applicant had produced did not demonstrate that persons deported to Tunisia are subject to ill-treatment as a regular practice. In fact, the situation in the country was, by and large, not very different from that in certain states that were signatories to the ECHR. Tunisia had ratified numerous human rights treaties, and it could be presumed that it would not default on its international obligations. Furthermore, the Italian government submitted, in view of the scale of the terrorist threat in the world today, the ‘benefit of the doubt’ should be given to a state which intends to deport a person for reasons of national security. Finally, Italy had sought diplomatic assurances and Tunisia had given an undertaking to apply in the present case the relevant Tunisian law, which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner’s lawyer and family. With regard to the alleged violation of Article 6, the Italian government asserted that the applicant has to prove that the feared denial of justice is ‘flagrant’ and that such proof has not been produced. Finally, any interference with Saadi’s right to respect for his family life pursued a legitimate aim and was proportionate.

In its submissions as third-party intervener the British government focused exclusively on the Article 3 issue, arguing that the ECtHR’s approach adopted in the Chahal case was too ‘rigid’ and therefore had to be ‘altered and clarified’. Terrorism, the government noted, seriously endangers the right to life. The contracting states therefore had an obligation to protect everyone within their jurisdiction from terrorist acts. However, the consequence of the Chahal judgment was that states were prevented from removing foreign terrorist suspects if there was a real risk of ill-treatment in the receiving state. Alternative ways of protecting the public from these people did not always exist. Criminal prosecution might not be possible because the individual concerned might not commit any offence or because it might be difficult to establish their involvement in terrorism beyond reasonable doubt, especially as it was often impossible to use intelligence information in criminal proceedings. Other, preventive, measures, such as surveillance or restrictions of the freedom of movement, at best provided partial protection.

The United Kingdom further argued that while it was true that Article 3 is absolute, in the event of expulsion the treatment in question would be inflicted not by the signatory state but another state. Thus, the signatory state was only bound by an ‘implied positive obligation’ to prevent treatment contrary to Article 3. Yet when it came to implied positive obligations, the Court had accepted that there is a need to strike a fair balance between the rights of the individual and the interests of the community. The different factors at issue in expulsion cases were of a relative nature: the degree of risk in the receiving country depended on a speculative assessment; treatment falling within Article 3 could range from torture to degrading treatment; and the nature of the threat posed by an individual to the signatory state also varied significantly. In light of this, the Chahal approach had to be adapted in two respects. First, the threat posed by the person to be deported should be a relevant factor to be weighed against the possibility and nature of the potential ill-treatment. Second, national security considerations should influence the standard of proof to be met by the applicant. If the state adduced evidence of a national security threat, those to be deported had to produce stronger evidence to prove that they would be at risk of ill-

33 Ibid. at para. 120.
treatment in the receiving country: they had to prove that it was ‘more likely than not’ that they would be subjected to treatment contrary to Article 3.

4. Decision of the Grand Chamber

After having set out the general principles emerging from its case-law on Article 3 in the context of expulsions, the Court first of all acknowledged ‘that States face immense difficulties in modern times in protecting their communities from terrorist violence.’ Although this may at first appear to be a reference to the post-September 11 situation, the statement is in fact taken almost word-for-word from Chahal. The Grand Chamber then addressed, first, in more or less detail, the United Kingdom’s different arguments for a fundamental change in its case-law on Article 3, next, the question as to the existence of a risk of ill-treatment in the present case and, finally, the Articles 6 and 8 issues.

A. The right to life argument

The United Kingdom’s argument that states have an obligation to protect the life of their citizens from terrorist violence was largely ignored by the ECtHR. Only Judge Myjer in his Concurring Opinion addressed this point, stressing that whilst this was true, states were not allowed to combat terrorism at all costs. The Court was, in my view, right to pay no attention to the right to life argument. It has become fashionable in recent years to re-conceptualise all sorts of values, and in particular security, as a human rights issue. For governments, this is a very appealing course of action – repressive state measures suddenly appear much more attractive when they are presented as a means of protecting the now often-invoked ‘right of people to go about their lives free from fear’. Yet the invocation of the right to life is nothing more than an attempt by governments to appropriate human rights language for their own purposes and does not help to address the relevant legal issue. The question is not whether states should, or should not, do something about terrorism but, as pointed out by Judge Myjer, how far they are allowed to go in doing so. To frame the issue in terms of ‘protection of the right to life’ instead of ‘protection of national security’ does not contribute anything to answering that question.

B. The ‘implied positive obligation’ argument

The Court was equally unimpressed by the argument that, in the context of expulsions, the signatory state’s obligation under Article 3 was only an ‘implied positive obligation’ and that therefore the applicant’s rights must be weighed against the interests of the community. Without directly addressing the nature of the obligation, the Grand Chamber refused to draw a distinction between treatment inflicted directly by a signatory state and treatment that might be inflicted by another state. Since protection against treatment contrary to Article 3 is absolute, the Court observed, there is an obligation not to expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. This must be the correct conclusion. It is not clear why there should be a difference between the state’s obligation not to mistreat a person and the state’s ‘implied positive obligation’ not to expose a person

34 Ibid. at para. 137.
35 Supra n. 12 at para. 79 (‘The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence.’)
to the risk of ill-treatment. In fact, the latter, it seems to me, is not a positive obligation at all: it is, just like the obligation not to mistreat a person, an obligation to refrain from doing something, that is, a negative obligation.\textsuperscript{36}

C. The balancing argument

At the heart of the British government’s submissions in \textit{Saadi}, and, as explained above, its general approach to counter-terrorism, was and is the contention that, in the face of the current threat from terrorism, a new balance must be struck between individual rights and collective security. Accordingly, as far as expulsions are concerned, the risk of ill-treatment should, according to the government, be weighed against the threat posed by the person in question. This is an argument that was made by a minority of seven dissenting judges in the \textit{Chahal} case.\textsuperscript{37} However, the Grand Chamber in \textit{Saadi} unanimously and emphatically rejected that position and reaffirmed the majority’s view in \textit{Chahal} that the conduct of the person concerned is irrelevant:

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.\textsuperscript{38}

The result reached by the Court is the only possible logical conclusion. Neither the minority in \textit{Chahal} nor the United Kingdom in \textit{Saadi} provided a reasonable explanation as to why, in the context of expulsions, a balancing requirement should be implied into Article 3 when this provision, as opposed to other Convention rights, does not refer to the proportionality test and is expressly listed as non-derogable.\textsuperscript{39} The British government suggested that the need for balancing follows from the fact that the concepts of ‘risk’ and ‘dangerousness’ are of a ‘relative nature’ and involve a speculative assessment. With all due respect, this argument is bizarre. Just because two concepts are relative in the sense that they may vary and depend on predictions does not mean that they should be balanced against each other. The real reason for the attempt to bring ‘dangerousness’ into the equation is that states are, understandably, keen to remove potentially dangerous people from their territory. Yet as far as absolute rights such as Article 3 are concerned, the ECHR makes it clear that state interests cannot be taken into account – there is no scope for balancing. As Judge Zupančič concluded quite harshly, but not unfairly, in his Concurring Opinion, ‘[t]he police logic advanced by the intervening Contracting State simply does not hold water.’\textsuperscript{40}

\textsuperscript{36} See also \textit{R (Limbuela) v Secretary of State for the Home Department} [2004] EWCA Civ 540 at para. 64.

\textsuperscript{37} Supra n. 12, Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits at para. 1.

\textsuperscript{38} Supra n. 7 at para. 139.

\textsuperscript{39} See ECHR, Art. 15(2).

\textsuperscript{40} Supra n. 7, Concurring Opinion of Judge Zupančič at para. 2.
D. The Higher Standard of Proof Argument

According to Soering, Article 3 prevents the removal of a person whenever ‘substantial grounds have been shown for believing’ that there is a ‘real risk’ that that person will be subjected in the receiving country to treatment prohibited by Article 3. The United Kingdom argued that where an applicant poses a threat to national security, the standard of proof should be modified and the applicant should be required to adduce stronger evidence that there is a risk of ill-treatment.

This argument is as obscure – and, even worse, to use Judge Župančič’s words, ‘intellectually dishonest’ – as the balancing argument. As the elements of ‘risk of ill-treatment’ and ‘dangerousness’ have nothing to do with each other, there is no reason why the standard of proof required to establish the former should depend on the latter. Effectively, what the whole talk about the ‘relative nature of the factors in issue’ boils down to is the argument that applying a higher standard of proof would serve national security as it would make it easier to deport potentially dangerous individuals. However, ‘[t]he spirit of the ECHR is precisely the opposite, i.e. the Convention is conceived to block such short circuit logic and protect the individual from the unbridled “interest” of the executive branch.’ Accordingly, the Grand Chamber rejected the British government’s position also in this respect:

[S]uch an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is ‘more likely than not’.

E. Risk of ill-treatment

After having rejected the British government’s attempt to undermine the absolute nature of Article 3, the ECtHR went on to consider whether there were ‘substantial grounds for believing’ that there is a ‘real risk’ that Saadi would be mistreated if deported to Tunisia. The Court acknowledged that the assessment of this risk is ‘to some degree speculative’. However, it also stressed that its case-law demonstrates that ‘it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment’ and rightly observed that it has only rarely reached the conclusion that an expulsion would be contrary to Article 3.

As in several previous cases, the ECtHR heavily relied on reports of human rights organisations, in the present case Amnesty International and Human Rights Watch, to establish the general human rights situation in the country of destination.

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41 Ibid.
42 Written observations of the United Kingdom, supra n. 29 at 5.
43 Supra n. 7, Concurring Opinion of Judge Župančič at para. 2.
44 Supra n. 7 at para. 140.
45 Ibid. at para. 142.
46 Ibid. Reference was made to Jabari v Turkey, Judgment of 11 July 2000, Application No. 40035/98.
47 See, e.g., Chahal v United Kingdom, supra n. 12 at paras 99-104; Mamatkulov and Askarov v Turkey, Judgment of 4 February 2005, Application Nos 46827/99 and 46951/99 at para. 72; Said v the Netherlands, Judgment of 5 October 2005, Application No. 2345/02 at paras 51 and 54.
These reports, which were corroborated by the report of the US State Department, indicated that in Tunisia suspected terrorists were tortured and mistreated on a regular basis. Referring to the authority and reputation of the authors of the reports and the seriousness of the investigations by which they were compiled, the Court did not doubt their reliability. Further observing that Saadi had been prosecuted in Italy for participation in international terrorism, that the deportation order against him had been issued on national security grounds and that he had been sentenced in Tunisia for membership of a terrorist organisation, the Grand Chamber concluded that substantial grounds had been shown for believing that there is a real risk that he would be subjected to ill-treatment if deported to Tunisia. Consequently, it held that the decision to deport Saadi would breach Article 3 of the Convention if it were enforced.

F. Diplomatic Assurances

In coming to this conclusion, the Court also noted that the risk of ill-treatment was not displaced by the existence of an exchange of notes between the Italian government and the Tunisian Ministry of Foreign Affairs. All that Tunisia had confirmed was that Tunisian laws guaranteed prisoners’ rights and that it had acceded to the relevant international treaties and conventions. This confirmation was not the assurance the Italian government had asked for and not sufficient to ensure adequate protection against the risk of ill-treatment. Thus, the ECtHR did not have to answer the question of whether diplomatic assurances that explicitly state that the deported person will not be tortured or mistreated can provide ‘adequate protection’. As explained above, several states, including the United Kingdom, have adopted a policy of seeking such assurances to carry out deportations to states that are notorious for practising torture, and it seems likely that the Court, sooner or later, will have to confront the issue. The Grand Chamber in Saadi did, however, make the following comment:

[I]t 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. ... The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time. 48

This is basically a summary of the Court’s previous case-law, according to which the reliability and effectiveness of diplomatic assurances must be assessed in the context of the particular case at hand. For example, in Mamatkulov and Askarov v Turkey the ECtHR found that the extradition of the applicants based on an assurance by the Uzbek government that they would not be subjected to torture did not violate Article 3, 49 whereas in Chahal it was not persuaded that the assurance provided by the Indian government would be an adequate guarantee against the risk of ill-treatment. 50

In recent decisions concerning the expulsion of terrorist suspects to Egypt, the UN Human Rights Committee and the UN Committee against Torture have adopted a similar position. Both committees evaluated the mechanisms for monitoring the enforcement of the diplomatic assurances in question, concluding that they were not

48 Supra n. 7 at para. 148.
49 Supra n. 47 at paras 76-7.
50 Supra n. 12 at para. 105.
sufficient to eliminate the risk of ill-treatment in the cases at hand.\textsuperscript{51} The UN Special Rapporteur on Torture has gone further than this in his criticism of diplomatic assurances. He has observed that such assurances are unreliable and ineffective in the protection against torture and ill-treatment, that they are usually sought from states where the practice of torture is systematic and that post-return monitoring mechanisms have proven to be no guarantee against torture.\textsuperscript{52} He therefore concluded that ‘States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.’\textsuperscript{53} In contrast, the ECtHR’s statement in \textit{Saadi} seems to suggest that, depending on the circumstances, it may consider diplomatic assurances to be a sufficient guarantee against the risk of ill-treatment.

G. Articles 6 and 8

The ECtHR has repeatedly stated that an expulsion or extradition might raise an issue under Article 6 of the ECHR where the individual being expelled has suffered or risks suffering a ‘flagrant denial of a fair trial’ in the receiving country.\textsuperscript{54} However, the Court has not fully explained in its jurisprudence what constitutes a ‘flagrant denial of a fair trial’ and it has not to date actually found an expulsion, or potential expulsion, to be in violation of Article 6.\textsuperscript{55} Given that Saadi had been convicted by a Tunisian military court and that, at least according to him, defendants in such proceedings do not have the possibility of adducing evidence, appointing a lawyer or addressing the court, his case would have offered the Court a good opportunity to elaborate the concept of ‘flagrant denial of a fair trial’. Yet the Grand Chamber rather elegantly avoided the issue:

The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention. Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 6 of the Convention.\textsuperscript{56}

Saadi’s claim that his expulsion to Tunisia would amount to a violation of his right to respect for family life under Article 8 was disposed of in the same way.

5. Conclusion


\textsuperscript{52} Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, UN Doc. A/60/316 at paras 46 and 51.

\textsuperscript{53} Ibid. at para. 51.

\textsuperscript{54} E.g., \textit{Soering v United Kingdom}, supra n. 8 at para. 113; \textit{Drozd and Janousek v France and Spain}, Judgment of 26 June 1992, Application No. 12747/87 at para. 110.

\textsuperscript{55} But see \textit{Mamatkulov and Askarov v Turkey}, supra n. 47, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan at para. 19.

\textsuperscript{56} Supra n. 7 at para. 160.
Human rights organisations hailed the Saadi judgment as a ‘major reassertion of the importance of the rule of law’ \(^{57}\) and a ‘landmark ruling’. \(^{58}\) In the current climate, where the consensus against torture is being challenged by governments and academics alike, \(^{59}\) the unequivocal reaffirmation of the absolute nature of the prohibition of torture and inhuman treatment by the most influential regional human rights body is indeed welcome and timely. Whereas, for instance, the Canadian Supreme Court has ‘not exclude[d] the possibility that in exceptional circumstances, deportation to face torture’ might be compatible with the Canadian Charter of Rights and Freedoms, \(^{60}\) the ECtHR has decisively rejected the British-led attempt to imply, in the deportation context, a balancing requirement into Article 3 of the ECHR. What made the attempt to overturn Chahal so dangerous is that it would effectively create a distinction between cases of domestic and foreign terrorist suspects: for the former, the prohibition of torture would still be absolute, whereas the latter could be exposed to the risk of ill-treatment. Such a position implies, as Judge Zupančič rightly pointed out, that foreign terrorist suspects ‘do not deserve human rights … because they are less human’ \(^{61}\) and thus represents an attack on the very idea of human rights.

At the same time, it is difficult to see how the ECtHR could have come to a different conclusion, and the result it reached is the one that most observers had predicted. \(^{62}\) Of course, the Court can depart from its previous case-law and it has done so before. \(^{63}\) However, it will only do so if there is a ‘cogent reason’. \(^{64}\) All there was in Saadi was, in the end, the assertion that the ‘international climate’ has changed and so the ‘rules of the game’ must be changed as well. Given the unambiguous wording of Article 3, this argument was easy to defuse for the Court:

Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time [the time of the Chahal judgment], that circumstance would not call into question the conclusions of the Chahal judgment concerning the consequences of the absolute nature of Article 3. \(^{65}\)

In this sense, if Saadi is indeed a ‘landmark ruling’, then this is so not so much because of what the Court said but because the judgment was handed down in the face of constant calls for a ‘new balance’. The more difficult issues arising from states’ attempts to deport terrorist suspects – such as the relevance of diplomatic assurances

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\(^{58}\) Amnesty International Australia, ‘European Court Reaffirms Ban on Torture’, 3 March 2008.


\(^{60}\) Saresh v Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 78.

\(^{61}\) Supra n. 7, Concurring Opinion of Judge Zupančič at para. 2.


\(^{63}\) See, e.g., Stafford v United Kingdom, (2002) 35 EHRR 32.

\(^{64}\) Ibid. at para. 68.

\(^{65}\) Supra n. 7 at para. 141.
or the notion of a ‘flagrant denial of justice’ in the receiving country – are still to be addressed by the Court.