

Saadi v. Italy: Preventing Deportation Under Article 3 and National Security Concerns: The European Court of Human Rights Struggles To Find a Balance

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I. OVERVIEW

Nassim Saadi, a Tunisian national living in Italy with a residence permit, was arrested on October 9, 2002, for suspected involvement in international terrorism along with five accomplices, all of whom had links to Islamic fundamentalist groups.¹ He was charged in the Milan Assize Court with “conspiracy to commit acts of violence” with the aim of spreading terror, falsification of documents, receiving stolen goods, and aiding and abetting illegal entry into Italy.² The court converted the charge of international terrorism, along with the forgery and receiving stolen property charges, and sentenced the defendant to four years and six months in prison for criminal conspiracy.³ The terrorism charge was converted because review of the evidence revealed gaps in proof of specific terrorist activities.⁴ The court could not determine whether the violent acts that Saadi and his accomplices were planning were intended to be part of an armed conflict, and there was no evidence to prove beyond a reasonable doubt that they had begun to enact their plan or that they supported others with terrorist activities.⁵ Although the court knew Saadi had links to Islamic fundamentalist circles and had proof that they were planning a “football match” to “strengthen their faith in God,” it could not crack the code, so the court failed to establish the planned activity.⁶ The court found that his visits to Iran, support of his brother’s “martyrdom,” and expressed “intention to take part in holy war” were not

1. Saadi v. Italy, App. No. 37201/06, paras. 1, 9-11, 18 (Eur. Ct. H.R. Feb. 28, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink; search “Application Number 37201/06”).

2. *Id.* para. 12.

3. *Id.* para. 14.

4. *Id.* paras. 16-21.

5. *Id.* paras. 17-18.

6. *Id.* para. 19.

sufficient evidence to prove participation in a terrorist organization.⁷ Upon Saadi's release from prison in August 2006, Italy's Minister of the Interior ordered him deported to Tunisia because of his participation in activities related to Islamic fundamentalist groups.⁸

Saadi requested political asylum on the grounds that he would likely be tortured by the Tunisian Government and punished for his political and religious views, a contention supported by letters from the World Organisation Against Torture and the Collective of the Tunisian Community in Europe.⁹ Saadi was denied asylum despite having been convicted in absentia by a military court in Tunisia,¹⁰ but Saadi successfully requested an interim order from the European Court of Human Rights staying his deportation to Tunisia until further notice.¹¹ He was released from detention on October 7, 2006, but a new expulsion order was brought against him for deportation to France instead of Tunisia, and he was redetained in a temporary facility.¹² When it became clear that he could not be deported to France, he was released from detention but forbidden to leave Italy.¹³ The European Court of Human Rights *held* that Saadi could not be deported to Tunisia because this would be a violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). *Saadi v. Italy*, App. No. 37201/06, para. 149 (Eur. Ct. H.R. Feb. 28, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search "Application Number 37201/06").

II. BACKGROUND

Article 3 of the European Convention on Human Rights states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁴ The European Court of Human Rights has held that article 3 not only prohibits contracting states from subjecting anyone to treatment contrary to article 3 within their own borders, but also imposes a duty not to deport aliens to a nonsignatory state where

7. *Id.* paras. 20-21.

8. *Id.* para. 32.

9. *Id.* paras. 35-37.

10. *Id.* paras. 35, 39, 41.

11. *Id.* paras. 39, 41.

12. *Id.* para. 42.

13. *Id.* para. 43.

14. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

they would likely be subjected to such treatment.¹⁵ The Court has recognized that states have the general right under international law “to control the entry, residence and expulsion of aliens” and that “the right to political asylum is not contained in either the Convention or its Protocols.”¹⁶ However, the European Convention on Human Rights implies an obligation not to deport or extradite an individual when doing so risks subjecting that individual to treatment contrary to article 3.¹⁷ Today, this absolute prohibition of subjection to such treatment creates a duty not to deport individuals where such ill-treatment is a real risk, even when the individual is a perceived threat to national security and is linked to international terrorism.¹⁸

Before concerns of terrorism dominated the international arena, the Court solidified the absolute nature of article 3 in *Soering v. United Kingdom*. In that case, a German man was captured in England after murdering his girlfriend’s parents in America.¹⁹ American authorities refused to guarantee that they would not seek the death penalty for Soering, and because of the circumstances of his crime, he was likely to be eligible for the death penalty under the laws of the State of Virginia.²⁰ The United Kingdom argued that American treatment of Soering for crimes committed in the United States was outside of the United Kingdom’s jurisdiction and that treatment contrary to article 3 by the receiving state should not invoke the responsibility of the extraditing state.²¹ The Court disagreed, noting that the responsibility of the contracting state is triggered whenever there is a serious risk of “torture or . . . inhuman or degrading treatment or punishment” under article 3.²² The Court considered the United Kingdom’s reading of the article to undermine the spirit of the European Convention on Human Rights by allowing for the transfer of an individual to a state “where there were substantial grounds for believing that he would be in danger of being subjected to torture.”²³

Although all involved parties agreed “that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under . . . Article 3,” the Court determined that there was a

15. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 32 (1989).

16. *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1853.

17. *Id.*

18. *Id.* at 1855.

19. *Soering*, 161 Eur. Ct. H.R. at 11.

20. *Id.* at 37.

21. *Id.* at 32.

22. *Id.* at 34-35 (quoting European Convention on Human Rights, *supra* note 14, art. 3).

23. *Id.* at 35.

real risk of treatment contrary to article 3 because of the general circumstances of the “death row phenomenon” and because of the specific hardships that Soering would undergo during the process.²⁴ The Court refused to consider how “heinous the crime allegedly committed” was, finding that regardless of the crime, states had the same duty to uphold the values of the European Convention on Human Rights and not to act “contrary to the spirit and intendment of the Article.”²⁵

Article 3 allows for no exceptions or derogations from the prohibition against this conduct, even during times of war or national emergencies, and provides an “absolute prohibition of torture and of inhuman or degrading treatment or punishment.”²⁶ Such prohibition “enshrines one of the fundamental values of the democratic societies making up the Council of Europe” and is found in other instruments, such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, which contain similar terms regarding this “internationally accepted standard.”²⁷ Given this absolute rule, when Soering was faced with “a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country,” article 3 engaged the responsibility of the United Kingdom not to expose him to such treatment and, thus, not to extradite him to the United States.²⁸ Even at this early juncture, however, the Court realized there must be a balance between this absolute rule and national security concerns.²⁹ As international travel becomes easier, the Court noted, all nations must work not to create safe havens for fugitives, and fleeing criminals must be brought to justice.³⁰

After *Soering* solidified the duty not to deport or extradite an individual where there was a real risk that conduct contrary to article 3 would occur, later cases allowed the Court to clarify the standard for determining what constitutes a “real risk.”³¹ In *Vilvarajah v. United Kingdom*, several Sri Lankan applicants were returned to Sri Lanka from the United Kingdom and were then allowed to reenter the United Kingdom after demonstrating the real risk they were facing in their home

24. *Id.* at 40-43.

25. *Id.* at 35.

26. *Id.* at 34.

27. *Id.*

28. *Id.* 35-36.

29. *Id.* at 35.

30. *Id.*

31. *Id.*; see *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) at 36-37 (1991); *Jabari v. Turkey*, 2000-VIII Eur. Ct. H.R. 149, 160.

country.³² For a determination of whether they would face a real risk if deported, the Court assessed the risk at the time the case was being decided and made a decision “in light of all the material placed before it, or if necessary, material obtained *proprio motu* [on its own motion].”³³ The Court assessed “the foreseeable consequences of the removal of the applicants to Sri Lanka in light of the general situation there in February 1988 as well as on their personal circumstances.”³⁴ In light of these factors, the Court determined that the applicants were not exposed “to a real risk of treatment going beyond the threshold set by Article 3.”³⁵

Almost a decade later, in *Jabari v. Turkey*, the Court upheld the same high standard for preventing nations from deporting individuals when there was a real risk they would be subject to treatment contrary to article 3.³⁶ In this case, an Iranian woman was released from detention in Iran after she was arrested for walking with a married man on the street and was then subjected to a virginity examination while in custody.³⁷ She fled to Turkey and then tried to reach Canada from France, but when French police found she had a forged passport, they sent her back to Istanbul.³⁸ The Court held that Turkish authorities could not return her to Iran, where she would be prosecuted for adultery and face the punishment of being stoned to death.³⁹ The Court came to this determination after a “rigorous scrutiny . . . of [her] claim that . . . deportation to a third country will expose [her] to treatment prohibited by Article 3.”⁴⁰

As the Court’s case law developed, the United Kingdom continually challenged this high standard for absolute intolerance for exposure of individuals to conduct contrary to article 3, citing the difficulty of protecting national security and hoping to erode this standard to allow for greater state discretion.⁴¹ In *Soering*, the Court had previously acknowledged that “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.”⁴² The U.K. Government admitted in *Ireland v*

32. *Vilvarajah*, 215 Eur. Ct. H.R. (ser. A) at 8-21, 24-25.

33. *Id.* at 36.

34. *Id.*

35. *Id.* at 37.

36. *Jabari*, 2000-VIII Eur. Ct. H.R. at 160.

37. *Id.* at 151, 154.

38. *Id.*

39. *Id.* at 158, 160.

40. *Id.* at 159-60.

41. *See* *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1854-55.

42. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989).

United Kingdom that it had overstepped this balance during the crisis in Northern Ireland and that its interrogation techniques had been in violation of article 3.⁴³ The Court agreed that the techniques did not strike a proper balance between protecting national security and human rights. Despite the Government's promise that the techniques they used "[would] not in any circumstances be reintroduced as an aid to interrogation," an argument that the case was moot, the Court chose to adjudicate on the merits and held the tactics in violation of article 3, emphasizing the importance of recognizing and remedying violations of this article.⁴⁴

Despite acknowledgment that some domestic conduct was in violation of article 3, the United Kingdom continued to push for erosion of the high standard regarding the allowance of state discretion in extraditing or deporting individuals.⁴⁵ The Court already had strong precedent that article 3 created a duty for the state not to deport regardless of the heinous nature of the crime committed or even real concerns over domestic terrorism.⁴⁶ However, in *Chahal v. United Kingdom*, the U.K. Government argued that article 3 should have an "implied limitation" regarding national security when there is a threat of international terrorism.⁴⁷ Alternatively, it proposed a balancing test:

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.⁴⁸

The Court did not agree that the threat of international terrorism altered the duty of a state under article 3 in any way.⁴⁹ It rejected the United Kingdom's implied limitation and the balancing test, finding that "[i]n these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" and that the only relevant consideration is "determining whether a State's responsibility under Article 3 is engaged."⁵⁰ The Court refused to assess the Government's allegations of terrorist activities or threats to national

43. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 61-62 (1978).

44. *Id.*

45. *Chahal*, 1996-V Eur. Ct. H.R. at 1854.

46. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35; see *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 59.

47. *Chahal*, 1996-V Eur. Ct. H.R. at 1854.

48. *Id.*

49. *Id.* at 1855.

50. *Id.*

security and found that the only relevant risk was the risk the applicant would face if deported.⁵¹

The Court in *Chahal* determined that the assessment of the risk of violations of article 3 should be based on the time the deportation would occur, which was the time of the decision, and used a wide variety of sources to determine this risk.⁵² Based on the Commission's general finding that despite evidence of improvements, there were no reports that Punjab police were under democratic or judicial control, and on the specific finding that because of his notoriety, the applicant "was likely to be of special interest to the security forces," there was a real risk he would be subject to treatment in India contrary to article 3.⁵³ Beyond the Commission's determination, the Court relied on reports from Amnesty International, the United Kingdom Immigration Appeal Tribunal, the United States Department of State's (State Department) report on India, and the National Human Rights Commission's report on Punjab.⁵⁴ From these sources, the Court determined that despite improvements over the years and reassurances from the Indian Government, the violation of human rights by Punjab police still presented a serious risk of treatment contrary to article 3.⁵⁵ The Court held by a vote of twelve to seven that the applicant's deportation would be a violation of article 3 of the European Convention on Human Rights.⁵⁶

III. THE COURT'S DECISION

In the noted case, the European Court of Human Rights upheld the absolute prohibition of subjection of individuals to conduct contrary to article 3. This includes the deportation or extradition of individuals to countries where this conduct is likely to occur, regardless of the extent to which the contracting state believes the individual is a threat to national security and a participant in international terrorism. The Court held unanimously that "if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention."⁵⁷ Because its disposition on the article 3 complaint prevented the applicant's deportation, the Court held that the possible

51. *Id.* at 1855-56.

52. *Id.* at 1856, 1858.

53. *Id.* at 1858.

54. *Id.* at 1859.

55. *Id.* at 1860-62.

56. *Id.* at 1872.

57. Saadi v. Italy, App. No. 37201/06, para. 19 (Eur. Ct. H.R. Feb. 28, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search "Application Number 37201/06").

breaches of articles 6 and 8 of the European Convention on Human Rights and article 1 of Protocol 7 did not need to be addressed.⁵⁸

The applicant claimed that it was common knowledge “that persons suspected of terrorist activities, in particular those connected with Islamist fundamentalism, were frequently tortured in Tunisia.”⁵⁹ Furthermore, to determine the general level of risk in Tunisia, investigations by Amnesty International and the State Department provided evidence of torture in Tunisia and reports of disappearances.⁶⁰ In addition, the applicant claimed that his family “was constantly subject to threats and provocations” by Tunisian police.⁶¹

The Italian Government claimed that Saadi was part of “an international network of militant Islamists, mainly composed of Tunisians . . . placed . . . under surveillance.”⁶² It further claimed that he was a member of an “Islamist cell” that was part of “a large-scale enterprise involving the production of false identity papers and their distribution to its members.”⁶³ The Government also tried to prove that his family supported terrorism, emphasizing that when his family learned that Saadi’s brother had died in a suicide bombing, they applauded him as a “martyr in the war against the infidel.”⁶⁴ It also argued that Saadi did not present any evidence of a risk of treatment contrary to article 3, criticizing the applicant’s reliance on the State Department and Amnesty International reports to describe rampant, systemic violations, when those reports, in fact, focused on isolated incidents.⁶⁵ Furthermore, the Government called on the Court to give weight to Tunisia’s ratification of various human rights instruments as well as Tunisia’s specific assurance that Saadi would suffer no ill-treatment.⁶⁶

The Government of the United Kingdom participated as a third-party intervener in the noted case. It argued that the rigidity of the holding in *Chahal* had made it too difficult for states to ensure national security because it prevented them from expelling individuals who were a threat.⁶⁷ The difficulty of proving participation in terrorist activities beyond a reasonable doubt stems from state intervention before attacks

58. *Id.* paras. 160, 170, 180.

59. *Id.* para. 98.

60. *Id.* para. 99.

61. *Id.* para. 100.

62. *Id.* para. 102.

63. *Id.* para. 103.

64. *Id.* para. 104 (internal quotation marks omitted).

65. *Id.* paras. 105-108.

66. *Id.* paras. 111-112, 116.

67. *Id.* para. 117.

and from the common use of each individual by organizations to participate only in minor offences.⁶⁸ Convictions for terrorist offenses are difficult to secure because governments use confidential intelligence sources to gather evidence.⁶⁹ For these reasons, the United Kingdom argued that states use detention and expulsion to contain terrorist threats.⁷⁰ As in *Chahal*, the United Kingdom argued for a balancing test, emphasizing that although article 3 was absolute, it did not explicitly apply to a contracting state deporting individuals, because the receiving state would be inflicting the ill-treatment.⁷¹ It argued for a sliding scale regarding the standard of proof of the risk of ill-treatment, whereby an applicant who was a high threat to national security would require more proof of the risk of ill-treatment than an applicant who was a low risk.⁷²

In reaching its decision, the Court began by reaffirming that as a matter of international law, states have “the right to control the entry, residence and removal of aliens” and that there is no right to political asylum within the European Convention on Human Rights or its protocols.⁷³ However, these rights are limited by treaty obligations and, specifically, by the European Convention on Human Rights, “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.”⁷⁴ Contrary to the United Kingdom’s argument that treatment by a receiving state is the responsibility solely of that state, the Court reasoned that “liability [was] 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.”⁷⁵ This high standard for protecting individuals from this kind of treatment stems from the fact that article 3 “enshrines one of the fundamental values of democratic societies.”⁷⁶ The Court emphasized that there was no provision for exception or derogation from this rule, and because this is an absolute right, “the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.”⁷⁷ This maintains the same standard established in cases unrelated to terrorism

68. *Id.* para. 118.

69. *Id.*

70. *See id.* paras. 118-119.

71. *Id.* para. 120.

72. *Id.* para. 122.

73. *Id.* para. 124.

74. *Id.* para. 125.

75. *Id.* para. 126.

76. *Id.* para. 127.

77. *Id.*

and emphasizes that this is truly a rule with no exception, even if the serious and difficult-to-prove crime of terrorism is at stake.

The only proper considerations in article 3 cases are the treatment of the individual and the likelihood that he or she will be exposed to ill-treatment upon return to the receiving country.⁷⁸ To determine this risk, the Court must engage in a rigorous assessment of the material before it or “material obtained *proprio motu*.”⁷⁹ This rigorous assessment includes examination of “the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.”⁸⁰ The Court used reports from international human rights groups and governments to determine the general risk in the receiving country.⁸¹ This risk must be more than just an “unsettled situation.”⁸² The history of abuses in the receiving country is important, but only “insofar as they shed light on the current situation,” because if the applicant has not yet been extradited, then the relevant time to be considered is the time of the proceedings before the court.⁸³ The severity of the situation will be assessed by the Court based on 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.”⁸⁴ The Court refused to weigh this evidence according to the perceived risk of the applicant, finding that the balancing test offered by the United Kingdom was misguided because the threat of the individual to the contracting state will “not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.”⁸⁵ The Court had already rejected this argument once in *Chahal*. The Court found consistent reports of abusive treatment from various human rights organizations and the State Department to be reliable.⁸⁶ Furthermore, the applicant had already been sentenced to twenty years in prison in Tunisia in his absence.⁸⁷ Assurances from the Tunisian Government that they would accept the applicant and had signed treaties on prisoners’ rights were not enough of an assurance to counteract the evidence of systemic abuse.⁸⁸ Although the Court did not

78. *See id.* paras. 128-130.

79. *Id.* para. 128.

80. *Id.* para. 130.

81. *Id.* para. 131.

82. *Id.*

83. *Id.* para. 133.

84. *Id.* para. 134.

85. *Id.* para. 139.

86. *Id.* para. 143.

87. *Id.* para. 144.

88. *Id.* para. 147.

rule out future reliance on the receiving state's assurances, it found them unpersuasive in this case.⁸⁹

The concurring opinion of Judge Zupančič emphasizes the speculative nature of the test used in *Chahal* and the noted case and the evidentiary implications of this test.⁹⁰ The Court's determination of the real risk of ill-treatment in the receiving country, Judge Zupančič notes, is inherently speculative and "applies to the probability of future events."⁹¹ This method forces courts to use past events to forecast the future without a guarantee that history will repeat itself.⁹² However, Judge Zupančič did agree with the Court that the United Kingdom's balancing test improperly weighed the threat of the individual against the risk of ill-treatment and asserted that it would be "intellectually dishonest . . . to suggest that expulsion cases require a low level of proof simply because the person is notorious for his dangerousness."⁹³ He warned of the dangerous trap of the United Kingdom's logic, which suggested that "such individuals do not deserve human rights . . . because they are less human."⁹⁴

In his concurring opinion, joined by Judge Zagrebelsky, Judge Myjer addressed more fully the concern of balancing terrorism threats with the rights of applicants.⁹⁵ He acknowledged that at first it may be hard to understand the Court's rationale, which emphasizes "the absolute nature of Article 3 [and] seems to afford more protection to the non-national applicant who has been found guilty of terrorist related crimes than to the protection of the community as a whole from terrorist violence."⁹⁶ Judge Myjer responded to such criticism by stating that "the Convention . . . contain[s] legal human rights standards which must be secured to everyone Everyone means everyone: not just terrorist and the like."⁹⁷ Even though states must protect their citizenry, they cannot "resort to methods which undermine the very values they seek to protect."⁹⁸ This balancing act applies to all human rights issues, not just absolute rights such as article 3.⁹⁹ This includes the balancing of "a direct threat posed by acts of terrorism and an indirect threat because anti-terror

89. *Id.* para. 148.

90. *Id.* para. 1 (Zupančič, J., concurring).

91. *Id.*

92. *See id.*

93. *Id.* para. 2.

94. *Id.*

95. *See id.* para. 1 (Myjer, J., concurring).

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

measures themselves risk violating human rights.”¹⁰⁰ In an effort to find this balance, Judge Myjer found it “counterproductive . . . to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards.”¹⁰¹ Accordingly, “there is only one (unanimous) answer possible.”¹⁰²

IV. ANALYSIS

Over the past twenty years, the European Court of Human Rights has established that article 3 creates an internal obligation not to subject people to ill-treatment and an external obligation not to deport people to areas where such treatment is likely.¹⁰³ The Court has defined this as an absolute rule with no room for derogation.¹⁰⁴ The Court looks not only to the structure and text of the European Convention on Human Rights but also to its underlying values to justify the absolute nature of rights under article 3.¹⁰⁵ This policy stands in contrast to a modern trend to limit the civil liberties and to infringe on the rights of those suspected to be terrorists. However, even though the specific concern over international terrorism may be new, the European Convention on Human Rights was drafted with the need for a balance in mind.¹⁰⁶

This balance is challenged in the context of the modern war on terror, where terrorism is inherently difficult to prove and national security is a real risk.¹⁰⁷ The Court has now established clear precedent that concerns over terrorism will not tip the scale toward the derogation of human rights, thus forcing countries to find other ways to protect their national security.¹⁰⁸ Although both *Chahal* and the noted case establish that countries cannot deport suspected terrorists to a country where they are likely to suffer ill-treatment contrary to article 3, the Court does not sufficiently address the concerns over this balance in its opinion. Judge Myjer’s concurring opinion in the noted case addresses the obvious concerns over this balance, acknowledging that it may appear that the

100. *Id.*

101. *Id.*

102. *Id.*

103. *See Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1855; *see also Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34-35 (1989).

104. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 34.

105. *Id.* at 35.

106. *Id.*

107. *See Chahal*, 1996-V Eur. Ct. H.R. at 1854.

108. *See id.*; *see also Saadi v. Italy*, App. No. 37201/06, paras. 124-127 (Eur. Ct. H.R. Feb. 28, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink; search “Application Number 37201/06”).

balance protects terrorists over the contracting state's community.¹⁰⁹ He responds by emphasizing that human rights are for "everyone" and that eroding the rights of suspected terrorists erodes the rights and liberties of the community at large as well.¹¹⁰

This Court's consistent encouragement of a culture of human rights is shown in its article 3 case law in three significant ways. First, this culture is sustained by relying on human rights reports from other nations and from human rights organizations.¹¹¹ The European Court of Human Rights consistently relies on these sources to determine the likelihood of the risk of ill-treatment contrary to article 3.¹¹² This explicit reliance increases the legitimacy and importance of those reports. Second, in all cases in which the Court found there was a real risk of an article 3 violation, it consistently refused to deport the individual, emphasizing that this is an absolute right.¹¹³ Third, the Court has consistently assessed real risk to the individual based on the time the deportation would occur, the history of the area, the particular risks to the individual, and the likelihood of ill-treatment upon return.¹¹⁴

This last test, the use of the historical trend of a country to subject individuals to ill-treatment in violation of article 3 and the likelihood of a violation to take place upon deportation, is a problematic way to assess risk. The concurring opinion of Judge Zupančič in the noted case emphasizes the difficulties of this kind of test, where the past is used to gauge the present, even though the current state of human rights in a country is not necessarily dependent on its past.¹¹⁵ However, without a more reasonable test to apply, the kind of analysis the Court has been using since *Soering* is the best solution to an impossibility because there may be no better way to determine whether an individual will be subject to ill-treatment without a crystal ball.¹¹⁶

The most controversial and relevant issue in the noted case is the continued application of the principle of a zero-tolerance policy of derogation of article 3 as applied to suspected terrorists. This determination in *Chahal* left the United Kingdom in pursuit of a balance tipped more toward the discretion of governments to act to protect national security in the face of inchoate crimes that are difficult to

109. *Saadi*, App. No. 37201/06, para. 1 (Myjer, J., concurring).

110. *Id.*

111. *See Chahal*, 1996-V Eur. Ct. H.R. at 1859; *Saadi*, App. No. 37201/06, para. 131.

112. *Saadi*, App. No. 37201/06, para. 130.

113. *Id.* paras. 127, 138.

114. *See Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) at 36 (1991).

115. *See Saadi*, App. No. 37201/06, para. 1 (Zupančič, J., concurring).

116. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989).

prosecute.¹¹⁷ The United Kingdom's position distinguishes a fleeing criminal like Soering from a suspected terrorist like Saadi. Whereas a man like Soering can still be convicted and is not a direct threat to the British community, Saadi remains free in Italy. This is why the United Kingdom intervened in the noted case after waiting since *Chahal* to once again raise the issue of this balance.¹¹⁸ However, just as before, the Court refused to lessen the strict standard protecting everyone, including alleged terrorists, from exposures to human rights abuses.¹¹⁹ The European Court of Human Rights denied the dangerous trap of such logic, and continued to find that article 3 is an absolute right with increased support within the Court for this position.¹²⁰ In *Chahal*, the Court came to its decision that article 3 was violated by a majority of twelve to seven; in the noted case, the Court decided unanimously.¹²¹ However, this idealistic and important commitment to human rights cannot change the reality that contracting states will have more difficulty controlling terrorists, and it exposes their communities to a risk of attack and burdens them with the task of monitoring these individuals until they can find alternative and humane means for dealing with these issues.

V. CONCLUSION

The right to freedom from "torture or . . . inhuman or degrading treatment or punishment" would be greatly undermined if countries were allowed to extradite individuals to places where violations of this right would occur.¹²² Without obligating contracting states both to protect the rights of individuals within their territory and not to expose them to risks in other territories, article 3 would cease to be meaningful. It is important that textually this right is different from the other articles and that it does not allow for derogation in times of war. Yet, it is even more important that the general principle behind this article is to uphold the democratic values of the Member States.¹²³ The bright line rule this court has created is essential in a world where nations often attempt to "fight

117. See *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1861-62, 1872.

118. See *Saadi*, App. No. 37201/06, paras. 122-123.

119. *Id.* para. 127.

120. *Id.*

121. *Chahal*, 1996-V Eur. Ct. H.R. at 1872; *Saadi*, App. No. 37201/06, para. 193.

122. European Convention on Human Rights, *supra* note 14, art. 3.

123. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989).

fire with fire” in an effort to combat threats of terrorism instead of honoring their duty to uphold basic human rights.¹²⁴

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124. *Saadi*, App. No. 37201/06, para. 1 (Myjer, J., concurring).

* © 2009 Casey Scott. J.D. candidate 2010, Tulane University School of Law; B.A. 2006, Tulane University. I would like to thank my friends and family, arguably the most patient nonlawyer audience that listens to law-related talk.