INTERNATIONAL HUMAN RIGHTS
LouvainX online course - prof. Olivier De Schutter

READING MATERIAL
related to: section 3, sub-section 2: The absolute prohibition of ill-treatment in deportation cases

European Court of Human Rights (4th sect.), *Othman (Abu Qatada) v. the United Kingdom* (Appl. 8139/09), Judgment of 17 January 2012 (final on 9 May 2012 after a request for referral to the Grand Chamber was denied):

183. First, the Court wishes to emphasise that, throughout its history, it has been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights (...). Faced with such a threat, the Court considers it legitimate for Contracting States to take a firm stand against those who contribute to terrorist acts, which it cannot condone in any circumstances (...).
184. Second, as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. It is no part of this Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his of her rights under the Convention (...).
185. Third, it is well-established that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion (*Saadi v. Italy* [GC], no. 37201/06, §§ 125 and 138).
186. Fourth, the Court accepts that (...) there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security (...). However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment. Before turning to the facts of the applicant's case, it is therefore convenient to set out the approach the Court has taken to assurances in Article 3 expulsion cases.
187. In any examination of whether an applicant faces a real risk of ill treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves

sufficient to ensure adequate protection against the risk of ill treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (see *Saadi*, cited above, § 148).

188. In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances (...).

189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, *inter alia*, to the following factors:

(i) whether the terms of the assurances have been disclosed to the Court (...);

(ii) whether the assurances are specific or are general and vague (...);

(iii) who has given the assurances and whether that person can bind the receiving State (*Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 344, ECHR 2005 III);

(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them (*Chahal*, cited above, §§ 105-107);

(v) whether the assurances concerns treatment which is legal or illegal in the receiving State (...);

(vi) whether they have been given by a Contracting State (...);

(vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances (...);

(viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers (...);

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible (...);

(x) whether the applicant has previously been ill-treated in the receiving State (...); and

(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State (...).

191. Turning therefore to the evidence before it, the Court first notes that the picture painted by the reports of United Nations bodies and NGOs of torture in Jordanian prisons is as consistent as it is disturbing. Whatever progress Jordan may have made, torture remains, in the words of the United Nations Committee Against Torture, "widespread and routine" (...).

192. As a result of this evidence it is unremarkable that the parties accept that, without assurances from the Jordanian Government, there would be a real risk of ill-treatment of the present applicant if he were returned to Jordan. The Court agrees. It is clear that, as a high profile Islamist, the applicant is part of a category of prisoners who are frequently ill-treated in Jordan. It is also of some relevance that he claims to have previously been tortured in Jordan (...). However, consistent with the general approach the Court has set out at paragraphs 187–189 above, the Court must also consider whether the assurances contained in the MOU, accompanied by monitoring by Adaleh, remove any real risk of ill-treatment of the applicant.

193. In considering that issue, the Court observes that the applicant has advanced a number of general and specific concerns as to whether the assurances given by Jordan are sufficient to remove any real risk of ill-treatment of him. At the general level, he submits that, if Jordan cannot be relied on to abide by its legally binding, multilateral international obligations not to

torture, it cannot be relied on to comply with non-binding bilateral assurances not to do so. He has also argued that assurances should never be relied on where there is a systematic problem of torture and ill treatment and further argues that, even where there is evidence of isolated, non-systemic acts of torture, reliance should only be placed on assurances where those are supported by the independent monitoring of a body with a demonstrable track-record of effectiveness in practice. The Court does not consider that these general submissions are supported by its case-law on assurances. As the general principles set out at paragraphs 187 189 above indicate, the Court has never laid down an absolute rule that a State which does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances; the extent to which a State has failed to comply with its multilateral obligations is, at most, a factor in determining whether its bilateral assurances are sufficient. Equally, there is no prohibition on seeking assurances when there is a systematic problem of torture and ill treatment in the receiving State; otherwise, as Lord Phillips observed [in the case presented to the House of Lords], it would be paradoxical if the very fact of having to seek assurances meant one could not rely on them.

194. Moreover, the Court does not consider that the general human rights situation in Jordan excludes accepting any assurances whatsoever from the Jordanian Government. Instead, the Court considers the United Kingdom and Jordanian Governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure that the applicant will not be ill-treated upon return to Jordan. The product of those efforts, the MOU, is superior in both its detail and its formality to any assurances which the Court has previously examined (...). The MOU would also appear to be superior to any assurances examined by the United Nations Committee Against Torture and the United Nations Human Rights Committee (...). The MOU is specific and comprehensive. It addresses directly the protection of the applicant's Convention rights in Jordan (...). The MOU is also unique in that it has withstood the extensive examination that has been carried out by an independent tribunal, SIAC, which had the benefit of receiving evidence adduced by both parties, including expert witnesses who were subject to extensive cross-examination (...).

195. [Moreover,] there is sufficient evidence for it to conclude that the assurances were given in good faith by a Government whose bilateral relations with the United Kingdom have, historically, been very strong (...). Moreover, they have been approved at the highest levels of the Jordanian Government, having the express approval and support of the King himself. Thus, it is clear that, whatever the status of the MOU in Jordanian law, the assurances have been given by officials who are capable of binding the Jordanian State (...). In the Court's view, all of these factors make strict compliance with both the letter and spirit of the MOU more likely.

196. Similarly, although the applicant has argued that his high profile would place him at greater risk, the Court is unable to accept this argument, given the wider political context in which the MOU has been negotiated. It considers it more likely that the applicant's high profile will make the Jordanian authorities careful to ensure he is properly treated; the Jordanian Government is no doubt aware that not only would ill-treatment have serious consequences for its bilateral relationship with the United Kingdom, it would also cause international outrage. (...)

197. In addition to general concerns about the MOU, the Court notes that the applicant has relied on six specific areas of concern as to the meaning and operation of the assurances. He submits that the MOU is not clear as to: (i) what was meant by "judge" in respect of the guarantee that he would be "brought promptly before a judge"; (ii) whether he would have access to a lawyer during the interrogation period of his detention; (iii) whether rendition is prohibited; (iv) whether, as a matter of Jordanian law, the assurances in the MOU were legal

and enforceable; (v) Adaleh's terms of access to him; and (vi) its capacity to monitor the assurances. The Court will consider each concern in turn.

198. For the first, the Court considers that the MOU would have been considerably strengthened if it had contained a requirement that the applicant be brought within a short, defined period after his arrest before a civilian judge, as opposed to a military prosecutor. This is all the more so when experience has shown that the risk of ill-treatment of a detainee is greatest during the first hours or days of his or her detention (...). However, the Court notes that, although it is unusual for lawyers to accompany detainees to appearances before the Public Prosecutor, as a matter of Jordanian law, the applicant would be entitled as of right to have a lawyer present (...). Given that the applicant's appearance before the Public Prosecutor within twenty-four hours of his return would be the first public opportunity for the Jordanian authorities to demonstrate their intention to comply with the assurances, the Court considers that it would be unlikely for the Public Prosecutor to refuse to allow a lawyer to be present. Moreover, the applicant's first appearance before the Public Prosecutor must be seen in the context of the other arrangements which are in place for his return. For instance, it is likely that the monitors who would travel with the applicant from the United Kingdom to Jordan would remain with him for at least part of the first day of detention in Jordan. This compares favourably with the delay of five weeks in obtaining access which the UN Human Rights Committee found to be deficient in *Alzery* (...) and significantly diminishes any risk of ill-treatment that may have arisen from a lack of clarity in the MOU.

199. For the second concern, the absence of a lawyer during interrogation, SIAC found that it was unlikely that the applicant would have a lawyer present during questioning by the [General Information Directorate] GID, that it was likely that he would have a lawyer present for any questioning by the Public Prosecutor and very likely that he would have such representation for any appearance before a judge. Denial of access to a lawyer to a detainee, particularly during interrogation is a matter of serious concern: the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment [see Eur. Ct. HR (GC), *Salduz v. Turkey* (Appl. No. 36391/02), judgment of 27 November 2008, § 54 (discussed in chap. 1, section 3)]. However, in the present case, that risk is substantially reduced by the other safeguards contained in the MOU and the monitoring arrangements.

200. Third, the Court would discount the risk that the applicant would be ill-treated if questioned by the CIA, that he would be placed in a secret GID or CIA "ghost" detention facility in Jordan, or that he would be subject to rendition to a place outside Jordan. In *Babar Ahmad and Others* [see Eur. Ct. HR (4th sect.), *Babar Ahmad and Others* (Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), judgment of 10 April 2012, §§ 78-82 and 113-116], the Court observed that extraordinary rendition, by its deliberate circumvention of due process, was anathema to the rule of law and the values protected by the Convention. However, in that case, it found the applicants' complaints that they would be subjected to extraordinary rendition to be manifestly ill-founded. Although the United States, which had requested their extradition, had not given any express assurances against rendition, it had given assurances that they would be tried before federal courts; the Court found rendition would hardly be compatible with those assurances.

Similar considerations apply in the present case. Although rendition is not specifically addressed in the MOU, the MOU clearly contemplates that the applicant will be deported to Jordan, detained and retried for the offences for which he was convicted *in absentia* in 1998 and 1999. If he is convicted, he will be imprisoned in a GID detention facility. It would be wholly incompatible with the MOU for Jordan to receive the applicant and, instead of retrying him, to hold him at an undisclosed site in Jordan or to render him to a third state. By the same token, even if he were to be interrogated by the United States authorities while in GID detention, the Court finds no evidence to cast doubt on SIAC's conclusion that the Jordanian

authorities would be careful to ensure that the United States did not "overstep the mark" by acting in a way which violated the spirit if not the letter of the MOU.
201. Fourth, it may well be that as matter of Jordanian law the MOU is not legally binding. Certainly, as an assurance against illegal behaviour, it should be treated with more scepticism than in a case where the State undertakes not to do what is permitted under domestic law (see paragraph 189(v) above). Nevertheless, SIAC appreciated this distinction. It is clear from its determination that SIAC exercised the appropriate caution that should attach to such an assurance (...). The Court shares SIAC's view, not merely that there would be a real and strong incentive in the present case for Jordan to avoid being seen to break its word but that the support for the MOU at the highest levels in Jordan would significantly reduce the risk that senior members of the GID, who had participated in the negotiation of the MOU, would tolerate non-compliance with its terms.
202. Fifth, the applicant has relied on the discrepancy between the Arabic and English versions of the MOU as evidence that Adaleh will only have access to him for three years after his deportation. However, the Court considers that this issue has been resolved by the diplomatic notes which have been exchanged by the Jordanian and United Kingdom Governments (...), which make clear that Adaleh will have access to the applicant for as long as he remains in detention.
203. Sixth, it is clear that the Adaleh Centre does not have the same expertise or resources as leading international NGOs such as Amnesty International, Human Rights Watch or the International Committee of the Red Cross. Nor does it have the same reputation or status in Jordan as, for example, the Jordanian NCHR. However, in its determination SIAC recognised this weakness. It recognised the Centre's "relative inexperience and scale" but concluded that it was the very fact of monitoring visits which was important (...). The Court agrees with this conclusion. Moreover, the Court is persuaded that the capability of the Centre has significantly increased since SIAC's determination, even if it still has no direct experience of monitoring. Mr Layden's statements show that it has been generously funded by the United Kingdom Government, which in itself provides a measure of independence for the Centre, at least from the Jordanian Government. Given the United Kingdom Government's broader interest in ensuring that the assurances are respected, it can be expected that this funding will continue. (...).
204. Although the precise nature of the relationship between the Centre and its subsidiary, the National Team to Combat Torture, is unclear, it would appear that the NTCT is fully staffed and has the necessary interdisciplinary expertise to draw on for monitoring (...). The Court would expect that, whatever allegations have been made as to the composition of the NTCT, the applicant would be visited by a delegation which included medical and psychiatric personnel who were capable of detecting physical or psychological signs of ill-treatment (...). There is every reason to expect that the delegation would be given private access to the applicant (...). It would clearly be in the applicant's interest to meet the delegation according to the pre arranged timetable and thus the Court considers it is implausible that the GID, in order to escape monitoring, would tell the delegation that the applicant did not wish to see them. In the event that the delegation were to receive such a response, the Court considers that (...) "rapidly escalating diplomatic and Ministerial contacts and reactions" [would follow]. For these reasons, the Court is satisfied that, despite its limitations, the Adaleh Centre would be capable of verifying that the assurances were respected.
205. For the foregoing reasons the Court concludes that, on the basis of the evidence before it, the applicant's return to Jordan would not expose him to a real risk of ill-treatment.

[The Court therefore found that the expulsion of Abu Qatada to Jordan would not result in a violation either of Article 3 ECHR or (for reasons not reproduced here) of Article 5 ECHR.

However, as mentioned above, the Court did conclude that the deportation would result in a violation of Article 6 ECHR, due to the conditions in which the retrial of Abu Qatada would be taking place. Indeed, the incriminating statements in Abu Qatada's case had been made by two different witnesses, both of whom had been exposed to torture. There was therefore a real risk of a flagrant denial of justice, according to the Court: although it would be open for Abu Qatada to challenge the admissibility of the statements against him that had been obtained through torture, he would encounter substantial difficulties in trying to do that many years after the events ; moreover, the court before which he faced retrial had routinely rejected such claims in the past.

In order to remove this remaining obstacle to the deportation of Abu Qatada to Jordan, the United Kingdom entered into negotiations with Jordan for the conclusion of a Treaty on Mutual Legal Assistance and Legal Matters, that was signed on 24 March 2013. Article 27 (4) provides:
"Where, before the date of signature of this Treaty, a Court in the sending State has found that there is a real risk that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State, and might be used in a criminal trial in the receiving State referred to in paragraph 1 of this Article, this statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution in the receiving State proves beyond any doubt that the statement has been provided out of free-will and choice and was not obtained by torture or ill-treatment by the authorities of the receiving State, and the Court in the receiving State is so satisfied."
Abu Qatada informed SIAC that, were the Treaty to come into force, he would return voluntarily to Jordan. The Treaty entered into force on 1 July 2013. On 8 July, Abu Qatada was expelled.]