

CASE LAW

Judgments of the Court of Justice of the European Union

Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities¹

Key words: Common foreign and security policy – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Competence of the Community – Freezing of funds – Fundamental rights – Jus cogens – Review by the Court – Action for annulment

Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005

110 In this regard, it must be pointed out that the Community has no express power to impose restrictions on the movement of capital and payments. However, Article 58 EC (Article 65 TFEU) allows the Member States to adopt measures having such an effect to the extent to which this is, and remains, justified in order to achieve the objectives set out in the article, in particular, on grounds of public policy or public security (...). The concept of public security covering both the State's internal and external security, the Member States are therefore as a rule entitled to adopt under Article 58(1)(b) EC (Article 65(1)(b) TFEU) measures of the kind laid down by the contested regulation. In so far as those measures are in keeping with Article 58(3) EC (article 65(3) TFEU) and do not go beyond what is necessary in order to attain the objective pursued, they are compatible with the rules on free movement of capital and payments and with the rules on free competition laid down by the EC Treaty (TFEU).

242 Thus, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to jus cogens.

243 Here, however, it is clear that the applicant has not been arbitrarily deprived of that right.

¹ See judgment of the Court of First Instance of 21 September 2005 in case T-306/01, European Court Reports 2005, p. II-03649, source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001TJ0315:EN:HTML>

244 In fact, in the first place, the freezing of his funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities.

245 In that regard, it is appropriate to stress the importance of the campaign against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations.

247 It is in the light of those circumstances that the objective pursued by the sanctions assumes considerable importance (...). The measures in question pursue therefore an objective of fundamental public interest for the international community.

248 In the second place, freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.

250 In the fourth place (...) the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

251 Having regard to those facts, the freezing of the funds of persons and entities suspected, on the basis of information communicated by the Member States of the United Nations and checked by the Security Council, of being linked to Usama bin Laden, the Al-Qaeda network or the Taliban and of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned.

252 It follows from the foregoing that the applicant's arguments alleging breach of the right to respect for property and of the general principle of proportionality must be rejected.

259 (...) the Council was not obliged to hear the applicant on the subject of his inclusion in the list of persons and entities affected by the sanctions, in the context of the adoption and implementation of the contested regulation.

260 The applicant's arguments based on the alleged infringement of his right to be heard by the Council in connection with the adoption of the contested regulation must therefore be rejected.

274 None the less, in circumstances such as those of this case, in which what is at issue is a temporary precautionary measure restricting the availability of the applicant's property, the Court of First Instance considers that observance of the fundamental rights of the person concerned does not require the facts and evidence adduced against him to be communicated to him, once the Security Council or

its Sanctions Committee is of the view that that there are grounds concerning the international community's security that militate against it.

276 It follows that the applicant's arguments alleging breach of the right to be heard must be rejected.

On those grounds,

The Court of First Instance (Second Chamber, Extended Composition) hereby:

1. Declares that there is no need to adjudicate on the application for annulment in part of Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 and for annulment of Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001;
2. Dismisses the action in so far as it is brought against Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001;

(...)

Case T-306/01 Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities²

Key words: Common foreign and security policy - Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban - Competence of the Community - Freezing of funds - Fundamental rights - Jus cogens - Review by the Court - Action for annulment

Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005

120 More particularly, the chief object of the sanctions at issue in this case was to prevent the Taliban regime from obtaining financial support from any source whatsoever, as is apparent from Paragraph 4(b) of Resolution 1287 (1999). The sanctions might have been circumvented if the individuals who were thought to maintain that regime had not been affected by them. As regards the relations between

² See judgment of the Court of First Instance of 21 September 2005 in case T-315/01, European Court Reports 2005, p. II-03533, source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001TJ0306:EN:HTML>

the former Taliban regime and Usama bin Laden, the Security Council considered that the latter, during the period in question, received assistance, at this point crucial, from the regime of which he could be regarded as forming part (...)

121 Thus, contrary to what the applicants maintained, the measures at issue were indeed intended to interrupt or reduce economic relations with a third country, in connection with the international community's fight against international terrorism and, more specifically, against Usama bin Laden and the Al-Qaeda network.

124 It follows from the foregoing that, contrary to what the applicants claimed, the Council was indeed competent to adopt Regulation No 467/2001 (...)

167 In this instance, the fight against international terrorism and its funding is unarguably one of the Union's objectives under the CFSP, as they are defined in Article 11 EU (Article 24 TEU), even where it does not apply specifically to third countries or their rulers.

288 It falls therefore to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringes the applicants' fundamental rights.

289 The Court considers that such is not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*, and that there is no need here to distinguish the situation of the entity Al Barakaat, as a legal person, from that of Mr Yusuf, as a natural person.

291 The express provision of possible exemptions and derogations thus attaching to the freezing of the funds of the persons in the Sanctions Committee's list clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment.

293 Thus, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*.

294 Here, however, it is clear that the applicants have not been arbitrarily deprived of that right.

295 In fact, in the first place, the freezing of their funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities.

296 In that regard, it is appropriate to stress the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations.

299 In the second place, freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.

301 In the fourth place (...) the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

302 Having regard to those facts, the freezing of the funds of persons and entities suspected, on the basis of information communicated by the Member States of the United Nations and checked by the Security Council, of being linked to Usama bin Laden, the Al-Qaeda network or the Taliban and of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned.

303 It follows from the foregoing that the applicants' arguments alleging breach of their right to make use of their property must be rejected.

320 None the less, in circumstances such as those of this case (...) the Court of First Instance considers that observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it.

321 It follows that the applicants' arguments alleging breach of their right to be heard by the Sanctions Committee (...) must be rejected.

330 The applicants' arguments based on the alleged infringement of their right to be heard by the Community institutions before the contested regulation was adopted must therefore be rejected.

331 It follows that the applicants' arguments alleging breach of the right to a fair hearing must be rejected.

On those grounds,

The Court of First Instance (Second Chamber, Extended Composition)
hereby:

1. Declares that there is no longer any need to adjudicate on the application for annulment of Council Regulation (EC) No 467/2001 of 6 March

2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 and for annulment of Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001;

2. Dismisses the action in so far as it is brought against Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001;

(...)

Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities³

Key words: Common foreign and security policy (CFSP) - Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban - United Nations - Security Council - Resolutions adopted under Chapter VII of the Charter of the United Nations - Implementation in the Community - Common Position 2002/402/CFSP - Regulation (EC) No 881/2002 Measures against persons and entities included in a list drawn up by a body of the United Nations - Freezing of funds and economic resources - Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) - Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 - Actions for annulment - Competence of the Community - Joint legal basis of Articles 60 EC (Article 75 TFEU), 301 EC (Article 215 TFEU) and 308 EC (Articles 352 and 353 TFEU) - Fundamental rights - Right to respect for property, right to be heard and right to effective judicial review

Judgment of the Court (Grand Chamber) of 3 September 2008

361 As the Court has already held in connection with another Community system of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including

³ See the judgment of the Court of Justice of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, European Court Reports 2008, s. I-06351, source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0402:EN:HTML>

those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights (see, to that effect, *Bosphorus*, paragraphs 22 and 23).

362 In the case in point, the restrictive measures laid down by the contested regulation contribute to the implementation, at Community level, of the restrictive measures decided on by the Security Council against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.

363 With reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate (...)

366 It must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.

369 The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.

370 It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property.

371 The plea raised by Mr Kadi that his fundamental right to respect for property has been infringed is therefore well founded.

372 It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.

373 However, the annulment to that extent of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again.

374 Furthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.

375 Having regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC (Article 264 TFEU), be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms.

376 In those circumstances, Article 231 EC (Article 263 TFEU) will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

On those grounds,

The Court (Grand Chamber)
hereby:

1. Sets aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*;
2. Annuls Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, in so far as it concerns Mr Kadi and the Al Barakaat International Foundation;
3. Orders the effects of Regulation No 881/2002 to be maintained, so far as concerns Mr Kadi and the Al Barakaat International Foundation, for a period that may not exceed three months running from the date of delivery of this judgment;

(...)

Judgments of the European Court of Human Rights

GRAND CHAMBER

Case of saadi v. Italy (application no. 37201/06) – Judgment strasbourg 28 february 2008⁴

I. The circumstances of the case

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

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.

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 Italy with 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.

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.

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, 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.

4 See the judgment of the European Court of Human Rights of 28 February 2008 in case of Saadi v. Italy, source: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=37201/06&sessionId=84043811&skin=hudoc-en>

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.

In the reasons for its judgment, which ran to 331 pages, the Assize Court observed that the evidence against the applicant included intercepts of telephone and radio communications, witness statements and numerous false documents that had been seized. Taken together, this evidence proved that the applicant had been engaged in a conspiracy to receive and falsify stolen documents, an activity from which he derived his means of subsistence. On the other hand, it had not been established that the documents in question had been used by the persons in whose names they had been falsely made out to enter Italian territory illegally.

As regards the charge of international terrorism, the Assize Court first noted that a conspiracy was “terrorist” in nature where its aim was to commit violent acts against civilians or persons not actively participating in armed conflict with the intention of spreading terror or obliging a government or international organisation to perform or refrain from performing any act, or where the motive was political, ideological or religious in nature. In the present case it was not known whether the violent acts which the applicant and his accomplices were preparing to commit, according to the prosecution submissions, were to be part of an armed conflict or not.

In addition, the evidence taken during the investigation and trial was not capable of proving beyond a reasonable doubt that the accused had begun to put into practice their plan of committing acts of violence, or that they had provided logistical or financial support to other persons or organisations having terrorist aims. In particular, such evidence was not provided by the telephone and radio intercepts. These proved only that the applicant and his accomplices had links with persons and organisations belonging to Islamic fundamentalist circles, that they were hostile to “infidels” (and particularly those present in territories considered to be Muslim) and that their relational world was made up of “brothers” united by identical religious and ideological beliefs.

Using coded language the defendants and their correspondents had repeatedly mentioned a “football match”, intended to strengthen their faith in God. For the Assize Court it was quite obvious that this was not a reference to some sporting event but to an action applying the principles of the most radical form of Islam. However, it had not been possible to ascertain what particular “action” was meant or where it was intended to take place.

Moreover, the applicant had left Milan on 17 January 2002 and, after a stopover in Amsterdam, made his way to Iran, from where he had returned to Italy on 14 February 2002. He had also spoken of a “leader of the brothers” who was in Iran.

Some members of the group to which the applicant belonged had travelled to “training camps” in Afghanistan and had procured weapons, explosives and observation and video recording equipment. In the applicant’s flat and those of his co-defendants the police had seized propaganda about jihad – or holy war – on behalf of Islam. In addition, in telephone calls to members of his family in Tunisia made from the place where he was being detained in Italy, the applicant had referred to the “martyrdom” of his brother Fadhil Saadi; in other conversations he had mentioned his intention to take part in holy war.

However, no further evidence capable of proving the existence and aim of a terrorist organisation had been found. In particular, there was no evidence that the applicant and his accomplices had decided to channel their fundamentalist faith into violent action covered by the definition of a terrorist act. Their desire to join a jihad and eliminate the enemies of Islam could very well be satisfied through acts of war in the context of an armed conflict, that is, acts not covered by the concept of “terrorism”. It had not been established whether the applicant’s brother had really died in a suicide bombing or whether that event had been the “football match” which the defendants had repeatedly referred to.

The applicant and the prosecution appealed. The applicant asked to be acquitted of all the charges, while the prosecution wanted him to be convicted of international terrorism and aiding and abetting clandestine immigration too.

In the prosecution’s appeal it was submitted that, according to the case-law of the Court of Cassation, the constituent elements of the crime of international terrorism were made out even where no act of violence had occurred, the existence of a plan to commit such an act being sufficient. In addition, an action could be terrorist in nature even if it was intended to be carried out in the context of an armed conflict, provided that the perpetrators were not members of the “armed forces of a State” or an “insurrectionary group”. In the present case, it was apparent from the documents in the file that the applicant and his associates had procured for themselves and others false documents, weapons, explosives and money in order to commit violent acts intended to affirm the ideological values of fundamentalist Islam. In addition, the accused had maintained contacts with persons and organisations belonging to the sphere of international terrorism and had planned a violent and unlawful action, due to be carried out in October 2002 as part of a “holy war” and in a country other than Italy. Only the defendants’ arrest had prevented the plan being implemented. Furthermore, at that time the armed conflict in Afghanistan had ended and the one in Iraq had not yet started.

The prosecution further submitted that the applicant’s brother, Mr Fadhil Saadi, had been detained in Iran; the applicant had visited him there in either January or February 2002. After his release Mr Fadhil Saadi had settled in France and stayed

in contact with the applicant. He had then died in a suicide bombing, a fact which was a source of pride for the applicant and the other members of his family. That was revealed by the content of the telephone conversations intercepted in the prison where the applicant was being held.

Lastly, the prosecution requested leave to produce new evidence, namely letters and statements from a person suspected of terrorist activities and recordings transmitted by radio microphone from inside a mosque in Milan.

On 13 March 2006 the Milan Assize Court of Appeal asked the Constitutional Court to rule on the constitutionality of Article 593 § 2 of the Code of Criminal Procedure (“the CCP”). As amended by Law no. 46 of 20 February 2006, that provision permitted the defence and the prosecution to appeal against acquittals only where, after the close of the first-instance proceedings, new evidence had come to light or been discovered. The Assize Court of Appeal stayed the proceedings pending a ruling by the Constitutional Court.

In judgment no. 26 of 6 February 2007 the Constitutional Court declared the relevant provisions of Italian law unconstitutional in that they did not allow the prosecution to appeal against all acquittals and because they provided that appeals lodged by the prosecuting authorities before the entry into force of Law no. 46 of 20 February 2006 were inadmissible. The Constitutional Court observed in particular that Law no. 46 did not maintain the fair balance that should exist in a criminal trial between the rights of the defence and those of the prosecution.

The first hearing before the Milan Assize Court of Appeal was set down for 10 October 2007.

In the meantime, on 11 May 2005, two days after delivery of the Milan Assize Court’s judgment, a military court in Tunis had sentenced the applicant in his absence to twenty years’ imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. He was also deprived of his civil rights and made subject to administrative supervision for a period of five years. The applicant asserted that he had not learned of his conviction until, the judgment having become final, its operative part was served on his father on 2 July 2005.

The applicant alleged that his family and his lawyer were not able to obtain a copy of the judgment by which the applicant had been convicted by the Tunis military court. In a letter of 22 May 2007 to the President of Tunisia and the Tunisian Minister of Justice and Human Rights, his representatives before the Court asked to be sent a copy of the judgment in question. The result of their request is not known.

B. The order for the applicant’s deportation and his appeals against its enforcement and for the issue of a residence permit and/or the granting of refugee status (...)

C. The diplomatic assurances requested by Italy from Tunisia (...)

II. Alleged violation of article 3 of the convention

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

The Court's assessment

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

Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. 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. It must therefore reaffirm the principle (...) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State (...)

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 (...)

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 (...) 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 (...) 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.

In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia (...), which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US State Department (...). 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 (...)

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” (...). 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 (...)

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 (...)

The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian Government asked the Tunisian Government (...) for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (...). However, the Tunisian authorities did not provide such assurances.

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

(...)

For these reasons, the court unanimously

1. Declares the application admissible;
2. Holds that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention;
3. Holds that it is not necessary to examine whether enforcement of the decision to deport the applicant to Tunisia would also be in breach of Articles 6 and 8 of the Convention and Article 1 of Protocol No. 7;
4. Holds that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. Holds
 - (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. Dismisses the remainder of the applicant's claim for just satisfaction.

by Tomasz Dubowski