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*, Chahal and others v. United Kingdom,* judgment of 15 November 1996:

[The first applicant, Karamjit Singh Chahal, is an Indian citizen who entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to regularize his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. In early 1984, upon returning to India, he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge. On his return to the United Kingdom he engaged in political activities within the Sikh community. In October 1985 he was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence. He was subsequently interrogated and arrested on a number of occasions, in connection with his political activities in the United Kingdom. Finally, on 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. On 16 August 1990 he was therefore placed into detention for the purposes of deportation in Bedford Prison. Mr Chahal claimed, however, that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees. He applied for asylum. The request was refused in March 1991. As to the risks of ill-treatment in India, the Home Secretary did not consider that Mr Chahal's experiences in India in 1984 had any continued relevance, since that had been a time of particularly high tension in Punjab.

The asylum refusal was quashed by the High Court on 2 December 1991 and referred back to the Home Secretary. The Court found that the reasoning behind it was inadequate, principally because the Home Secretary had neglected to explain whether he believed the evidence provided by NGOs relating to the situation in Punjab and, if not, the reasons for such disbelief. A fresh decision to refuse asylum was adopted in June 1992. The Home Secretary (Mr Clarke) considered that the breakdown of law and order in Punjab was due to the activities of Sikh terrorists and was not evidence of persecution within the terms of the 1951 Convention. Furthermore, relying upon Articles 32 and 33

of that Convention, he expressed the view that, even if Mr Chahal were at risk of persecution, he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security.

An appeal before the Court of Appeal was dismissed on 22 October 1993 *(R.* v. *Secretary of State for the Home Department, ex parte Chahal* [1994] *Immigration Appeal Reports* 107). The Court held that the combined effect of the 1951 Convention and the Immigration Rules was to require the Home Secretary to weigh the threat to Mr Chahal's life or freedom if he were deported against the danger to national security if he were permitted to stay. In the words of Lord Justice Nolan: 'The proposition that, in deciding whether the deportation of an individual would be in the public good, the Secretary of State should wholly ignore the fact that the individual has established a well-founded fear of persecution in the country to which he is to be sent seems to me to be surprising and unacceptable. Of course there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and well-being become virtually irrelevant. Nonetheless one would expect that the Secretary of State would balance the risks to this country against the risks to the individual, albeit that the scales might properly be weighted in favour of the former.' In the view of the Court of Appeal, the Home Secretary did take into account the evidence that the applicant might be persecuted and it was not possible for the court to judge whether his decision to deport was irrational or perverse because it did not have access to the evidence relating to the national security risk posed by Mr Chahal. In the absence of evidence of irrationality or perversity, it was impossible under English law to set aside the Home Secretary's decision. Leave to appeal from that decision was denied.

The excerpts below relate to the claim that by deporting Mr Chahal to India, the United Kingdom would be committing a breach of Article 3 of the European Convention on Human Rights.]

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

76. Although the Government's primary contention was that no real risk of ill-treatment had been established, they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case law, particularly paragraphs 88 and 89 of its above-mentioned *Soering* judgment [see chapter 2, section 3.1.] In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, *inter alia,* by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

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

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

78. The Commission ... rejected the Government's arguments. It ... expressed the opinion that the guarantees afforded by Article 3 were absolute in character, admitting of no exception.

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

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

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

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

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

[Applying these principles to the circumstances of the case, the Court arrives at the conclusion that, taking into account in particular 'the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere', there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India (paras. 83–107 of the judgment). This part of the judgment was adopted by twelve votes to seven.]

Joint partly dissenting opinion, by judges Gölcüklü, Matscher, Sir John Freeland, Mr Baka, Mifsud Bonnici, Gotchev and Levits:

We agree with the majority that national security considerations could not be invoked to justify ill-treatment at the hands of a Contracting State within its own jurisdiction, and that in that sense the protection afforded by Article 3 is absolute in character. But in our view the situation is different where, as in the present case, only the extra-territorial (or indirect) application of the Article is at stake. There, a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.