

APPLICABILITY OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT THE BORDERS OF EUROPE

Enni Lehto¹

Helsinki Law Review, 1/2018, pp. 54–77.

© 2018 Pykälä ry, Mannerheimintie 3 B, 5th floor, 00100 Helsinki, Finland, and the author.

Keywords:

human rights, prohibition of torture, expulsion, extradition, ECHR, ECtHR

ABSTRACT

The European Court of Human Rights has consistently held the prohibition of torture and inhuman treatment or punishment as absolute, meaning no derogation or balancing against other interests is allowed. Based on this, the Court has considered the expulsion or extradition of an alien also prohibited under Article 3 when it would result in the individual being ill-treated in the destination country. However, the Court has found an expulsion or extradition to violate Article 3 only rarely. A more detailed analysis of the Court's jurisprudence shows that in practice the prohibition of torture is subject to limitations and different forms of balancing even though it is not stated outright in the judgements. The Court's references to the absolute nature of the prohibition function more as an argumentative tool for an inclusive interpretation of Article 3 than a definitive statement about the non-derogability of the prohibition of torture. However, the obscuration of exactly how the balancing works is problematic. It results in rather inconsistent jurisprudence and allows the Court wide discretion to decide on the applicability of Article 3 on a case by case basis.

TABLE OF CONTENTS

1.	Introduction
2.	Article 3 of the European Convention on Human Rights
2.1	Non-derogable Right
2.2	Why Does the Court Read Non-Refoulement into the Convention?
3.	The Standard and Burden of Proof
3.1	Specialised Standard of Proof
3.2	Real Risk
3.3	Substantial Grounds
3.4	Burden of Proof
4.	Balancing the Risk of Ill-Treatment against Other Interests
4.1	Threat to National Security – Strasbourg vs. the United Kingdom
4.2	Threat to National Security – Under the Surface
4.3	Economic Interests
5.	Conclusion
	References

¹ LL.B. (University of Helsinki). The article is based on the author's Bachelor's thesis.

I. INTRODUCTION

The prohibition of torture and inhuman or degrading treatment expressed in Article 3 of the European Convention on Human Rights (the Convention, ECHR) is one of the most fundamental human rights norms and the only one that is considered to be absolute.² From this absolute character the European Court of Human Rights (the Court) has derived the prohibition on refoulement, which has recently been of increasing importance.³ The aftermath of the Arab Spring and the subsequent rise of the Islamic State of Iraq and Syria (ISIS) has forced millions of people to flee their homes. Many of them have sought refuge in Europe, which has resulted in the “refugee crisis” and exhausted the resources of national migration institutions. The amplified pressure on the European states to fulfil their obligations under international refugee law and the heightened threat of terrorism have led to a situation where the states’ resources for the examination of asylum applications are stretched at the same time as they have an increased incentive to reject them. This creates a tension between immigration control and the protection of human rights.

The Court has considered the prohibition of refoulement to flow from the absolute nature of the prohibition of torture. In practice, however, the Court has found extradition or expulsion to be in violation of Article 3 only in a handful of cases, even though one would expect, in the light of the supposedly absolute nature of the prohibition, the situation to be the opposite. This disparity between the Court’s rhetoric and its practice raises the question of how absolute the prohibition of torture actually is in the context of non-refoulement?

The purpose of the present article is to explore this question and to discover the reasons behind the contradiction. This is not by any means the first attempt to do so and this paper owes much to the work of authors who have studied the question previously, especially to Hemme Battjes’ article “In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed”. However, in the almost 10 years since the publication of Battjes’ article, writing on the topic has mostly focused on more specialised issues.

An analysis of the jurisprudence of the Court is the natural method to employ for the study of exactly how “absolute” the Court regards Article 3. The aim is to demonstrate how the Court’s rhetoric of “absolute rights” conflicts with the practical application of said rights. In choosing the cases for this article, an effort has been made to discover the judgements which go beyond merely applying the existing doctrine on the applicability of Article 3 in the context of expulsion or extradition.

2 See for example Battjes 2009, p. 583.

3 The term ‘prohibition of refoulement’ (or principle of non-refoulement) is borrowed from international refugee law and used here as a shorthand term for ‘the prohibition to expel or extradite an individual to a country where they face a real risk of ill-treatment as defined in Article 3 of the ECHR’.

The article starts with some general considerations. There is first a brief overview of how the proscribed treatment is defined in the practice of the Court, followed by the Court’s rationale for applying Article 3 to extradition and expulsion cases. Chapter 3 focuses on how the standard and burden of proof have the capacity to heavily impair the protection of Article 3. Chapter 4 discusses the possibility of balancing the prohibition of torture against other interests in relation to the absolute nature of the provision. Due to limited space, it has been possible to include only some of the factors that affect the extent of the protection provided by Article 3. Priority has been given to the aspects that are perhaps less obvious but more directly related to the interpretation and application of Article 3. On this basis, most of the more purely procedural aspects have been left out.

For the purpose of this article there is mostly no need to distinguish between torture and other forms of maltreatment proscribed by Article 3.⁴ Therefore, “ill-treatment” is used as an umbrella term to refer to the content of Article 3. Similarly, “expulsion” is employed as a general term for the removal of a person from a state’s territory for any reason, be it extradition of a criminal or a suspect, expulsion of a failed asylum seeker or any other person

2. ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.1 Non-derogable Right

Article 3 of the European Convention on Human Rights reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The single sentence stands out in sharp relief against the other provisions of the Convention, most of which span multiple paragraphs. Article 3 is the only article that does not include any qualifications, exceptions or restrictions, overt or implied, to the rights guaranteed. Since the prohibition is unqualified it must be interpreted, and indeed has been interpreted, as absolute.⁵

Further underlining the fundamental character of the prohibition of torture is the fact that Article 15 of the Convention, which allows for general derogation from the treaty in times of war or public emergency, does not grant the same freedom in regard to Article 3. The European Court of Human Rights has also consistently reaffirmed the absolute nature of the prohibition. In the case of *Ireland v. the United Kingdom* the Court stated that “[t]he Convention prohibits

4 The Court does not usually distinguish between them in expulsion and extradition cases. Since the treatment has yet to occur, it would be quite impossible to do so (*Babar Ahmad and Others v. the United Kingdom*, 10 April 2012, para 170).

5 *Ireland v. The United Kingdom*, 18 January 1978, Separate opinion of Judge Sir Gerald Fitzmaurice, para 33.

in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct" and has since reiterated it in almost every judgement.⁶

The absolute wording of the prohibition of torture emphasises its non-derogable nature but does little to define the actual scope of Article 3. What, exactly, is prohibited hinges on how the terms "torture", "inhuman treatment or punishment" and "degrading treatment or punishment" are defined. As no definition is given in the Convention, the task falls to the Court to establish what kind of maltreatment is severe enough to be prohibited by Article 3.

Not all kinds of mistreatment, even if unpleasant or illegal, give rise to an issue under Article 3. The ill-treatment "must attain a minimum level of severity if it is to fall within the scope of Article 3".⁷ The evaluation of this minimum should be based on all the circumstances of the case. As an example of possibly relevant circumstances, the Court mentions the duration of the ill-treatment, its physical or mental effects on the victim as well as the sex, age and health of the victim in some cases. The assessment of the minimum, and therefore the definition of the terms of Article 3, is relative.⁸ As these factors are mostly conditions specific to the victim, the qualification of ill-treatment as such depends on the effect it has on the individual subjected to it.⁹

In sum, this means that certain treatment could constitute ill-treatment in some cases while being perfectly justifiable in others.¹⁰ For example, the detention of a small child separated from his or her parents amounts to inhuman treatment while similar circumstances might not do so in the case of an adult.¹¹ In the light of the supposedly absolute nature of Article 3 this relativity seems paradoxical. It is not, however, the prohibition itself that is relative but rather the definition of the prohibited treatment. The example above does not mean that inflicting inhuman treatment on the adult might be acceptable in some circumstances but that the treatment in question is not inhuman in the case of adults since it will not cause the same level of anguish for them.¹²

This contextual approach adopted by the Court is in accord with the object and purpose of the Convention which requires it to be applied in a way that makes its safeguards practical and effective.¹³ The relativism does not undermine the absolute nature of Article 3 – on the contrary, it is an interpretation that can be used to widen the scope of Article 3.¹⁴ Since the definition of ill-treatment depends on the individual features of the person subjected to it, the

6 *Ireland v. The United Kingdom*, 18 January 1978, para 163.

7 *ibid.*, para 162.

8 *ibid.*

9 Battjes 2009, p. 613.

10 Ovey – White 2006, p. 76.

11 See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, paras 55, 58.

12 Battjes 2009, p. 613.

13 *Soering v. the United Kingdom*, 07 July 1989, para 87.

14 *Mavronicola – Messineo* 2013, p. 594.

provision is able to better provide individuals the protection they need. If the Court stuck to formalist categorisation instead, classifying different types of treatment as either falling under the prohibition or outside of it, especially the most vulnerable individuals like children might be deprived of effective protection.

The absolute character of Article 3 also means that ill-treatment can never be justified by the object or purpose of the treatment. However, the purpose can have relevance in determining if the treatment amounts to torture or is inhuman or degrading.¹⁵ This is reflected in the Court's case-law concerning legitimate punishments and the treatment associated with them. In the case of *Saadi v. Italy* the Court stated that the suffering or humiliation must go beyond of what is inevitable considering the form of the legitimate treatment or punishment in question for it to constitute ill-treatment prohibited by Article 3.¹⁶ It is only logical that the relativist interpretation is applied to punishments as well. The same way the definition of ill-treatment is dependent on the individual traits of the person involved, in defining inhuman or degrading punishment the nature and context of the punishment together with the manner and method of its execution are taken into account.¹⁷

2.2 Why Does the Court Read Non-Refoulement into the Convention?

The first article of the European Convention on Human Rights reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It imposes a double obligation on the states to both not infringe the protected rights and to ensure that within their jurisdiction the rights are guaranteed to everyone regardless of nationality.¹⁸ However, there is no right to asylum under the European Convention on Human Rights, nor does it include a prohibition of refoulement. The only restrictions to expulsions in the Convention can be found in Article 3(1) and Article 4 of the Protocol No. 4 to the ECHR, which prohibit the expulsion of a state's own nationals and the collective expulsion of aliens, respectively.

This raises the question of why the European Court of Human Rights applies the Convention to expulsion or extradition cases in the first place. After all, it is inherent in those cases that the alleged violations occur outside of the jurisdictions of the contracting parties. Naturally the Convention cannot impose obligations on states not parties to it, a matter the Court is well aware of.¹⁹ This means that for the Court to find a violation of the Convention, the

15 *Ireland v. The United Kingdom*, 18 January 1978, Separate Opinion of Judge Sir Gerald Fitzmaurice, para 19.

16 *Saadi v. Italy*, 28 February 2008, para 135

17 *Tyrer v. The United Kingdom*, 25 April 1978, para 30

18 Ovey – White 2006, p. 20.

19 *Soering v. the United Kingdom*, 07 July 1989, paras 86, 91.

violation must be imputable to a signatory state of the Convention. This in turn leads to the question of why they should be held responsible for treatment occurring under the jurisdiction of another state.

The first case where the Court found that extradition would amount to a violation of Article 3 was *Soering v. United Kingdom*. In the judgment, the Court conceded that Article 1 of the Convention does indeed set a territorial limit to the applicability of the Convention but held that this does not mean the contracting states can never be held responsible for the consequences of extradition. To support this conclusion, the Court resorted to a teleological interpretation stating that the object and purpose of the Convention require that its provisions guarantee “practical and effective” safeguards instead of offering mere illusory or theoretical protection.²⁰ While this does not imply the existence of a general principle stipulating that the extraditing state must ensure the conditions in the destination country are fully in accord with the Convention standards, it allows for a possibility that in some cases extradition could amount to a violation of its terms.²¹

Citing the absolute character of Article 3, the Court proceeded to argue that since the prohibition of torture is

*“one of the fundamental values of a democratic society ... [it] would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture.”*²²

On these grounds, taking into account also the requirement for effective protection under the Convention, the Court considered extradition to be within the scope of Article 3.²³ In the case of *Cruz Varas v. Sweden* the Court extended this principle to apply also in expulsion cases.²⁴ The liability of a contracting state is due to the action taken by the state (expelling or extraditing) resulting in an individual being exposed to ill-treatment, even if the actual suffering happens outside of its jurisdiction.²⁵

3. THE STANDARD AND BURDEN OF PROOF

3.1 Specialised Standard of Proof

The most obvious distinction between expulsion cases and other cases concerning alleged violations of Article 3 is that instead of examining past events the former require the Court to rule on a potential violation. In *Soering* the Court noted that “[i]t is not normally for the

Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention” but in the light of the seriousness of the potential suffering deems it necessary to deviate from this principle.²⁶

In a case concerning an alleged past violation of Article 3, it needs to be satisfied that a violation has indeed occurred. The Court recognises that allegations concerning a potential eventuality cannot be proven in the same way as past events. Requiring the applicant to produce indisputable evidence of a risk of ill-treatment is practically asking them to prove a future event.²⁷ Naturally this is impossible and consequently the assessment of the risk is always somewhat speculative.²⁸

Due to this unique feature of expulsion cases, the standard of proof normally required to demonstrate a violation of Article 3 (“beyond reasonable doubt”) would place an unfair burden of proof on the applicant and render the protection of Article 3 purely theoretical.²⁹ It would be equally infeasible, however, to grant unqualified protection from expulsion under Article 3. To do so would deny altogether the states’ right to control the entry and residence of aliens into their territory – a well-established part of their sovereignty under international law that the European Court of Human Rights cannot disregard.³⁰ Therefore the risk of being subjected to treatment prohibited by Article 3 must reach at least some degree of probability in order to engage the responsibility of the expelling state under the Convention.³¹

The Court formulated a specialised standard of proof for expulsion cases in *Soering* and has applied it consistently in subsequent case-law.³² According to this standard the proposed expulsion would be in violation of Article 3 “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”.³³ The degree of probability required to give rise to a breach of Article 3 in expulsion cases is indicated by “real risk” while “substantial grounds” refers to the amount of evidence necessary to prove the existence of such a risk.³⁴ Consequently, the extent of the protection provided by Article 3 depends on the threshold of “real risk”, what evidence is required to establish “substantial grounds” and how the burden of proof is split between the state and the applicant.³⁵

20 den Heijer 2008, p. 288.

21 *Soering v. the United Kingdom*, 07 July 1989, paras 85–87.

22 *ibid.*, para 88.

23 *ibid.*, para 87.

24 *Cruz Varas and Others v. Sweden*, 20 March 1991, para 70.

25 *Soering v. the United Kingdom*, 07 July 1989, para 91; den Heijer 2008, p. 288.

26 *Soering v. the United Kingdom*, 07 July 1989, para 90.

27 *Rustamov v. Russia*, 3 July 2012, para 117; *Azimov v. Russia*, 18 April 2013, para 128. See also *Saadi v. Italy*, 28 February 2008, Concurring Opinion of Judge Zupančič.

28 *Saadi v. Italy*, 28 February 2008, para 142; *Rustamov v. Russia*, 3 July 2012, para 117; *Azimov v. Russia*, 18 April 2013, para 128. See also *Bensaid v. the United Kingdom*, 6 February 2001, para 39; *N. v. the United Kingdom*, 27 May 2008, para 50.

29 *Ireland v. the United Kingdom*, 18 January 1978, para 161.

30 *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, para 102.

31 de Weck 2016, p. 233.

32 See for example *Chahal v. the United Kingdom*, 15 November 1996, para 74; *Saadi v. Italy*, 28 February 2008, para 125; *J.K. and Others v. Sweden*, 23 August 2016, para 79.

33 *Saadi v. Italy*, 28 February 2008, para 125. See also *Soering v. the United Kingdom*, 07 July 1989, para 9.

34 de Weck 2016, p. 233.

35 *Ibid.*

3.2 Real Risk

For an expulsion to violate Article 3, there must be a “real risk” that the applicant will be subjected to torture or inhuman or degrading treatment in the destination country. It is probably an understatement to say the concept is very vague. As long as a risk exists, it can hardly be described as “unreal”. In an early study of the jurisprudence, Alleweldt argues that the standard indicates that even a very small risk of ill-treatment is enough to invoke Article 3, since ignoring even a very low probability would result in a number of individuals ending up ill-treated after being expelled.³⁶ He is doubtlessly right and in the light of the absolute nature of the prohibition of torture this would be the logical conclusion. In any case, the lower the likelihood required for the risk to be accepted as “real” by the Court, the wider the scope of the protection provided by the Convention.³⁷

The Court has never provided a proper definition for the “real risk” standard. Examination of its case-law does not offer much clarification since it has also been less than consistent when applying it. The only clear limits that can be derived from the jurisprudence are that the risk needs to be higher than just a possibility and, since the assessment of risk is a prognosis of future events, certitude of ill-treatment cannot be required.³⁸ In the case of *Saadi v. Italy* the Court expressly rejected the view put forth by the intervening United Kingdom government that the probability of ill-treatment should be “more likely than not”.³⁹ It did not, however, clarify what it should be instead. In *Azimov v. Russia* the standard was set to a “high likelihood” and in a few cases the Court has even required the possibility of ill-treatment to be proven “beyond reasonable doubt” – the standard used in cases of alleged past violations of Article 3.⁴⁰ This is a very high standard for an event that has yet to occur. It has not, however, been often recalled by the Court in the context of refoulement.⁴¹

The standard of proof has been set particularly high in cases where the risk stems from factors which cannot engage the responsibility of the receiving state’s officials, directly or indirectly.⁴²

In the case of *D. v. the United Kingdom* the risk did not emanate from intentional ill-treatment by the authorities or private parties but from unavailability of adequate medical care in the destination country. The Court considered that in the light of the fundamental importance and absolute nature of Article 3, limiting its scope to only intentionally inflicted ill-treatment would undermine the protection it is supposed to offer.⁴³

The Court emphasised that the lower standard of health care in the destination country could not in itself amount to a violation of Article 3.⁴⁴ However, in very exceptional circumstances “where the humanitarian grounds against the removal are compelling” deportation could be in violation of the Convention.⁴⁵ In the case of *D.*, who until recently was the only person granted protection under Article 3 on medical grounds, this condition was satisfied by the “real risk of dying under most distressing circumstances”.⁴⁶

In these so called medical cases the standard of proof quoted by the Court is still “real risk” but the threshold has been intentionally set very high.⁴⁷ In the case of *N. v. the United Kingdom*, the mere chance that the applicant’s condition might not deteriorate rapidly enough to qualify as inhuman suffering was enough to deny her claim.⁴⁸ This implies that the required degree of probability in medical cases is at least near certainty.⁴⁹

The only conclusion to be derived from the above jurisprudence is that the Court seems to apply the standard of “real risk” on a case by case basis and exercise rather free discretion while doing so.⁵⁰ The very low number of successful complaints indicates that it is not only the medical cases where the bar is set quite high.⁵¹ In their joint dissenting opinion in the case of *E.G. v. the United Kingdom*, judges Garlicki and Kalaydjieva criticised the Court for setting the threshold so high it undermines the protection of Article 3. They argued that the benefit of the doubt should favour the applicant since the consequences for an applicant subjected to ill-treatment after expulsion are far more severe than those suffered by the state in the case it is made to needlessly tolerate an unwanted alien.⁵²

In the judgement *Harkins and Edwards v. the United Kingdom*, the Court admitted that “it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention” and added that “it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had

36 Alleweldt 1993, p. 366.

37 Battjes 2009, p. 611.

38 *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, para 111; *Azimov v. Russia*, 18 April 2013, para 128.

39 *Saadi v. Italy*, 28 February 2008, para 140.

40 *Azimov v. Russia*, 18 April 2013, para 128; *Shamayev and Others v. Georgia and Russia*, 12 April 2005, paras 338, 353; *Garabayev v. Russia*, 7 June 2007, para 76.

41 de Weck 2016, p. 234.

42 In the initial case of *Soering*, the potential ill-treatment would have been caused by the public authorities of the receiving state. In its subsequent case-law the Court has found that a risk emanating from sources other than public agents can also give rise to an issue under Article 3. In the case of *Ahmed v. Austria* the Court found the general situation of instability and violence in Somalia enough to establish a risk of ill-treatment. In the case of *H.L.R. v. France* the Court explicitly stated that Article 3 applies also in cases where the danger emanates from persons other than public officials, on the condition that the authorities of the state cannot provide sufficient protection from it. (*Ahmed v. Austria*, 17 December 1996, para 44; *H.L.R. v. France*, 29 April 1997, para 40. See also Janis – Kay – Bradley 2008, p. 224.)

43 *D. v. the United Kingdom*, 2 May 1997, para 49.

44 *Ibid.*, para 49; *Paposhvili v. Belgium*, 13 December 2016, para 192.

45 *N. v. the United Kingdom*, 27 May 2008, para 42.

46 *D. v. the United Kingdom*, 2 May 1997, para 53.

47 *N. v. the United Kingdom*, 27 May 2008, para 43. See also Greenman 2015, p. 269.

48 *Ibid.*, para 50; Battjes 2009, p. 611

49 *Ibid.*

50 Battjes 2009, p. 611.

51 de Weck 2016, p. 236.

52 *E.G. v. the United Kingdom*, 31 May 2011, Joint Dissenting Opinion of Judges Garlicki and Kalaydjieva.

a long history of respect for democracy, human rights and the rule of law”.⁵³ Despite the factual manner of the statement it seems to carry clear normative undertones.⁵⁴ It implies that when the destination country is one mostly “respecting” human rights there would be a stronger assumption that no real risk of ill-treatment exists. While it does not provide any concrete information about how the state’s political history would alter the interpretation of the standard of proof, it serves as a yet another example of the unexplained inconsistencies in the Court’s jurisprudence.

3.3 Substantial Grounds

To prove that there is a “real risk” of ill-treatment the applicant must demonstrate “substantial grounds” for believing such a risk exists.⁵⁵ This refers to the evidence the applicant needs to produce in order to substantiate their claim. To determine if there is a risk of ill-treatment, the Court examines the “foreseeable consequences of the removal of an applicant to the receiving country in the light of the general situation there as well as his or her personal circumstances.”⁵⁶ So both the general human rights situation in the country and the applicant’s personal circumstances can be considered as evidence and there is no legal or hierarchical distinction between them. In the *Sufi and Elmi v. the United Kingdom* judgement the Court clarified this by stating that

*“[i]f the existence of such a risk is established, the applicant’s removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.”*⁵⁷

While these statements demonstrate the Court considers both the personal circumstances of the applicant and the general human rights situation in the destination country, not every situation of general violence is sufficient in itself to give rise to a risk.⁵⁸ The Court has set the standard quite high – only the “most extreme cases” of general violence could cause a real risk of ill-treatment simply by virtue of an individual being exposed to it.⁵⁹ When the general situation in the country is not enough to warrant protection under Article 3, the applicant needs to show that there is something special in their circumstances, which makes them more susceptible to being ill-treated.

53 *Harkins and Edwards v. the United Kingdom*, 17 January 2012, para 131. This most likely refers to the USA as it was the destination country in the judgment.

54 Mavronicola – Messineo 2013, p. 600.

55 *Saadi v. Italy*, 28 February 2008, para 125. See also *Soering v. the United Kingdom*, 07 July 1989, para 9; *Chahal v. the United Kingdom*, 15 November 1996, para 74.

56 *Hirsi Jamaa and Others v. Italy*, 23 February 2012, para 117; see also *NA. v. the United Kingdom*, 17 July 2008, para 113; *Sufi and Elmi v. the United Kingdom*, 28 June 2011, para 216, *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, para 108.

57 *Sufi and Elmi v. the United Kingdom*, 28 June 2011, para 218.

58 *Ibid.*; *NA. v. the United Kingdom*, 17 July 2008, para 114.

59 *NA. v. the United Kingdom*, 17 July 2008, para 115

This was clearly demonstrated in the now rather dated case of *Vilvarajah and Others v. The United Kingdom*. The case concerned young Tamil men whose asylum applications had been rejected and who were returned to the Sri Lankan civil war. Although it was well known that Tamils were persecuted by the Sri Lankan government, the Court found no violation of Article 3 since there were no special features in the applicants’ personal circumstances distinguishing their position from other young Tamil men. The Court acknowledged the risk of ill-treatment but since it was randomly targeted it was not enough to demonstrate “substantial grounds”.⁶⁰ In a more recent ruling *J.K. v. Sweden* the Court restated that as a rule the applicant must provide sufficient proof of a risk of ill-treatment that distinguishes their situation from the general perils in the destination country.⁶¹

While this rather demanding standard established in *Vilvarajah* is still the general rule, it has been somewhat mitigated in subsequent case-law. In the case of *Salah Sheekh v. the Netherlands* the Court relaxed the rigid requirement of individual persecution if the applicant can establish that they are a member of a group systematically subjected to ill-treatment in the destination country. In such cases the Court considers the membership of such a targeted group sufficient to put the individual at risk and it is not necessary for the applicant to demonstrate any further distinguishing features concerning them personally.⁶² The applicant still has to provide “serious reasons to believe” that there exists a practice of ill-treatment towards the members of a certain group and their membership of this group.⁶³ Nonetheless, it is a significant alleviation to the standard of proof.

The Court explained this departure from earlier jurisprudence with the finding that to require such further evidence would be contrary to the absolute character of Article 3 by rendering its protection illusory.⁶⁴ This can only be regarded as a step in the right direction since the requirement to demonstrate a risk of personal persecution is very demanding. Especially asylum seekers often have considerable difficulty in producing evidence pertaining to their own personal circumstances.⁶⁵ On the other hand, information about the general situation in an area and any systematic persecution of certain groups within them is much more readily available. It is also difficult to reconcile the view adopted in *Vilvarajah* with the supposedly absolute nature of Article 3. If, in addition to being a member of a persecuted group, the applicant needs to personally face a higher risk of ill-treatment than the other members of the group, the very people who probably most need the protection of Article 3 would be deprived of it. It would create an

60 *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, paras 111–112, 115; *NA. v. the United Kingdom*, 17 July 2008, paras 114–117.

61 *J.K. and Others v. Sweden*, 23 August 2016, para 94.

62 *Salah Sheekh v. the Netherlands*, 11 January 2007, para 14.

63 *Saadi v. Italy*, 28 February 2008, para 132.

64 *NA. v. the United Kingdom*, 17 July 2008, para 116.

65 *Said v. the Netherlands*, 5 July 2005, para 49.

unjustifiable double standard and heavily impair the effectiveness of the protection of Article 3 if being ill-treated as a member of a certain group was more acceptable than enduring the same treatment for more personal reasons.

3.4 Burden of Proof

Like always, the initial burden of proof is with the applicant.⁶⁶ They need to present

*“evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.”*⁶⁷

If the applicant is able to do so, it is then the responsibility of the respondent state to dispel any doubts about it.⁶⁸ For example in the cases *Hilal v. the United Kingdom* and *R.C. v. Sweden*, the applicant was able to produce a medical report along with expert opinions that it was genuine. As the State was unable to provide any evidence to the contrary, the Court accepted the view presented in the opinions provided by the applicants.⁶⁹

In the recent case of *J.K. v. Sweden*, the Court seemed to partially redistribute the burden of proof. The Court considered that since the applicant would normally be the only one able to provide information about their own personal circumstances, they should bear the burden of proof regarding those circumstances. This is in accord with the Court’s earlier jurisprudence. However, in the light of the difficulties an asylum seeker may face in collecting evidence, the Court argued that a different approach should be taken considering the general situation in the country concerned. In such matters the respondent government should bear the burden of proof instead of the applicant.⁷⁰ This shift in the division of the burden of proof receives a confirmation in the case of *S.K. v. Russia* where the Court considered that it was primarily the responsibility of the respondent state to provide evidence that the general situation was not serious enough to warrant protection under Article 3.⁷¹ Failure to do so led the Court to conclude that there was no reason to suspect that the applicants take on the situation was incorrect and ruled that the expulsion would be in violation of Article 3.⁷²

In the *J.K.* judgement the Court made also another alleviation to the applicant’s burden of proof. If the applicant has been able to provide sufficient evidence to prove they have already been

subjected to ill-treatment in the past, the Court considers it a strong indication of a risk of being subjected to it again. In such circumstances the burden of proof is transferred to the respondent government who then needs to adduce evidence that the circumstances have changed in such a way that the applicant is no more likely to be subjected to treatment proscribed by Article 3 if they were returned.⁷³ While establishing past ill-treatment is not necessarily in itself enough to provide “substantial grounds” to believe a future risk exists, it does ease the rather heavy burden of proof placed on the applicant.⁷⁴

The shift in the Court’s jurisprudence regarding the burden of proof had already been foreshadowed in earlier judgements.⁷⁵ However, in *J.K.* the judges used multiple paragraphs explaining the reasoning behind it. The Court made multiple references to the materials produced by the office of the United Nations High Commissioner for Refugees and contrasted the new interpretation with its earlier case-law.⁷⁶ This is hopefully an indicator that the redistribution of the burden of proof between the applicant and the state to better correspond to the resources each has in their disposal is to be incorporated in future jurisprudence as well. The way the Court explicitly stated in *J.K.* that rules concerning the burden of proof should not be such that they impair the effective protection under Article 3 seems to confirm this is their intention.⁷⁷

4. BALANCING THE RISK OF ILL-TREATMENT AGAINST OTHER INTERESTS

4.1 Threat to National Security – Strasbourg vs. the United Kingdom

Yet another problem emerges in the light of the general relativity of the ECHR provisions. As a rule, the Convention allows for balancing against other public concerns such as national security.⁷⁸ In the current context such balancing would mean that, even though the standard of proof has been met, other factors could justify exposing the individual in question to the (already proved) risk of ill-treatment nonetheless.

In principle, the absolute nature of Article 3 precludes all balancing.⁷⁹ It is not acceptable to torture someone “a little” in any circumstances. However, even states that generally respect and uphold human rights and unequivocally condemn torture and other forms of ill-treatment have a vested interest in controlling the entry, residence and expulsion of aliens within their jurisdiction.

66 *Ibid.*; *Saadi v. Italy*, 28 February 2008, para 129; *R.C. v. Sweden*, 9 March 2010, para 50; *NA. v. the United Kingdom*, 17 July 2008, para 111.

67 *Saadi v. Italy*, 28 February 2008, para 129.

68 *Ibid.*; *R.C. v. Sweden*, 9 March 2010, para 50; *NA. v. the United Kingdom*, 17 July 2008, para 111.

69 *Hilal v. the United Kingdom*, 6 March 2001, para 63; *R.C. v. Sweden*, 9 March 2010, para 53.

70 *J.K. and Others v. Sweden*, 23 August 2016, paras 96-98.

71 *S.K. v. Russia*, 14 February 2017, para 59.

72 *Ibid.*, paras 62-63.

73 *J.K. and Others v. Sweden*, 23 August 2016, paras 99-102.

74 *Ibid.*, paras 99, 101.

75 See *R.C. v. Sweden*, 9 March 2010, para 55; *R.J. v. France*, 19 September 2013, para 42.

76 *J.K. and Others v. Sweden*, 23 August 2016, paras 99-101.

77 *Ibid.*, para 97.

78 See Ovey – White 2006, p. 7

79 *Ireland v. the United Kingdom*, 18 January 1978, para 163.

Especially when said aliens are convicted criminals or suspected terrorists, concerns for national security often trump concerns about the possible consequences of removal for the individual in question.

In the case of *Soering* the Court seemed to leave room for balancing, stating 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”.⁸⁰ This statement, as well as the Court’s deliberation on the beneficial purpose of extradition and the interest of all nations to prevent suspect offenders from fleeing abroad, implies that at least in the context of expulsions the absolute character of Article 3 does not preclude balancing.⁸¹

Based on these remarks, in the case of *Chahal v. the United Kingdom*, which concerned the expulsion of an individual suspected of terrorism, the government of the United Kingdom argued that national security concerns could limit the scope of Article 3 in expulsion cases. The government claimed that where such interests were at stake, an individual could be deported regardless of a risk of ill-treatment in the destination country.⁸² The Court rejected this view outright. With reference to the absolute character of Article 3, the Court stated that the activities of the individual in question cannot be given any significance, however undesirable or dangerous they are.⁸³ The Court continued with a definitive statement that there is absolutely no room for balancing the risk of ill-treatment against the reasons for the expulsion.⁸⁴ The United Kingdom government has been using every available opportunity to overturn this “*Chahal* principle” ever since.⁸⁵

Similar circumstances emerged again in the *Saadi* case. Like *Chahal*, the case concerned an individual suspected of terrorist activities. The United Kingdom government participated in the proceedings as an intervener and argued that when the ill-treatment is not inflicted by a signatory state of the Convention but by another state, the protection of the individual’s rights could be weighed against the interests of the community as a whole.⁸⁶ The Court was not persuaded by this argument. It maintained that since the prohibition of ill-treatment is absolute, simply the risk of such treatment means that the person cannot be deported if it would subject them to that risk. The fact that the ill-treatment would be inflicted by another

state was deemed irrelevant. The Court then reaffirmed the view adopted in *Chahal* that the conduct of the person in question and the reasons for the proposed removal could not be weighed against the risk of ill-treatment.⁸⁷

4.2 Threat to National Security – Under the Surface

The Court consistently reaffirms the absolute nature of the prohibition of torture and holds accordingly that no balancing with other interests is allowed. In other words, if it is established that there are substantial grounds to believe the person concerned runs a real risk of facing treatment contrary to Article 3, no other concerns can justify exposing an individual to that risk. However, this does not automatically preclude more subtle forms of balancing that can take place before the Court arrives to the conclusion that a real risk of ill-treatment exists.⁸⁸

As discussed in chapter 2.1, the qualification of a conduct as ill-treatment is relative. While the relativity does enable more effective protection against ill-treatment, it can just as easily be used to limit the scope of Article 3. The critical question in this regard is which factors are included in the “all the circumstances of the case” to be taken into consideration when determining whether certain treatment is prohibited or not. Of particular interest here is whether the fact that the possible future ill-treatment would occur in another state is one of them.⁸⁹

In the *Saadi* case discussed above, the United Kingdom government also argued that the nature of the ill-treatment should be evaluated in relation to the threat presented by the person in question.⁹⁰ While it is somewhat unclear what they meant with this part of their argument, it seems to imply that if the person poses a security threat to the expelling country, the minimum level of severity required for the treatment to fall under the scope of Article 3 could be higher. The Court did not address this part of the United Kingdom argument in *Saadi*, but in the case of *Babar Ahmad and Others v. the United Kingdom* the Court partially accepted the argument as interpreted above.⁹¹

In *Babar Ahmad* the Court maintained that the reasons for the removal or the dangerousness of the person concerned cannot be a factor in the assessment of whether the minimum level of severity is reached.⁹² However, while no actual balancing against other interests is

80 *Soering v. the United Kingdom*, 07 July 1989, para 89.

81 *Ibid.*, paras 86, 89

82 *Chahal v. the United Kingdom*, 15 November 1996, para 76.

83 *Ibid.*, para 80. See also *Saadi v. Italy*, 28 February 2008, para 138.

84 *Ibid.*, para 81.

85 Clearly frustrated with refuting basically the same arguments in every judgment, in *Babar Ahmad* the Court explicitly stated that kind of balancing approach contemplated in the *Soering* judgement has been abandoned. (*Babar Ahmad and Others v. the United Kingdom*, 10 April 2012, para 173).

86 *Saadi v. Italy*, 28 February 2008, para 120.

87 *Ibid.*, para 138.

88 Here the distinction between interpretation and balancing becomes somewhat ambiguous but, as the interpretations are modified specifically on account of other concerns, the coherence of the article is better preserved by discussing the issues collectively here.

89 Mavronicola – Messineo 2013, p. 593-94. Also, in determining the proportionality of the punishment the conduct of the person in question is a legitimate factor to consider.

90 *Saadi v. Italy*, 28 February 2008, para 122.

91 *Babar Ahmad and Others v. the United Kingdom*, 10 April 2012, para 177. For a more detailed analysis of the case see Mavronicola – Messineo 2013.

92 *Ibid.*, para 172

allowed, simply the fact that the possible ill-treatment would happen in a non-contracting state might affect the degree of severity required. In the paragraph 177 of the judgement the Court made a clear deviation from its earlier case-law, stating that “treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case.”⁹³

This departure from the established jurisprudence is highly problematic. The Court has always before held that since the prohibition of treatment contrary to Article 3 is absolute, there can be no derogation from it.⁹⁴ Yet, what else is the above-mentioned statement if not a derogation? The Court has effectively created a double standard where treatment that qualifies as ill-treatment in the domestic context might not fall under the protection of Article 3 in expulsion cases.⁹⁵ This is the exact conclusion the Grand Chamber rejected in *Saadi*. Granted, the method the Court reached this conclusion in *Babar Ahmad* is different. In *Saadi*, the fact that the ill-treatment happened in the hands of another state did not allow for balancing against other interests, but according to *Babar Ahmad* it can be a factor when assessing what constitutes the ill-treatment in the first place. Arguably, the difference will not matter much to the applicant.

There is also the question of whether the standard of proof allows for balancing. In *Saadi*, the United Kingdom government argued further that the risk of ill-treatment should be balanced against the danger the person in question presents to the community. Specifically, they argued that if the person concerned was a threat to national security, the standard of proof for the risk of ill-treatment should be “more likely than not”.⁹⁶ The Court rejected the argument, stating that if a real risk of ill-treatment exists, the dangerousness of the person does not reduce the degree of probability of them being subjected to it on return. The relevant probability cannot be affected by the possible threat the person poses to the state if not returned.⁹⁷

In connection to this argument, the United Kingdom also contended that where the respondent state presented evidence that the person concerned was indeed a threat to national security, the applicant should in turn supply stronger evidence of the risk of ill-treatment than “substantial grounds” would otherwise require.⁹⁸ The Court replied that “such an approach is not compatible with the absolute nature of the protection afforded by Article 3”. It proceeded to reaffirm the standard of proof as “substantial grounds for believing there is a real risk of treatment prohibited

by Article 3”.⁹⁹ Although, as discussed in chapter 3.2, the Court’s formal rejection of these arguments does not necessarily mean that the standard is not relative and open for balancing. If anything, the wildly inconsistent manner the Court has applied the standard of “real risk” suggests that the interpretation of that standard is indeed different depending on the case.

4.3 Economic Interests

In the cases discussed above the balancing was proposed in relation to national security concerns. The text of the judgements is worded to cover other interests as well, referring to “reasons for removal” in *Chahal* and “the interests of the community as a whole” in *Saadi*.¹⁰⁰ They would seem to imply that balancing against any other common interests is not allowed either. However, the Court’s jurisprudence indicates the opposite.

The case of *N. v. the United Kingdom* concerned a person who was HIV-positive and alleged that if expelled to Uganda, she would not have access to medication she needed and consequently she would face considerable suffering followed by an early death.¹⁰¹ The Court reiterated the need for balancing the interests of the individual against those of the community it had previously presented in *Soering* and stated that in principle, aliens subject to expulsion do not have an inherent right to stay in order to access medical or other forms of assistance provided by the state.¹⁰² The contracting states are not obliged to alleviate the differences in the level of medical care between countries by offering unlimited health care to aliens within their jurisdiction. The reasoning offered by the Court was that “[a] finding to the contrary would place too great a burden on the Contracting States.”¹⁰³

While the Court does not quite state outright that balancing against economic interests is allowed, it is obvious that at least in the medical cases such balancing does take place. The rhetoric of the Court implies that at least formally, the balancing happens by modifying the standard of real risk or the minimum level of severity required. As discussed in chapter 3.2, the threshold of “real risk” when applying Article 3 in medical cases is high, which already limits its applicability. In relation to the minimum level of severity, the Court holds that when the suffering is caused by factors public authorities cannot be held responsible for, only “very exceptional circumstances” would attain the required level of severity.¹⁰⁴ Although not as clearly spelled out, this seems to be the same reasoning the Court later relied on in *Babar Ahmad*.¹⁰⁵

93 *Ibid.*, para 177. See also *Harkins and Edwards v. the United Kingdom*, 17 January 2012, para 129. Interestingly, both judgements were adopted by the Fourth Section of the Court within months of each other.

94 *Saadi v. Italy*, 28 February 2008, para 138.

95 *Mavronicola – Messineo* 2013, p. 601.

96 *Saadi v. Italy*, 28 February 2008, para 122.

97 *Ibid.*, para 139.

98 *Ibid.*, para 122.

99 *Ibid.*, para 140.

100 *Ibid.*; *Chahal v. the United Kingdom*, 15 November 1996;. See also Greenman 2015, p. 274.

101 *N. v. the United Kingdom*, 27 May 2008, paras 26–27.

102 *Ibid.*, paras 42, 44.

103 *Ibid.*, para 44.

104 *Paposhvili v. Belgium*, 13 December 2016, para 177. *D. v. the United Kingdom*, 2 May 1997, paras 52–54.

105 *Babar Ahmad and Others v. the United Kingdom*, 10 April 2012, para 177.

There is no overt evidence of similar balancing taking place in other than medical cases. Regardless, the procedure for assessing the risk necessarily requires some balancing between the interest of the applicant and the resources of the state. It is the duty of the state, together with the applicant, to gather and evaluate information about the circumstances when assessing the potential risk of ill-treatment if the applicant was returned. Given the importance of the prohibition, this scrutiny must be “a rigorous one”.¹⁰⁶ The more thorough the investigation, the better guaranteed the protection of Article 3. However, the required standard needs to be reconciled with the fact that the resources of the state for the conducting of such an investigation are not endless.

Jurisprudence on the question of what is required of domestic authorities in assessing an alleged risk of ill-treatment is scarce. The Court often repeats that its own assessment must be conducted “primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion”.¹⁰⁷ This would imply that there is a limit to what the state’s public authorities “ought to know”. In the case of *F.G. v. Sweden*, the Court ruled that the state is not required to discover potentially relevant aspects of the applicant’s circumstances by itself, but where they are made aware of such facts the authorities must carry out the assessment about the possible risk posed by them by their own motion.¹⁰⁸

These types of limitations are of course more or less inevitable since it is simply not feasible for the state to spend an infinite amount of resources on the evaluation of the possible risk of ill-treatment. In the medical cases, where the balancing is made obvious, the reasons behind it are the same. The requirement for the states to afford medical care to everyone who happens to ask for it would put the states into an impossible financial situation.

5. CONCLUSION

Even though it is rarely stated expressly in the judgments, there is no denying that some form of balancing takes place regardless of the absolute nature of Article 3.¹⁰⁹ The inconsistent application of the “real risk” standard and the high probability of ill-treatment required to satisfy it also call into question the supposedly absolute character of the prohibition. There exists a clear discrepancy between the Court’s rhetoric and the way it actually applies Article 3 in practice.

At the same time there is no doubt the European Court of Human Rights regards the prohibition of torture as a non-derogable right. In *Soering* the Court discussed at length the conflict

between the absolute character of Article 3 and the jurisdictional limit imposed by Article 1 of the Convention, and it is not difficult to conceive them arriving to the opposite conclusion at the end of it.¹¹⁰ This contradiction between the effort extended by the Court to interpret Article 3 as prohibiting refoulement and the way it has then created a standard of proof that is extremely difficult to satisfy has a surprisingly simple explanation: reality.

While the European Court of Human Rights exists for the express purpose of promoting and protecting human rights, it is still bound by economic and political realities. Applying the Convention in a way that places too heavy a burden on the signatory states is simply not feasible. Unrealistic standards of human rights protection are more likely to undermine the efficiency of the protection than to inspire the states to adhere to those standards. Ultimately, the ECHR is a treaty and therefore there are limits to how far the Court can go before the parties decide to withdraw from it.

In the context of expulsion the Court has to be careful not to interpret the Convention in a way that would create too great obstacles for extradition or expulsion and effectively turn Europe into a safe haven for criminals. In the same vein placing too much weight on medical concerns would overload the healthcare systems of the signatory states. While this kind of “floodgate” arguments might not be considered legitimate legal reasoning, they are very real concerns and cannot be ignored in the practise of the Court.¹¹¹

The problem with the concept of absoluteness is that it only offers a dichotomy. Either something is absolute or it is not, and the smallest exception is enough to conclude the latter. This does not mean that the Court’s continuous references to the “absolute” nature of Article 3 are meaningless. They function as an argumentative tool the Court is able to employ, and has done so, in order to extend the scope of the prohibition.¹¹² Furthermore, alleviating the burden of proof in favour of the applicant in recent cases indicates that the Court is aiming for more effective protection under Article 3.

Balancing the “absolute” character of Article 3 against practical realities is not an easy exercise. It can still be questioned if concealing the act of balancing behind the rhetoric of fundamental and absolute rights is the best way to go about it. It could be that the Court does not want to undermine the argumentative power those concepts possess by admitting they are open for balancing. However, the absence of clear and defined principles about how the balance is constructed is problematic. When the fact that balancing takes place is obscured, the lack of

106 *F.G. v. Sweden*, 23 March 2016, para 113.

107 *Ibid.*, para 115.

108 *Ibid.*, para 127.

109 See also the similar conclusion reached in by Battjes (Battjes 2009).

110 *Soering v. the United Kingdom*, 07 July 1989, paras 86–88; den Heijer 2008, p. 286–288.

111 As the dissenters in *N. v. the United Kingdom* pointed out, paragraph 44 of the judgement can be considered to be a floodgate argument (*N. v. the United Kingdom*, 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann). See also Greenman 2015, p. 275–276.

112 Battjes 2009, p. 619.

transparency only results in what appears to be rather inconsistent jurisprudence, especially in regards to the required standard of proof.¹¹³ Above all, this makes it very hard for applicants to estimate the successfulness of their complaint, which probably does not help the Court with its excessive case load. Additionally, the unexplained inconsistency creates a rather unfortunate impression that the Court is simply making it up as they go.

REFERENCES

Books and Articles

Alleweldt, Ralf, *Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*. Vol. 4, No. 1, *European Journal of International Law*, 1993, p. 360–376. (Alleweldt 1993)

Battjes, Hemme, *In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed*. Vol. 22, No. 3, *Leiden Journal of International Law*, 2009, p. 583–621. (Battjes 2009)

Greenman, Kathryn, *A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law*. Vol. 27, No. 2, *International Journal of Refugee Law*, 2015, p. 264–296. (Greenman 2015)

den Heijer, Maarten, *Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights*. Vol. 10, No. 3, *European Journal of Migration and Law*, 2008, p. 277–314. (den Heijer 2008)

Janis, Mark W., Kay, Richard S. and Bradley, Anthony W., *European Human Rights Law: Text and Materials*, 3th edn. Oxford, Oxford University Press 2008. (Janis – Kay – Bradley 2008)

Mavronicola, Natasa and Messineo, Francesco, *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*. Vol. 76, No. 3, *Modern Law Review*, 2013, p. 589–619. (Mavronicola – Messineo 2013)

Ovey, Clare and White, Robin, *Jacobs and White, the European Convention on Human Rights*, 4th edn. Oxford, Oxford University Press 2006. (Ovey – White 2006)

de Weck, Fanny, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*. Brill 2016. (de Weck 2016)

113 *Ibid.*

Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms 1950, opened for signature 4 November 1950, entered into force 3 September 1953.

Cases

Ahmed v. Austria, Application no. 25964/94, 17 December 1996

Azimov v. Russia, Application no. 67474/11, 18 April 2013

Babar Ahmad and Others v the United Kingdom, Application no. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012

Bensaid v. the United Kingdom, Application no. 44599/98, 6 February 2001

Chahal v. the United Kingdom, Application no. 22414/93, 15 November 1996

Cruz Varas and Others v. Sweden, Application no. 15576/89, 20 March 1991

D. v. the United Kingdom, Application no. 30240/96, 2 May 1997

E.G. v. the United Kingdom, Application no. 41178/08, 31 May 2011

F.G. v. Sweden, Application no. 43611/11, 23 March 2016

Garabayev v. Russia, Application no. 38411/02, 7 June 2007

Harkins and Edwards v. the United Kingdom, Application no. 9146/07 and 32650/07, 17 January 2012

Hilal v. the United Kingdom, Application no. 45276/99, 6 March 2001

Hirsi Jamaa and Others v. Italy, Application no. 27765/09, 23 February 2012

H.L.R. v. France, Application no. 24573/94, 29 April 1997

Ireland v. the United Kingdom, Application no. 5310/71, 18 January 1978

J.K. and Others v. Sweden, Application no. 59166/12, 23 August 2016

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, Application no. 13178/03, 12 October 2006

N. v. the United Kingdom, Application no. 26565/05, 27 May 2008

NA. v. the United Kingdom, Application no. 25904/07, 17 July 2008

Paposhvili v. Belgium, Application no. 41738/10, 13 December 2016

R.C. v. Sweden, Application no. 41827/07, 9 March 2010

R.J. v. France, Application no. 10466/11, 19 September 2013

Rustamov v. Russia, Application no. 11209/10, 3 July 2012

Saadi v. Italy, Application no. 37201/06, 28 February 2008

Shamayev and Others v. Georgia and Russia, Application no. 12 April 2005, 12 April 2005

Said v. the Netherlands, Application no. 2345/02, 5 July 2005

S.K. v. Russia, Application no. 52722/15, 14 February 2017

Soering v. the United Kingdom, Application no. 14038/88, 07 July 1989

Sufi and Elmi v. the United Kingdom, Application no. 8319/07 and 11449/07, 28 June 2011

Tyrer v. the United Kingdom, Application no. 5856/72, 25 April 1978)

Vilvarajah and Others v. The United Kingdom, Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991