

**OBSERVATIONS OF THE GOVERNMENTS OF LITHUANIA, PORTUGAL,
SLOVAKIA AND THE UNITED KINGDOM INTERVENING IN
APPLICATION No. 25424/05 RAMZY v THE NETHERLANDS**

Introduction

1. This case is illustrative of a problem faced by Contracting States that is increasingly acute. A person is present in the territory of a Contracting State. The Contracting State wishes to remove the person on the basis that he poses a threat to the citizens and security of the State because of involvement in terrorist activities. Yet the person who is judged to pose this threat claims that he faces the possibility of ill-treatment prohibited by Article 3 in the only State to which it would be possible to remove him.

2. The question the Governments of Lithuania, Portugal, Slovakia and the United Kingdom ("the Governments") invite the Court to consider is whether, recognising the increased and major threat posed by international terrorism, it is appropriate or justified to maintain the principle that in the situation outlined above there is only a single relevant issue, namely whether or not substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 in the receiving State. On that basis, it can never be appropriate even to take into account as relevant the fact, nature or degree of the national security threat posed by an individual. That appears to have been the conclusion of the majority of the Court in *Chahal v the United Kingdom*, Judgment of 25 October 1996 (paragraph 81). The practical difficulty encountered by Contracting States is caused both by the absolute nature of the prohibition against removal and by the relatively low threshold of risk that needs to be demonstrated before it arises.

3. The Governments' position is that:

3.1. no challenge is made to the absolute nature of the prohibition in Article 3 against a Contracting State itself subjecting an individual to Article 3 ill-treatment;

3.2. however, the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism;

3.3. it is necessary and appropriate for all the circumstances of a particular case to be taken into account in deciding whether or not a removal in the situation set out above is, or is not, compatible with the Convention - national security considerations cannot simply be dismissed as irrelevant in this context.

The rights in issue

4. It is necessary to start by identifying the Convention rights and obligations that are in play in this situation.

5. The first set of rights comprises those of the citizens of the Contracting State. The threat posed by individuals who choose to involve themselves in terrorist activities strikes at the heart of the Convention scheme and at the core values the Convention is designed to protect. The right to life is the necessary foundation for the enjoyment of any human rights. It is that right, as enjoyed by members of the public, which is destroyed by the actions of terrorists when they carry out attacks, often with the object of indiscriminately killing as many people as possible. More generally, terrorism seeks to attack the foundations of life in a democratic society by terrorising all those living in it and dislocating daily life to the maximum extent possible.

6. The corresponding obligation on Contracting States, and their democratically elected Governments, to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially those threatening the right to life, is a heavy one.

7. It is important in considering the rights of the citizens of the Contracting State to have regard to the nature of the threat currently posed by terrorism, notably by organisations such as Al Qaida. Three particular matters are to be noted:

7.1. The threat is a real one. Terrorists, including those supporting extremist organisations such as Al Qaida, have shown the willingness and the capacity to kill and maim members of the public.

7.2. The threat is also of a particularly serious kind. It involves concerted efforts to cause terrorist outrages by well-organised groups and networks. It involves the use of individuals who are prepared themselves to die in perpetrating such outrages. For obvious reasons, that makes the threat all the more difficult to protect against. It also involves the well-publicised threatened use of chemical, nuclear, radiological or biological material - in other words of atrocities of the most serious and appalling kind.

7.3. There has been a significant increase in the level of threat in recent years with no current sign of its diminishing.

8. The second set of rights comprises those of an individual whose removal is contemplated. It is acknowledged that the Convention rights of such persons may be engaged by removal. No challenge is sought to be made to this principle, or to the development of the principles applicable in this field in cases in which terrorism threatening the Convention rights of citizens of the Contracting State is not in issue (eg *Soering v the United Kingdom*, Judgment of 7 July 1989; *Vilvarajah v the United Kingdom*, Judgment of 30 October 1991).

9. However, it needs to be clearly recognised that such rights represent a significant extension of the provisions of the Convention.

9.1. Traditionally, States have been entitled under international law to protect themselves against threats to national security from outside by the use of immigration laws (ie controlling entry, removal etc).

9.2. The Convention includes no right to asylum. That was evidently not an accidental omission. Rather, asylum was dealt with at the time the Convention was first entered into in the 1951 Convention on the Status of Refugees, the negotiations leading up to both Conventions occurring at the same time.

9.3. The 1951 Convention, negotiated in that way, is explicit that the right of asylum does not extend to cases where there is a risk to national security. The protections afforded by the 1951 Convention were expressly made unavailable to those who acted contrary to the very purposes and principles of the United Nations, for example by choosing to engage in terrorism (see further paragraphs 26.3 and 26.4 below). In those circumstances, it is difficult to see how those who negotiated and agreed both Conventions can have intended that that position under the 1951 Convention should effectively be reversed by interpretation of Article 3 of the Convention.

10. In considering the rights of the individual whose removal is contemplated, the basis for the engagement of a Contracting State's responsibility needs to be recognised. It does not follow from the fact that Article 3 is "absolute" in the context of treatment by a Contracting State of those within its jurisdiction, that the same approach is appropriately to be transposed into the very different context in which removal to another State is contemplated in order to protect national security.

10.1. The right not to be removed to such a State, corresponding to the State's obligation not to remove, is "inherent" or implied, not expressly set out, in Article 3.

10.2. Moreover, the State is not itself subjecting the person to Article 3 ill-treatment. Such ill-treatment, if it were to eventuate, would be at the hands of a foreign State or the citizens of a foreign State. In most instances, this State will be another State (not a Contracting State) outside the norms of the ECHR. Further, reliance on Article 1 of the Convention is needed in order for the responsibility (not to expose a person to the risk of ill-treatment) to be engaged. The engagement of responsibility is therefore analogous to a positive obligation to prevent Article 3 ill-treatment.

10.3. As is well established in the Court's jurisprudence, the principle of striking a fair balance between the interests of an individual and the interests of the general community underlies the whole of the Convention. The need to do so has been particularly acknowledged and applied in the field of inherent or implied obligations and of positive obligations imposed on Contracting State (see eg *Ilascu v Moldova and Russia*, Judgment of 8 July 2004, at para. 332).

The difficulties created by the majority's judgment in Chahal

11. The majority's judgment in *Chahal* creates real difficulties for Contracting States in the context of protecting their citizens effectively against the threat of terrorism. The Governments have a long-standing history and policy of support for the Convention; and seek by this intervention to address those difficulties in a way that properly balances the various Convention rights in issue.

12. If that judgment is accepted as currently understood, in a case in which substantial grounds are shown for believing that there is a real risk of ill-treatment in a receiving State, it is not possible to remove a person believed to threaten the Contracting State and its citizens through terrorism. That is despite the fact that expulsion is the classic method by which Contracting States have sought to protect themselves against foreign nationals on their territories who are judged to be a threat to national security (a procedure recognised by Article 5(1)(f) of the Convention). The potential impediment to removal is likely to arise in a significant number of the cases of those who currently pose a major terrorist threat.

13. It may or may not be possible to overcome the difficulties in practice, and so remove the individual.

13.1. The Contracting State can obtain governmental assurances as to proper treatment of the individual if returned to his home State. However, as Chahal itself makes clear, Article 3 requires examination of whether such assurances will achieve sufficient practical protection. Different conclusions on the same material, as Chahal itself demonstrated, are likely (compare the majority and minority judgments in that case).

13.2. A State other than the home State of the individual concerned may be prepared to take him. However, in almost all cases, this is unrealistic and so does not meet the problem. If an individual is suspected of involvement in terrorism, it is highly unlikely that any third State will be willing to allow him to enter its territory.

14. If the individual commits a criminal offence, there may be some scope for the Contracting State to protect itself by trying him in the criminal courts for that offence, and by the imposition of a criminal sentence for that offence. But this does not offer a sufficient or effective route to ensure that the terrorist threat posed by the individual is properly dealt with. This is for a number of reasons:

14.1. An individual concerned in terrorism may take great care not to commit any criminal offences until the time comes for him to strike or provide material assistance to his cause;

14.2. Any criminal offences he commits may be only tangentially related to his terrorist intentions (eg petty theft or fraud), and the sentence imposed must be appropriate for the crime rather than based upon a preventive principle to safeguard the public against a quite different activity and risk, namely terrorist action;

14.3. Even if criminal offences are committed, there may be insuperable impediments in the way of the authorities in the Contracting State being able to rely upon secret intelligence information in criminal proceedings in order to secure a conviction (eg it may be impossible to rely upon evidence from an informant, where the disclosure of that evidence would necessarily reveal the informant's identity and place him at serious risk of harm or murder); and

14.4. The evidence available to the authorities may amply indicate that the individual in question does pose a serious risk to national security through involvement in terrorism, without enabling them to establish that he has

engaged in such activity to the level of proof beyond reasonable doubt, sufficient to secure a criminal conviction. See also *Lawless v Ireland* (No. 3), judgment of 1 July 1961, paras. 35 and 36.

So recourse to the criminal law cannot provide adequate protection for the public against the serious risk of harm which the presence of the individual amongst them may pose.

15. A further way in which a Contracting State may seek to ensure that there is adequate protection against the risk of terrorism when dealing with such an individual is by subjecting them to preventive measures of some kind. Detention will unquestionably be the best and most effective safeguard for the protection of the public and national security. That in itself raises serious Convention issues as the derogation cases recently decided by the House of Lords in the United Kingdom indicate. It may or may not be that such detentions would be permissible under Article 5(1)(f). In *A & others v the United Kingdom*, Application No.3455/05, the Government of the United Kingdom have made submissions about the scope and effect of Article 5(1)(f). Those are not repeated here. There may be other lesser measures, such as surveillance or a system along the lines of control orders restricting the movement and/or activities of particular individuals. However, these provide at best partial protection for the public.

16. In these circumstances, it is understandable that there should be serious concern about the point to which the Court's jurisprudence has developed when viewed alongside the risks currently posed by terrorism to the lives of citizens of Contracting States.

The relative nature of the factors in issue

17. It is necessary, in judging whether the Chahal approach is necessary or appropriate, to have regard to the fact that both (a) the degree and nature of any risks in the receiving State and (b) the degree and nature of the threat posed by an individual, are relative.

18. The degree of risk faced in the receiving State in almost all cases will depend on a series of judgements and evaluations. A necessarily uncertain prediction about future events is required. The test of "substantial grounds for believing that there is a real risk" is (a) (at least on one view) a relatively low threshold, that is not requiring proof beyond doubt or even on the balance of probabilities; but (b) also inherently difficult to apply with consistency. In a case which meets the test, there will still be questions of degree involved - some risks or threats being far clearer than others.

19. In considering the nature of the risk faced in a receiving State, it is to be borne in mind that Article 3 applies not merely to cases at the extreme end of seriousness, such as torture. Treatment falling within Article 3 exists in a spectrum of seriousness. As is well established, a minimum level of severity must be reached for a case to fall within Article 3. However, at the lower end of

the spectrum, the concept of degrading treatment is a relatively broad one. The greater the reach or coverage of Article 3, the more pressing becomes the issue whether a terrorist threat should be wholly left out of account.

20. The nature of the threat posed by an individual to the citizens of the Contracting State, and the clarity with which that threat is made out, may also vary. However, there may be cases in which the threat is clear, imminent and extremely serious.

21. It is legitimate to test the validity of the approach in *Chahal* against examples at the ends of the spectrums involved. Take, as but one example, a case in which (a) there were substantial grounds for believing that there was a real risk of a form of degrading treatment that would just cross the Article 3 minimum level of severity; but (b) there was powerful intelligence from an informer of imminent involvement in a terrorist attack of the most serious kind.

The submissions

22. The Governments submit that the approach in *Chahal* needs to be, and consistently with fundamental Convention principles can be, adapted or clarified to meet the threat posed by international terrorism. Two submissions are made as to how that should be done:

22.1. First, it is submitted that, in the context of removal of a person who poses a national security risk, the threat posed by the person whose removal is being considered can and should be a relevant factor to be weighed against the possibility and nature of any feared ill-treatment.

22.2. Secondly, it is submitted that national security considerations can have an impact on the threshold to be overcome by a person who is to be removed.

23. Five particular matters are relied on in support of the first submission.

24. First, an approach that recognises the relative nature of the issues, and does not exclude one set of rights as irrelevant, would allow all the human rights in play to be properly weighed and respected. As to this:

24.1. The absolute approach affords no weight whatever to the rights of those whose lives (and thus Article 2 rights) might be significantly protected by the removal of a person believed to pose a terrorist threat.

24.2. The fact that both the degree and nature of the risks faced in the receiving State and the degree and nature of the risks posed in the Contracting State exist in a spectrum indicates that it is likely to be difficult if not impossible properly to balance the competing rights in play without having regard to the particular facts

of the case. Suppose for example that a person had just surmounted the substantial grounds for believing that there was a real risk of say corporal punishment on a single occasion (eg *Tyrer v the United Kingdom*, Judgment dated 25 April 1978) or any physical force by persons in authority that might not be strictly necessary (eg *Ribitsch v Austria*, Judgment dated 4 December 1995) or that he might be detained for a relatively short period in prison conditions that might be considered degrading (*Becciev v Moldova* Judgment dated 4 October 2005). On the absolute approach national security and the particular risks to life posed by that person would become irrelevant. Suppose then that the facts indicated substantial grounds of a compelling kind for believing that there was a real risk that the person concerned would involve himself in bombing the London Underground during rush hour. It may fairly be asked how the Convention rights of all concerned could be said to be properly balanced and protected by an absolute prohibition on removal. The Governments submit that the risk of such treatment could not suffice to override the right of the State to protect its citizens from serious risks involving the potential for injury and death.

24.3. There are circumstances in which it might be contended that removal is incompatible with other obligations imposed by the Convention, for example that on return to his home state the person concerned would face a flagrant denial of justice (as contemplated in *Soering*). The Court has not yet confronted a case where it has had to decide whether there is an absolute prohibition against removal in such circumstances or whether risks to the Contracting State posed by, say, a person engaged in terrorist activities can be balanced against his Article 6 rights. The Governments would submit that in such a case there would be no credible argument against engaging in a balancing exercise.

25. Secondly, the absolute approach is inconsistent with the nature of the obligation on a Contracting State in this context.

25.1. It is accepted that the obligation on a State not itself to subject a person to Article 3 ill-treatment is absolute. However, as set out in paragraph 10 above, the obligation not to return an alien to a place where there are substantial grounds for believing that a real risk of such treatment exists is an obligation that is (a) inherent or implied and not express and (b) in substance a positive obligation (or at least closely analogous to one). Inherent or implied obligations have consistently been recognised as permitting implied limitations if warranted having regard to the context and case. Positive obligations have also consistently been treated as involving a balanced consideration of all the circumstances and an assessment of how it would be reasonable for a Contracting State to act: *DP & JC v the United Kingdom*, Judgment dated 10 October 2002.

25.2. Moreover, where, as here, the context involves competing Convention rights (ie the Article 3 rights of the person to be removed and, amongst others, the Article 2/3 rights of members of the public), an appropriate balancing exercise is needed.

25.3. The Court in *Soering* reiterated 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" (para. 89). It is submitted that that recognition was all the more apt in a context involving an inherent obligation which was positive in nature and in a context in which rights of equal seriousness both need protection. The approach of the Court in *Chahal* is hard to reconcile with that paragraph.

25.4. The approach sits uneasily with the Court's approach to claims of torture and other expressly forbidden behaviour under Article 3, where a complainant must establish the alleged ill-treatment beyond reasonable doubt.

26. Thirdly, the absolute approach is not supported by universally applied international law. International law has long recognised that the right of an alien to refuge is subject to necessary qualifications.

26.1. The right of states both to control immigration and, more specifically, to protect their citizens by expulsion of aliens who pose a threat to national security is long recognised (see eg *Chahal v the United Kingdom* at para. 73).

26.2. Grotius in "*De Jure Belli ac Pacis*" (1623) stated that asylum is to be enjoyed by people "who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men".

26.3. Recognition of such qualifications is to be found in the express terms of Articles 32 and 33 of the 1951 Convention. The benefit of the rule against return may not be claimed "by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is..." (Article 33(2)).

26.4. Further, Article 1F(c) of the 1951 Convention provides that: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that ... [h]e has been guilty of acts contrary to the purposes and principles of the United Nations." UN resolutions (e.g. UN Security Council Resolutions 1373 (2001), paragraph 5 and 1368 (2001)) make clear that acts, methods and practices of terrorism, and knowingly financing, planning and inciting acts of terrorism, are contrary to the purposes and principles of the United Nations.

26.5. It is acknowledged that the Torture Convention has been interpreted as imposing an absolute approach. However, (a) it is by no means clear that the drafting of the relevant part of the Torture Convention supports such an interpretation; (b) the interpretations of the Committee Against Torture are not legally binding; and (c) in any event, it is to be noted that that approach applies only in the case of torture.

27. Fourthly, the absolute approach does not reflect a universally

recognised moral imperative.

27.1. In principle, it is legitimate to ask: why should it be irrelevant, in considering whether removal would amount to inhuman or degrading treatment, that the person to be removed himself posed a real risk to the lives of the citizens in the Contracting State? It is also to be noted, if it is suggested that to take any account of national security would be contrary to a clear moral paradigm, that seven of the judges in *Chahal* dissented on the Article 3 issue, holding that it was legitimate in the context of removal for a fair balance to be struck taking into account national security considerations. The Governments submit that the dissenting judges were correct in their approach.

27.2. International law has recognised not merely that national security can be a relevant factor, but that national security can preclude a right to asylum altogether. It would be surprising if the words of Article 33(2) of the 1951 Convention were found to fly in the face of such moral paradigm.

27.3. There are states in which the absolute approach is not followed. In Canada, for example, national security and the threat to citizens posed by the person to be removed are treated as relevant: see, for example, *Suresh* [2002] 1 SCR 3, [2002] SCC 1 and *Sogi* (2004) FC 853. As appears below, in the United States a higher standard of proof of torture is required - an express understanding having been made by the United States on entering into the Torture Convention.

27.4. The need for a balancing of the various interests involved has been recognised in *Soering* (see paragraph 24.3 above).

28. Fifthly, the absolute approach is not supported by, and is inconsistent with, the evident intentions of the original signatories to the Convention. It is doubtful whether a right of asylum of any kind is appropriately to be implied into Article 3 in circumstances in which asylum appears to have been intentionally left to be dealt with in another Convention (the 1951 Convention which was signed in 1951 by 26 mainly western states). However, be that as it may, it is a significant further step to interpret Article 3 as having inherent or implied within it a right to asylum of a kind that requires national security considerations to be ignored. There is no warrant for concluding that that was intended, or would have been agreed to, by the Contracting States involved.

29. It is stressed that the Governments do not submit that national security considerations will inevitably permit removal of a person believed to present a threat on national security grounds. The submission is a narrower one: national security considerations cannot be dismissed as irrelevant, and may be taken into account, in considering whether the removing, Contracting State's responsibility should be

engaged and it should be held in violation of Article 3 by reason of removal. A considered judgement, weighing all the circumstances, would need to be made in any particular case.

30. The Governments' second submission, as set out above, is that national security considerations can have an impact on the threshold to be overcome by a person who is to be removed. In a case in which there is material indicating a national security threat, it would be appropriate for it to be shown more clearly, or to a higher standard, that a person might be ill-treated.

31. It is to be noted that the Commission's delegate in Chahal (Sir Nicolas Bratza) sought to explain and give effect to para. 89 of Soering by suggesting that "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 the doubt could be given to the removing State whose national interests were threatened by his continued presence" (see para. 78 of Chahal recording this position).

32. However, it is submitted that, if national security is to affect the standard to which risks in the receiving State need to be demonstrated, it would be appropriate (a) for the standard of proof to be significantly higher (rather than seeking to introduce a concept of "serious doubts" into the already fluid concepts of "substantial grounds for believing" and "real risk"); and (b) for this to be made clear.

33. There is doubt as to precisely what standard is currently imposed by the "substantial grounds for believing real risk" approach.

33.1. In *F v the United Kingdom* (Admissibility Decision dated 31 August 2004) the Court equated it with likelihood (p. 23).

33.2. However, in practice, it appears that a lower standard is applied by the Court than "more likely than not".

34. It is to be noted in this context that an understanding was made by the United States on entering into the Torture Convention, to the effect that it understood the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 of the Torture Convention as meaning "if it is more likely than not that he would be tortured". There have been no objections to this understanding.

35. It is clearly established under Convention jurisprudence (see for example *H. v Sweden*, Decision of 5 September 1994, 79-A D.R. 85) that the burden of establishing the risk of ill-treatment is upon the applicant. He is required to do so by the production of cogent grounds and not mere assertion.

36. It is submitted that the test, in a case in which national security concerns arise, should at least require the person to be removed to show that it is more likely than not that he would be subjected to ill-treatment contrary to Article 3. The formulation of a "more likely than not" test would make clear that a different approach was to be followed in national security cases. A considered judgement would then need to be made having regard to the particular facts of individual cases, and not by reference to generalisations. It is submitted that such a test and such an approach would not set the standard at a height likely to undermine the practical and effective protection and safeguarding of applicants Article 3 rights; and would not be inconsistent with a recognition of the importance of Article 3 in the hierarchy of Convention rights.

Conclusion

37. For these reasons, the Governments submit that the Court should reconsider, and change, the approach and principles set out at paras. 79-82 of the majority's judgment in *Chahal*. The need for a reconsideration of that approach is especially evident in a context involving a heightened threat of the most serious kind to the Article 2 rights of members of the public.