



CENTRE FOR CRIMINAL JUSTICE AND HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY COLLEGE CORK.

MIGRATION LAW CLINIC

Subsidiary Protection: Case Law Project

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PREFACE

This project was undertaken following discussions with the Refugee Legal Service, Cork, on the need for an easily accessible and comprehensive case law resource, for use in subsidiary protection claims. With the introduction of a subsidiary protection regime in Ireland in October, 2006, the unmet legal need arising from the absence of such a resource became increasingly urgent.

The *European Communities (Eligibility for Protection) Regulations, 2006* gives effect to EU *Asylum Qualification Directive*. One of the most important aspects of the 2006 Regulation was the introduction of the concept of subsidiary protection into Irish law. Section 4 of the 2006 Regulations lays down the definition of subsidiary protection as applying to those who are facing:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment in their country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

With this case law resource, the Migration Law Clinic, has produced an invaluable research tool. This resource is aimed at all those involved in the asylum determination process. In particular, we hope that the project will be of assistance to decision makers and to the busy legal practitioner

This case-book marks a further practical contribution which the Migration Law Clinic, is continually making in bridging the gap between formal legal education and the legal world in action. It is hoped that this project will be the template for further interaction between the Centre and the wider legal community.

For additional information on this project, readers can contact the editor, Mr. Liam Thornton at l.thornton@student.ucc.ie

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The Migration Law Clinic forms part of the Centre for Criminal Justice and Human Rights, Faculty of Law, U.C.C. The Centre was established in 2006. Our mission is to promote excellence in the study of crime, justice and human rights and to contribute to public debate through:

- Innovative legal education, training and outreach programs;
- Strategic partnerships with Government, international organisations and civil society;
- Critical and engaging research and scholarship.

The Migration Law Clinic builds on the Faculty's growing expertise in the field of migration law and seeks to provide an interface between law and practice in this rapidly expanding area of Irish law.

HOUSE OF LORDS JUDGEMENTS

1.	<i>R. (on the applications of Adam, Tesema, and Limbuela) v. Secretary of State for the Home Department</i> [2005] UKHL 66
Citation	[2005] UKHL 66
Date	3 November 2005
Applicant	Adam Limbuela Tesema
Respondent	Secretary of State for the Home Department
Articles of the Convention / Protocols cited	Article 3 ECHR
Finding of the Court	Violation of article 3 ECHR
Procedural Stage and Previous Stages	This conjoined appeal came from three separate cases lodged by the applicants who all applied for asylum within 24 hours of arriving in the U.K. but did not make the applications at port of entry. In the Administrative Court in <i>Limbuela</i> [2004] EWHC 219 and <i>Tesema</i> [2004] EWHC (Admin) 295 High Court judges found that article 3 had been violated as there was a serious prospect that if social support was not provided to the asylees, they would suffer inhuman and/or degrading treatment.. However in the <i>Adam</i> case, Charles J. relied on the <i>Zardasht</i> decision [2004] EWHC 91 in finding that article 3 could not be breached where there was a failure for the State to provide support. In the Court of Appeal, [2004] QB 36 , [2004] EWCA Civ 540 , in a 2 to 1 decision, held that article 3 had been violated in the cases at hand.
Keywords	Destitution Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the withdrawal of all supports from an asylum seeker who did not apply for refugee status as soon as the Home Secretary considered reasonably practicable, could breach article 3 of the ECHR?
Facts and Issues	F1. Section 95 of the Immigration and Asylum Act, 1999 provides a legal right for destitute asylum seekers to be provided with support by the Home Secretary. Section 55 of the Nationality, Immigration and Asylum Act, 2002 gave the Home Secretary the power to not provide such support if he was of the opinion that the applicant did not apply

	<p>for asylum “as soon as reasonably practicable.”</p> <p>F2. All three applicants applied for asylum within one day of their arrival within Britain, however the Home Secretary, refused to provide support under section 55 of the 2002 Act. All received interim relief from the High Court, and Limbuela and Adam had to sleep rough for periods before interim relief was granted.</p> <p>F3. The respondents argued that the Home Secretary would have breached article 3 of the ECHR in that they would have been treated in an ‘inhuman and degrading’ manner were all supports withdrawn from asylees who were legally in the country and generally prohibited from working.</p> <p>F4. The Home Secretary argued that a failure by the state to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute "treatment" for article 3 purposes. The Home Secretary argued that the Court should accept the ‘spectrum analysis’ of article 3 set out by Laws J. (dissenting) in [2004] QB 36 [2004] EWCA Civ 540. This requires that in all but extreme cases a wide range of factors must be considered to decide where on the spectrum a particular case lies and whether, therefore, article 3 liability is engaged. The Home Secretary referred to a number of ECtHR judgments which stated there was no right to provided with a minimum standard of living. The Home Secretary also noted that article 16(2) of the Reception Conditions directive allowed Member States to withdraw reception conditions where the asylee does not apply for asylum as soon as is practicable.</p>
Held	<p>H1. The Home Secretary may exercise his power under section 55 of the 2002 Act only if it will not result in a breach of the Human Rights Act, 1998 which incorporated the ECHR into British law (para. 5 per Lord Bingham).</p> <p>H2. The fact that an act of a positive nature is required to prevent ‘treatment’ from attaining the minimum level of severity which engages the article 3 prohibition does not alter the essential nature of the article (para. 47). The European Court's jurisprudence provides that article 3 may require states to provide protection against inhuman or degrading treatment or punishment for which they themselves are not directly responsible, including cases where such treatment is administered by private individuals (para. 53). That treatment must reach a certain minimum standard of severity so that “where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3...” (para. 54 per Lord Hope-quoting <i>Pretty v United Kingdom</i> 35 EHRR 1, [2002] ECHR 427 at</p>

	<p>para 52).</p> <p>H3. The decision to withdraw support from someone who would otherwise qualify for support under section 95 of the 1999 Act because he is or is likely to become, within the meaning of that section, destitute is an intentionally inflicted act for which the Secretary of State is directly responsible (para. 56 per Lord Hope).</p> <p>H4. A number of factors in a particular case will decide if the treatment can be considered inhuman and degrading, including the sex, age, health, availability of charitable assistance, length of time or possible length of time an applicant may have to live on the streets, lack of basic sanitation and sense of humiliation and despair a person will feel (para. 59 per Lord Hope).</p> <p>H5. There is no need to adopt a ‘wait and see’ approach (para. 61 per Lord Hope).</p> <p>H6. It might be possible to endure homelessness and lack of food/sanitation for a defined period. But to have to endure such treatment unless one is in a place where it is both possible and legal to live off the land, is inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age (para. 78 per Baroness Hale).</p>
Legal instruments cited	<p><u>International/European Instruments</u> European Convention on Human Rights and Fundamental Freedoms, article 3 and article 8. Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, article 16(2).</p> <p><u>British Statutes</u> Immigration and Asylum Act, 1999, section 95 Nationality, Immigration and Asylum Act, 2002, section 55 Human Rights Act, 1998, section 6</p>
Cases cited	<p><u>European Convention on Human Rights Cases</u> <i>A v U.K.</i> (1999) 27 EHRR 611, [1998] ECHR 85 <i>Assenov v Bulgaria</i> (1999) 28 EHRR 652, [1998] ECHR 98 <i>Aydin v Turkey</i> (1998) 25 EHRR 251, [1997] ECHR 75 <i>Chapman v United Kingdom</i> (2001) 33 EHRR 399, [2001] ECHR 43 <i>Ireland v United Kingdom</i> (1978) 2 EHRR 25, [1978] ECHR 1 <i>Iwanczuk v Poland</i> (2001) 38 EHRR 148, [2001] ECHR 757</p>

	<p><i>O'Rourke v United Kingdom</i>, (Application No 39022/97) (unreported) 26 June 2001</p> <p><i>Pretty v United Kingdom</i> (2002) 35 EHRR 1, [2002] ECHR 427</p> <p><i>Raninen v Finland</i> (1997) 26 EHRR 563, [1997] ECHR 102</p> <p><i>V v. United Kingdom</i> (1999) 30 EHRR 121, [1999] ECHR 171</p> <p><i>Z v. United Kingdom</i> (2001) 34 EHRR 97, [2001] ECHR 333</p> <p><u>British cases</u></p> <p><i>N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)</i> [2005] 2 AC 296, [2005] UKHL 31,</p> <p><i>R (Limbuela, Tesema & Adam) v Secretary of State for the Home Department</i>, [2004] QB 1440, [2004] EWCA CIV 540</p> <p><i>R (Tesema) v Secretary of State for the Home Department</i> [2004] EWHC (Admin) 295 (16 February 2004)</p> <p><i>R (Limbuela) v Secretary of State for the Home Department</i> [2004] EWHC 219 (4 February 2004)</p> <p><i>R (Zardasht) v Secretary of State for the Home Department</i> [2004] EWHC 91 (23 January 2004)</p> <p><i>R (Q) v Secretary of State for the Home Department</i> [2004] QB 36, [2003] EWCA CIV 364,</p> <p><i>R (Gezer) v Secretary of State for the Home Department</i> [2004] EWCA CIV 1730</p> <p><i>R (T) v Secretary of State for the Home Department</i> (2003) 7 CCLR 53</p> <p><i>R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)</i> [2002] 1 AC 800, [2001] UKHL 61</p>
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EUROPEAN COURT OF HUMAN RIGHTS JUDGEMENTS

2.	<i>Ahmed v Austria</i> [1997] 24 EHRR 278, [1996] ECHR 63
Application No.	25964/94
Date	17 December 1996
Applicant	Ahmed
Respondent State	Austria
Articles of the ECHR cited	Article 3 Article 5 Article 13
Finding of the Court	Violation Article 3 No Jurisdiction Article 5 No Jurisdiction Article 13
Procedural Stage and Previous Stages	There were a number of domestic court actions, which are considered in the facts. The case was referred to the Court by the European Commission of Human Rights (the Commission) on 11 September 1995. It originated in an application (no. 25964/94) against the Republic of Austria lodged with the Commission under Article 25 of the European Convention on Human Rights (the Convention) by a Somali national, Mr. Sharif Hussein Ahmed, on 13 December 1994. The object of the Commission's request was to obtain a decision as to whether, in the event of the applicant being deported to Somalia, the facts of the case would disclose a breach by the respondent State of its obligations under Article 3 of the Convention.
Keywords	Criminal Conviction Deportation Political activities Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the intended expulsion of the applicant to Somalia was contrary to Article 3 of the Convention?
Facts and Issues	F1. The applicant is a Somali citizen who requested refugee status in Austria on 4 November 1990. The grounds for his application were that were he to return to Somalia he would suffer persecution there within the meaning of the Geneva Convention due to him and his family being suspected of belonging to the United Somali Congress (USC) and taking parts in acts of rebellion. This suspicion arose from his uncle's membership in the USC. The applicant stated that his father and brother had been executed for assisting his uncle and that he had been assaulted and had left Somalia through fear of being

	<p>arrested and executed. In 1992 the applicant was granted refugee status by the Minister for the Interior. The applicant was subsequently convicted of attempted robbery; a serious crime in that it was punishable by up to ten years imprisonment and a 'serious crime' was determined as one imposing a sentence of at least 5 years. In April 1995 the Minister of the Interior examined the applicant's prior convictions and other complaints against him and concluded that taken together they revealed a clear tendency to aggression and therefore it could not be excluded that the applicant might commit further offences, which made him a danger to society. The Minister therefore ordered the forfeiture of Mr. Ahmed's refugee status. This decision was subsequently upheld by the Administrative Court. On 14 November 1994 the Graz Federal Police Authority (Bundespolizeidirektion) issued an indefinite exclusion order against the applicant under section 18 (1) and (2) of the Aliens Act, 1992. He was taken into custody at the Graz police headquarters on 14 December 1994 with a view to his expulsion. The applicant instigated a number of appeals against the decision to expel him and the Graz Federal Police Authority found on 31 October 1995 that in Somalia Mr. Ahmed would be at risk of persecution for one of the reasons set out in section 37 of the Aliens Act, 1992 and accordingly stayed his expulsion for a renewable period of one year. The Commission expressed the unanimous opinion that there would be a violation of Article 3 if the applicant were to be deported to Somalia.</p> <p>F2. In relation to the case before the Court, Mr. Ahmed asked the Court to consider the facts of the case under Articles 3, 5 and 13 of the Convention. In relation to Article 3 the applicant alleged that if he were deported to Somalia, he would certainly be subjected there to treatment prohibited by this Article. He argued that by granting him refugee status in 1992 the Austrian authorities recognised the existence of that risk and that the situation in Somalia had not fundamentally changed since then. He contended that only his criminal conviction had made him lose his refugee status; however, the alleged seriousness of the offence a person had committed was not sufficient to justify placing his life in danger. The applicant claimed compensation for damage and the reimbursement of his costs under Article 50. He further claimed compensation for non-pecuniary damage in a sum which he asked the Court to determine.</p> <p>F4. The Government asked the Court to hold that there had been no breach of Article 3. The Government too considered that Mr. Ahmed was at risk of being subjected in Somalia to treatment incompatible with Article 3 but they contended that they had complied with the requirements of that provision to the extent that Austrian legislation permitted. As the deportation order had become final, it could no longer be deferred; therefore the stay of execution of the measure against the applicant was the only means whereby he could lawfully remain in Austrian territory. Mr. Ahmed would be</p>
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	<p>entitled to apply to have the stay extended for as long as the danger in Somalia persisted and that if such an application were rejected, he could still apply to the Constitutional Court and the Administrative Court. The government did not contest the applicant's submission that there was no observable improvement in the situation in his country. On the contrary Austrian authorities had decided to stay the execution of the expulsion in issue because they too considered that, as matters stood, Mr. Ahmed could not return to Somalia without being exposed to the risk of treatment contrary to Article 3.</p>
Held (unanimously)	<p>H1. The Court does not have jurisdiction to consider the applicant's complaints under Articles 5 and 13 of the Convention as no complaints under Articles 5 or 13 were submitted by the applicant in his application to the Commission, the Court could not entertain such complaints (<i>Masson and Van Zon v The Netherlands</i> (1996) 22 EHRR 491 [1995] ECHR 32) (para. 23).</p> <p>H2. For as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented. In reaching this decision the Court concluded the following: Contracting States have the right to control the entry, residence and expulsion of aliens and the right to political asylum is not contained in either the Convention or its Protocols (para. 38) (<i>Vilvarajah and Others v United Kingdom</i> [1991] 14 EHRR 248, [1991] ECHR 47). The expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances Article 3 implies the obligation not to expel the person in question to that country (<i>Soering v United Kingdom</i> 11 EHRR 439, [1989] ECHR 14; <i>Cruz Varas and Others v Sweden</i> [1991] 14 EHRR 1, [1991] ECHR 26; <i>Chahal v United Kingdom</i> [1997] 23 EHRR 413, [1996] ECHR 54) (para. 39). Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct (para. 40). This principle is equally valid when issues under Article 3 arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration (para. 41). The Court attached particular weight to the granting of refugee status to the applicant in 1992 and although the applicant lost refugee status two years later this was solely due to his criminal conviction; the consequences of expulsion for the applicant were not taken into account (para. 42). The material point in time for the assessment of risks in the case of an expulsion that has not yet taken place is the time of the Court's consideration of the case (para. 43). In relation to the present situation in Somalia the Court based its assessment on the findings of the Commission.</p>

	<p>There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him. (para. 44). The Court concluded that as matters stood Mr. Ahmed could not return to Somalia without being exposed to the risk of treatment contrary to Article 3 and that due to the absolute nature of Article 3 this conclusion was not invalidated by the applicant's criminal conviction or the current lack of State authority in Somalia (paras. 45-46).</p> <p>H3. The Court considered that the applicant must have suffered non-pecuniary damage but that the present judgment afforded him sufficient compensation in that respect. Austria was obliged to pay the applicant monies which would cover the cost of the application to the Court (para. 51-54).</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, articles 3, 5, 13</p> <p><u>International</u> UN 1951 Convention on the Status of Refugees</p> <p><u>Austria</u> Aliens Act, 1992 (Fremdengesetz) Right to Asylum Act, 1991 (Asylgesetz)</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>Beldjoudi v France</i> [1992] 14 EHRR 801, [1992] ECHR 42 <i>Chahal v United Kingdom</i> [1997] 23 EHRR 413, [1996] ECHR 54 <i>Cruz Varas and Others v Sweden</i> [1991] 14 EHRR 1, [1991] ECHR 26 <i>Masson and Van Zon v The Netherlands</i> (1996) 22 EHRR 491 [1995] ECHR 32 <i>Soering v United Kingdom</i> 11 EHRR 439, [1989] ECHR 14 <i>Vilvarajah and Others v United Kingdom</i> [1991] 14 EHRR 248, [1991] ECHR 47</p>

3.	<i>Al-Adsani v United Kingdom</i> [2002] 34 EHRR 273, [2001] ECHR 761
Application No.	35763/97
Date	21 November 2001
Applicant	Al-Adsani
Respondent State	United Kingdom
Articles of the ECHR cited	1 3 6 13
Finding of the Court	No violation
Procedural Stage and Previous Stages	The applicant was allegedly tortured by the Kuwaiti authorities for alleged distribution of pornography involving the Emir of Kuwait. The applicant attempted to initiate civil proceedings in Britain, against the Emir and the Government of Kuwait [(1996) 107 ILR 536] however a majority found that the grant of sovereign immunity in a civil case did not violate the applicants rights. The majority refused to accept that torture although <i>jus cogens</i> in nature, could trump a nations sovereign immunity.
Keywords	State Immunity Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the failure of the U.K. to assist a citizen in achieving a civil remedy for torture against a sovereign state was contrary to article 3 or article 6 of the Convention?
Facts and Issues	F1. The applicant had dual British/Kuwaiti citizenship. When Iraq invaded Kuwait, Al-Adsani who is a trained pilot, went to defend Kuwait. He alleged that he suffered torture at the hands of Kuwaiti state officials including the Emir of Kuwait. The applicant attempted, but failed to get civil redress in the British courts on the basis of immunity of both the State itself and Kuwaiti officials. The applicant claimed that there was a constructive breach of article 3 by the applicants. F2. In relation to article 3, the U.K. stated that the claim failed on

	<p>three grounds, firstly the torture did not take place in the U.K., secondly any positive obligations under article 3 could only extend to prevention of torture, and not provision of compensation and finally the grant of immunity to Kuwait under domestic law, was not a violation of its obligations under the Convention. In relation to the article 6 claim the U.K. claimed that universal principles of public international law, as well as international treaties, demanded that immunity of a State and its officials be respected.</p>
Held	<p>H1. The Court held unanimously that there was no violation of article 3 and by a nine to eight majority that there was no violation of article 6.</p> <p>H2 (Unanimously) Article 1 and 3 taken together can place positive obligations on a State party to ensure that torture does not occur on its territory (<i>A v U.K.</i> (1999) 27 EHRR 611, [1998] ECHR 85). Article 3 and article 13 taken together imposes a duty on States to carry out a thorough and effective investigation of any torture which occurs on its territory (<i>Aksoy v Turkey</i> (1997) 23 EHRR 533 [1996] ECHR 68) (para. 39). While the Court recognizes the extra-territorial nature of article 3 in certain circumstances (<i>Soering v U.K.</i> (1989) 11 EHRR 439, [1989] ECHR 14), there is no causal connection with the U.K. or its authorities in perpetrating the torture. It cannot be said there is a duty on States to provide a civil remedy for the applicant against the Kuwaiti authorities (para. 40).</p> <p>H3. (by an 8-7 majority) The applicant's claim had a legal basis given that personal injury claims are a cause of action within the British (para. 48). The grant of an immunity to a State is a procedural bar to the full hearing of an action (para. 49). The Court must examine if the limitation on access to the Courts is a legitimate aim (para. 54), and whether any restriction is proportional to the aim pursued (para. 55). Measures taking by a State party pursuant to public international law cannot, in principle, be regarded as a disproportionate interference with article 6 (para. 56). There is a difference between criminal liability under international law and civil liability under international law (para. 51).</p> <p>H4. (by an 8-7 majority) The Court accepts that the prohibition of torture is a peremptory norm (<i>Prosecutor v Furundzija</i> (1999) 38 ILM 317), however none of the international instruments which outlaw torture, relate to civil proceedings or to state immunity (para. 62). The Court while noting the growing recognition of the overriding importance of the prohibition of torture can not say that this allows for the proposition that a State is not entitled to immunity under international law from a civil action (para. 66).</p> <p>H5. (Six judge Dissent) The majority accepted the jus cogens nature of the prohibition of torture but refuse to draw the consequences of this dissent i.e. the full withdrawal of any state immunity in civil</p>

	actions. The distinction made by the majority between civil and criminal liability is not consonant to the <i>jus cogens</i> nature of the prohibition of torture (section O-III4).
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, articles 1, 3, 6, 13 European Convention on State Immunity 1972 (Basel Convention), articles 11 and 15</p> <p><u>International</u> International Covenant on Civil and Political Rights, article 7 Universal Declaration of Human Rights, article 5 UN Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading punishments, article, 3 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, articles, 2, 4. Vienna Convention on the Law of Treaties, article 31(3)(c).</p> <p><u>U.K.</u> State Immunities Act, 1978</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>A v U.K.</i> (1999) 27 EHRR 611, [1998] ECHR 85 <i>Aksoy v Turkey</i> (1997) 23 EHRR 533, [1996] ECHR 68 <i>Assenov v Bulgaria</i> (1999) 28 EHRR 652, [1998] ECHR 98 <i>Selmouni v France</i> (2000) 29 EHRR 403, [1999] ECHR 66 <i>Soering v United Kingdom</i> (1989) 11 EHRR 439, [1989] ECHR 14</p> <p><u>U.K. Courts</u> <i>Al-Adsani v Government of Kuwait</i> (1996) 107 ILR 536 <i>R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte</i> (No. 3) [2000] A.C. 147,</p> <p><u>Other Courts</u> <i>Prosecutor v Furundzija</i> (1999) 38 ILM 317 <i>Flawtow v Islamic Republic of Iran</i> 76 F. Supp. 2d 16, 18 (1999) <i>Siderman de Blake v Republic of Argentina</i> 965 F. 2d 699 (9th Circuit, 1992)</p>

4.	<i>Amuur v. France</i> [1996] 22 EHRR 533, [1996] ECHR 25
Application No.	19776/92
Date	20 May 1996
Applicant	Amuur Ma. Mo. L.
Respondent State	France
Articles of the Convention cited	3 5 6 13 25
Finding of the Court (Violation / No Violation)	Violation of article 5(1)(f) of the ECHR
Procedural Stage and Previous Stages	<p>On March 25, the applicants, Somali nationals, requested the French Office for the Protection of Refugees and Stateless Persons to grant them refugee status pursuant to the 1951 Geneva Convention Relating to the Status of Refugees. On March 31, after the applicants were sent back to Syria, the Office for the Protection of Refugees ruled that it lacked jurisdiction because the applicants had not obtained temporary residence permits. The <i>Creteil tribunal de grande instance</i>, ruled that their detention in the extra-territorial ‘international zone’ at Paris-Orly Airport was unlawful, and directed that they be released (31 March 1992). The Paris <i>tribunal de grande instance</i>, giving judgment in an application for damages brought by three asylum-seekers who had been held in the international zone stated that holding an alien on the premises of the Hotel Arcade, given the degree of restriction of movement it entails and its duration – which is not laid down by any provision and depends solely on an administrative decision, without any Judicial supervision, impinges on the liberty of the person concerned. The Court further held, that in the absence of any specific rules governing the holding of an asylum-seeker in the international zone for the time strictly necessary for the administrative authorities to consider whether his application is admissible, those authorities are not, moreover, entitled to invoke to their advantage a</p>

	<p>necessary, general right to hold an alien in that supervised zone. On March 27, 1992, the applicants had applied to the European Commission of Human Rights, alleging breaches of Articles 3, 5, 6 and 13 of the Convention. On the same day, the President of the Commission indicated to the French Government that it would be desirable, in the interest of the parties and the proper conduct of proceedings, to refrain from sending the applicants back to Somalia before April 4, 1992. In its report of January 10, 1995, the Commission concluded, by 16 votes to 10, that Article 5 was inapplicable and that there had therefore been no breach of that provision. While admitting that the applicants' stay in the international zone did not differ – when its length was taken into account – from 'detention' in the ordinary meaning of that term, the Commission considered that the degree of physical constraint required for the measure to be described as a 'deprivation of liberty' was lacking in this case.</p>
Keywords	<p>Detention International zone</p>
Core Issue	<p>Whether the nature of the applicants detention in the so-called extra-territorial 'international zone' at Paris-Orly Airport, constituted a breach of their rights under article 5 (f) of the Convention?</p>
Facts and Issues	<p>F1. The applicants fled Somalia and arrived from Syria, in Paris-Orly airport on 9 March 1992. They asserted that they had fled from Somalia because their lives were in danger. The applicants were kept in the 'international zone' of the airport until 29 March when, the Minister of the Interior having refused them leave to enter, they were sent back to Syria. The applicants went through various judicial processes in France (outlined above). The applicants maintained that the conditions of their detention constituted a breach of their rights under article 5.1(f) of the Convention.</p> <p>F.2. The Government argued that the applicants could not be regarded as victims under article 25 of the Convention since the <i>Cretil</i> had already ruled in their favour of the applicants. The French government argued that the stay within the Hotel and separation from other guests at the hotel was to ensure that they could not unlawfully reside in France. So the restriction of liberty was justified. The French Government noted that the regime of detention was provided for in a series of ministerial circulars and now provided for in a number of laws.</p>

	<p>F3. The Court referred to a number of Council of Europe documents which examined entry of asylum seekers, international zones and conditions of detention.</p>
Held	<p>H.1. The Court rejected the Government’s preliminary objection that the applicants were not victims within the meaning of Article 25 of the Convention and unanimously held that Article 5, paragraph 1 applied in the case and had been breached (para. 34-36 and 54).</p> <p>H.2. The Court clarified that the mere fact that the <i>Tribunal de grande instance of Creteil</i> had ruled in favour of the applicants did not deprive them of their status as victims. In particular, the tribunal’s decision was not handed down until 31 March, whereas the applicants had been held in the transit zone since March 9, and, above all, had been sent back to Syria on March 29 (para. 34-36).</p> <p>H.3. The Court acknowledged the difficulties involved in the reception of asylum-seekers at most large European airports and stressed the undeniable sovereign right of the contracting states to control aliens’ entry into and residence in their territory (para. 41).</p> <p>H.4. Affirming its judgement in <i>Guzzardi v. Italy</i> (1980) 3 EHRR 333 [1980] ECHR 5, the Court held that the difference between deprivation and restriction liberty was merely one of degree or intensity, and not one of nature and substance. Consequently, the holding of aliens in an international zone should not be prolonged excessively. To do otherwise would risk turning a mere restriction of liberty into a deprivation (para. 42).</p> <p>H.5. In relation to the nature of the confinement, the Court said it must not deprive the asylum seeker of the right to gain effective access to procedures for determining refugee status. Here, the applicant had been held in the international zone, without such access (para. 43).</p> <p>H.6. The Court rejected the Government’s argument that, although the transit zone was closed on the French side, it remained open to the outside. It held that the mere fact that it was possible for asylum seekers voluntarily to leave the country where they wished to take refuge could not exclude a restriction of liberty. Furthermore, the possibility of leaving may not exist in fact if no other country offering protection comparable to that of the country in which they are seeking asylum is inclined to accept them (para. 46).</p> <p>H.7. The Court concluded that, in view of the restrictions</p>

	<p>suffered, holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice to a deprivation of liberty and that Article 5, paragraph 1 therefore applied. (para. 49).</p> <p>H.8. In allowing only those deprivations of liberty that are ‘in accordance with a procedure prescribed by law,’ Article 5 (1) refers, essentially, to national law. Detentions must have a basis in a domestic law that is both accessible and precise (para. 50). The Court emphasised that neither the decree nor the unpublished circular of the Minister of the Interior fulfilled the requirements for a law authorising deprivation of liberty in respect of asylum seekers. In particular, none of the applicable texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose limits on the length of detentions. They did not provide for legal, humanitarian or social assistance; nor did they lay down procedures and time limits for access to such assistance so that asylum seekers like the applicants could take the necessary steps in making their claim (para. 53).</p> <p>H.9. The Court held that the judgement in itself constitutes sufficient just satisfaction for the alleged prejudice. Costs were awarded to the applicants (para. 59).</p>
<p>Legal instruments cited</p>	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms Protocol No. 4 (P4-2), Article 2 The Parliamentary Assembly’s report of 12 September 1991 on the arrival of asylum-seekers at European airports Recommendation No. R (94) 5 of the Committee of Ministers on Guidelines to Inspire Practices of the Member States of the Council of Europe Concerning the Arrival of Asylum-Seekers at Airports, of 21 June 1994 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 4 June 1992</p> <p><u>International</u> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p> <p>1951 Geneva Convention Relating to the Status of Refugees, article 31</p> <p><u>France</u> Decree no. 82-442 of 27 May 1982, article 12</p>

	Decree no. 95-507 of 2 May 1995 Ordinance no. 45-2658 of 2 November 1945, articles: 5, 35 Circular from the Prime Minister dated 17 May 1985 on asylum seekers. Circular of 26 June 1990 Law no. 89-548 of 2 August 1989 Law of 6 September 1991 Law of 25 July 1952, section 5(b) Law no. 92-625 of 6 July 1992 Law no. 94-1136 of 27 December 1994 New Code of Civil Procedure, article 435 Preamble to Constitution of 27 October 1946 (incorporated into that of 4 October 1958)
Cases Cited	Malone v. U.K. (1984) 7 EHRR 14, [1984] ECHR 10 Guzzardi v. Italy (1980) 3 EHRR 333, [1980] ECHR 5 Kemmache v. France (1995) 19 EHRR 349, [1994] ECHR 41 Kolompar v. Belgium (1993) 16 EHRR 197, [1992] ECHR 59 Ludi v. Switzerland (1992) 15 EHRR 173, [1992] ECHR 50

5.	<i>B.B. v. France</i> [1998] ECHR 84
Application No.	30930/96
Date	7 September 1998
Applicant	The applicant requested not to be identified. Known as B.B.
Respondent State	France
Articles of the Convention / Protocols cited	Article 3 Article 8 Article 25
Finding of the Court (Violation / No Violation)	Case struck out. The risk of violation Article 3 had ceased as the French Government undertook not to deport the applicant and issued a compulsory residence order. The Court reserved the right to restore the case if circumstances arose to justify this measure.

Procedural Stage and Previous Stages	In September 1995, the applicant was convicted of possession of drugs, and entering France illegally. He was sentenced to two years imprisonment and an order was made for his permanent exclusion from France. The Paris Court of Appeal acquitted the applicant of some of the offences but upheld the exclusion order. Upon his release on 27 March 1996, he was subject to a detention order to effect deportation. He made several applications to the Versailles Administrative Court for an order to quash or suspend the order on medical grounds. In September 1996, the deportation order was quashed and replaced by a compulsory residence order. The exclusion order still remained.
Keywords	Access to medical treatment Criminal conviction Deportation Torture, cruel, inhuman or degrading treatment
Core Issue	Whether the deportation of Mr B.B. (a Congolese national) suffering from AIDS to his country of origin where he would not receive appropriate medical treatment amounted to a breach of Article 3 and 8?
Facts and Issues	<p>F1. The applicant was HIV positive and was in the advanced stages of a serious illness. The treatment he required would not be available to him in his country of origin.</p> <p>F2. He was released from detention on 27 March 1996. The same day the <i>tribunal de grande instance</i> made an order for the applicant's detention to facilitate the execution of the permanent exclusion order. He was due to be deported on 2 April 1996.</p> <p>F3. Several applications to the Versailles Administrative Court were made seeking to suspend or quash the order. On 4 July, the Versailles Administrative Court ordered a 3-month suspension of the order.</p> <p>F4. On the 26 September the deportation order was quashed on the grounds that the applicant's illness was in an advanced stage and the appropriate treatment was not available in his country of origin.</p> <p>F5. On the 9 April the Minister of the Interior issued a compulsory residence order. The applicant applied to the French Authorities to have the exclusion order rescinded a hearing date of 8 September 1998 was set.</p> <p>F6. The French Government invited the Court to strike out the case, as the applicant no longer risked being deported. The applicant invited the court to proceed.</p>

Held	<p>H1. The applicant argued that the compulsory residence was a step in the implementation of the permanent exclusion order to which he was still bound. He argued that the French Authorities could rescind the residence order at any time. (para 35). The Court noted that there was no friendly settlement as the compulsory residence order was unilateral in nature. (para 37). However, it was satisfied that the nature and duration of the residency order was compliant with Article 3 requirements. It reflected the French Authorities intention to allow the applicant to receive the requisite medical treatment and guaranteed him, for the time being the right to remain in France. They also held that Governments statement that they had “not shown any intention of actually deporting Mr. B.B.” was tantamount to an undertaking not to expel the applicant. The risk of a potential violation of Article 3 had ceased (para 37).</p> <p>H2. Article 8 was not considered as no independent issues arose (para 38). There was no public policy reason to proceed with the case (para 39). Accordingly, the case was struck out. The Court reserved the power to restore it if new circumstances arise to justify the measure.(para 40)</p>
Legal instruments cited	<p><u>European Legal Instruments</u> European Convention on Human Rights and Fundamental Freedoms, articles 3, 8, 25.</p>
Cases cited	<p><i>D. v United Kingdom</i> [1997] EHRR 423, [1997] ECHR 25 <i>Rubinat v. Italy</i> [1985] 7 EHRR 516 [1985] ECHR 2</p>

6.	<i>Berrehab v The Netherlands</i> [1989] 11 EHRR 322, [1988] ECHR 14
Application No.	10730/84
Date	21 June 1988
Applicant	Mr. Berrehab Rebecca Berrehab
Respondent State	The Netherlands
Articles of the ECHR cited	3 8
Finding of the Court	No violation of article 3 (unanimous) Violation of article 8 (6:1 majority)
Procedural Stage and Previous Stages	Mr. Berrehab was granted permission to stay in the Netherlands for the ‘sole purpose’ of living with his Dutch wife, Mrs. Kosher in 1978. Their daughter Rebecca was born in 1979 and the couple subsequently divorced. An application to renew Mr. Berrehab’s residence permit was refused. A request to review the decision was refused by the Minister for Justice. His appeal was dismissed by the Litigation Division of the Raad van State in 1983 on the basis that s.11 (5) of the <i>Aliens Act 1965</i> provided for a refusal to renew a residence permit on public interest grounds and this was justified as Mr. Berrehab no longer satisfied the conditions of his permit. The <i>Raad van State</i> held that the fulfilment of his obligations to his daughter did not serve any vital national interest and that those obligations subsisted independently of his place of residence and that four meetings a week was not sufficient to constitute family life within the meaning of article 8. Mr. Berrehab subsequently deported to Morocco. Mr. Berrehab was later granted a one month visa for the Netherlands and upon return remarried Mrs. Kosher and was granted permission to remain in the Netherlands “for the purpose of living with his Dutch wife and working during that time”. The case originated in an application lodged with the European Commission of Human Rights under article 25 by Mr. Berrehab and his daughter, Rebecca Berrehab, a Netherlands national. The Commission found a violation of the applicants’ rights under article 8.
Keywords	Family life Inhuman Treatment Residence
Core Issue	Whether the deportation of Mr. Berrehab to Morocco amounted to treatment that was inhuman and contrary to article 3 and an infringement of the right to respect for private and family life pursuant to article 8?

Facts and Issues	<p>F1. The applicants argue that article 8 did not presuppose permanent cohabitation and argue that visitation and maintenance were factors that should be taken into account.</p> <p>F2. The applicants argue that the decision to deport did not pursue any of the legitimate aims listed in article 8(2) and did not promote the “economic well-being of the country”, because they prevented Mr. Berrehab from contributing to the costs of maintaining and educating his daughter.</p> <p>F3. The Netherlands entry requirements are laid out in the Aliens Act of 1965 and the “Circular on Aliens”. However it is Dutch policy to allow overriding humanitarian considerations to justify an independent residence permit, this policy is rarely applied. The European Court noted that the Dutch Court of Cassation favours a broad interpretation of ‘family life’, while the Litigation Division of the Raad van State take a narrower view. The decision in this case is in line with earlier cases before the <i>Raad van State</i> but in a (then) recent decision it appears that the Raad van State will adopt the same stance as the Court of Cassation where it was held that cohabitation is not a <i>sine qua non</i> of ‘family life for the purposes of art 8 of the Convention (<i>Nederlandse Jurisprudentie</i>, 1998, no.188).</p> <p>F4. The Netherlands argued that nothing prevented Mr. Berrehab from having access to his daughter, as he may travel from Morocco on a temporary visa. The expulsion of the first applicant was necessary in the public order, pursued a legitimate aim and was necessary in a democratic society.</p>
Held	<p>H1. The Court held by a majority of six to one that there was a violation of article 8 and unanimously held that there was no violation of article 3.</p> <p>H2. The court found that cohabitation is not a <i>sine qua non</i> of family life between parents and children. A marriage is regarded as family life (<i>Abdulaziz, Cabales and Balkanadali v. The United Kingdom</i> (1985) 7 EHRR 471, [1985] ECHR 7) “<i>It follows from the concept of family life on which Article 8 is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of a child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to “family life”, even if the parents are not then living together</i>”. The Court found that the ties of family life had not been broken in this case and referred to the frequent and regular meetings that Mr. Berrehab had with his daughter prior to his deportation. (para. 21)</p> <p>H3. The Court accepts that the decision to refuse the renewal of</p>

	<p>Mr. Berrehab's residence permit was consistent with Dutch immigration-control policy. (para. 26) In determining whether an inference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the contracting States (<i>W v. United Kingdom</i> [1987] ECHR 17 and <i>Olsson v. Sweden (No.1)</i> (1989) 11 E.H.R.R. 259, [1988] ECHR 2) (para. 28).</p> <p>H4. The Court asserted that the "<i>the legitimate aim pursued has to be weighed against the seriousness of the inference with the applicants' right to respect for their family life</i>". (para. 29) In this case the applicant already lived in the Netherlands and had real family ties. The refusal to grant an independent residence permit coupled with the deportation threatened to break those ties. It followed that the effect of the inferences in this case were more serious given the very young age of his daughter. The court held that the means employed in this case were disproportionate to the legitimate aim pursued. (para. 29)</p> <p>H5. Article 8 Dissenting judgment It is held that Mr. Berrehab's rights did not outweigh the respondent's interests under article 8(2) given the fact that the applicants did not live in the same house and that the parents of the child were not married at the time of deportation. The fact that the authorities did not consider the rights of the child did not in itself amount to a breach of article 8 and the court must assess the competing rights and interests independently. The child's situation was very precarious and she had no voice in the matter and 'family life' existed solely on the basis of agreement between her father and mother. It is submitted that there an argument in favour of the States position in this regard.</p> <p>H6. The facts of the case did not show that either father or daughter suffered from 'inhuman' or 'degrading' treatment. (para. 30-31)</p>
Legal instruments cited	<p><u>European</u> <u>European Convention on Human Rights and Fundamental Freedoms</u>, articles 3 and 8</p> <p><u>The Netherlands</u> Aliens Act 1965</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>Abdulaziz, Cabales and Balkanadali v. The United Kingdom</i> (1985) 7 EHRR 471, [1985] ECHR 7 <i>W v. United Kingdom</i> [1987] ECHR 17 <i>Olsson v. Sweden (No.1)</i> (1989) 11 E.H.R.R. 259, [1988] ECHR 2</p>

	<u>Dutch Courts</u> <i>Nederlandse Jurisprudentie, 1998, no.188</i>
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7.	<i>Čonka v Belgium</i> (2002) 34 EHRR 1298, [2002] ECHR 14
Application No.	51564/99
Date	5 th February 2002
Applicant	Mr Ján Čonka, Mrs Mária Čonková Miss Nad'a Čonková Miss Nikola Čonková
Respondent State	Belgium
Articles of the ECHR cited	3 5.1, 5.2, 5.4 13 Article 4 of Protocol No.4
Finding of the Court	Violation of Article 5 .1 No Violation of Article 5 .2 Violation of Article 5 .4 Violation of Article 4 of Protocol No.4 No Violation of Article 13 taken in conjunction with article 3 Violation of Article 13 taken in conjunction with Protocol no.4
Procedural Stage and Previous Stages	The applicants sought political asylum in Belgium on the 12 th November 1998. Their applications were considered inadmissible at first instance due to insufficient evidence. The applicants lodged an appeal under the urgent-applications procedure with the Commissioner-General for Refugees and Stateless Persons which affirmed the decision at first instance on the 18 th June 1999. The applicants lodged judicial review proceedings with the Conseil d'Etat for a stay of execution and legal aid. Their application for legal aid was refused for not having the appropriate certificate of means, which resulted in their being charged legal fees and their stay of execution application, was struck off the list on 28 th October 1999. At the end of September 1999 the applicants were served with a notice to attend the police station at Ghent. They were served with a deportation order and a detention order. On the 4 th October their lawyer requested the Aliens Office not to deport the applicants, he did not appeal against the deportation or detention orders made on 29

	<p>September 1999. On the 5th of October the applicants were repatriated. The applicants applied to the ECtHR on the 4th October 1999 alleging the particular circumstance of their arrest and deportation to Slovakia amounted to an infringement of Articles 5 and 13 of the Convention and of Article 4 of Protocol No. 4. A hearing took place on the 15th May 2001. The government made a preliminary objection that the applicants failed to exhaust all domestic remedies.</p>
Keywords	<p>Arrest Deportation Detention Lack of access to domestic remedies</p>
Core Issue	<ul style="list-style-type: none"> • Whether the applicants arrest and detention at Ghent Police Station on 1st October 1999 violated article 5.1 of the ECHR and whether there was an accessible domestic remedy under article 35.1 when read in conjunction with article 5.1? • Whether the applicants had been furnished with insufficient information about the reasons for their arrest contrary to article 5.2 of the ECHR? • Whether the limited appeal offered by the Committals Division to the applicants was a sufficient remedy to satisfy the requirements of article 5.4 of the ECHR? • Whether the government authorised a policy of collective expulsions contrary to article 4 of Protocol. No.4.of the ECHR? • Whether there had been a remedy available to complain of the alleged violations of article 3 and article 4 of Protocol No.4 of the ECHR and whether this satisfied article 13 of the Convention?
Facts and Issues	<p>F1. The applicants were four Slovakian nationals of Roma origin who alleged the particular circumstance of their arrest and deportation to Slovakia amounted to an infringement of Articles 5 and 13 of the Convention and of Article 4 of Protocol No. 4.</p> <p>F2. The applicants fled Slovakia due to several violent assaults by skinheads between March and November 1998. Mr Čonka had been so seriously injured in an assault that he had to be hospitalised. The police had been called but had refused to intervene.</p> <p>F3. The applicants were refused asylum on political grounds at first instance and on appeal this decision was affirmed. Mr Čonka's application was refused for non attendance at the appeal and Mrs Čonka due to major discrepancies in her disposition and credibility.</p>

	<p>Each refusal was accompanied by a five day deportation order. Mrs Čonkova had been incarcerated for 8 months due to a conviction of theft and was released on the 24th June 1999.</p> <p>F4. The applicants applied for Judicial Review but their applications were dismissed due to the omission of a certificate of means, and were later struck off the list on the 28th October 1999.</p> <p>F5. At the end of September 1999 the applicants were served with a notice to attend the police station at Ghent. The notice was drafted in Dutch and Slovak and stated that their attendance was required to enable the files concerning their applications for asylum to be completed. At the police station, where a Slovak-speaking interpreter was also present, the applicants were served with a fresh order to leave the territory dated 29 September 1999, accompanied by a decision for their removal to Slovakia and their detention for that purpose. The documents served, which were all in identical terms, informed the recipients that they could apply to the <i>Conseil d'Etat</i> for judicial review of the deportation order and for a stay of execution, provided that they did so within sixty days of service of the decision.</p> <p>F6. The applicants and other Roma families, accompanied by an interpreter who remained for a short time, were taken to a closed transit centre, known as “Transit Centre 127 <i>bis</i>”, at Steenokkerzeel near Brussels Airport. The applicants say that they were told that they had no further remedy against the deportation order. At 10.30 p.m. on Friday 1 October 1999 the applicants' counsel, Mr van Overloop, was informed by the President of the Roma Rights League that his clients were in custody. He requested the Aliens Office not to deport the applicants as they had to take care of a member of their family who was in hospital. However, he did not appeal against the deportation or detention orders made on 29 September 1999. On the 5th of October the applicants were repatriated.</p> <p>F7. The applicants claimed that their arrest had been unnecessary to secure their departure. They complained above all of the manner of their arrest, saying that they had been lured into a trap as they had been induced into believing that their attendance at the police station was necessary to complete their asylum applications when, from the outset, the sole intention of the authorities had been to deprive them of their liberty. The Government argued that the orders served on the applicants on the 18th June 1999 stated they were liable to detention with a view to deportation and that the applicants had not acted in good faith. That the misleading nature of the notice could not amount to an abuse of power, this was evidenced by the public regret expressed by the Minister of the Interior. Therefore, any deception there had been had been a “little ruse”.</p> <p>F8. The applicants claimed they were unable to access their lawyer</p>
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	<p>and were told they had no avenue of appeal. They claimed that even if they had lodged an appeal it would have been futile as they would have been deported a day before it could be heard. The government claimed that the applicants were aware and could have appealed in the circumstances.</p> <p>F9. The applicants further claimed they were given insufficient information about the reasons for their arrest. The applicants claimed that the review available was a limited review as it was confined to the procedural lawfulness of the detention and the committals division did not have regard to the proportionality of the detention. Also due to the circumstances of the applicants' arrest no appeal to the committals division would have been possible. The government claimed the applicants were given sufficient information about the reasons for their arrest and this was evidenced by the presence of the interpreter. The Government claimed that their procedure for review satisfied all the requirements of the Convention.</p> <p>F10. The applicants claimed that the Dutch policy documents (see below) reflected the authorities' determination to pursue collective expulsions. The Minister of the Interior declared in reply to a parliamentary question put on 23 December 1999 that the wording used in the notice delivered to the applicants and other asylum seekers was 'unfortunate' and 'may have been misleading'. Also on the 24th August 1999, the Director-General of the Aliens Office wrote of his intention to deal with asylum applications from Slovakian nationals rapidly in order to send a clear signal to discourage other potential applicants. A "Note providing general guidance on overall policy in immigration matters" approved by the Cabinet on 1 October 1999, stated that a plan for collective repatriation of Slovaks was currently under review. The applicants claimed the process had been christened 'Operation Golf' by the authorities. They claim there had not been a reasonable and objective examination of the particular case of each individual. In response to that complaint, the Government objected that the applicants had failed to challenge the decisions which they alleged constituted a violation, namely those taken on 29 September 1999, in the <i>Conseil d'Etat</i>, notably by way of an application for a stay under the extremely urgent procedure.</p> <p>F11. The applicants claimed that the remedies available before the <i>Conseil d'Etat</i> were not effective for the purposes of Article 13, as they had no automatic suspensive effect and the administrative authority were perfectly entitled to execute the deportation order without waiting for the judgment. The Government said that the effectiveness of the available remedies had to be determined as a whole, having regard to the fact that two categories of remedy existed under Belgian law and could be exercised successively and cumulatively against deportation orders made by the Aliens Office.</p>
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	<p>One appeal lay to the Commissioner-General for Refugees and Stateless Persons, the other to the <i>Conseil d'Etat</i> which provides the extremely urgent procedure. The government also noted that the court should have regard to the political and legal context and afford the state a margin of appreciation as the right to an effective remedy did not guarantee a right to abuse process or to be incompetent.</p>
Held	<p>H1. There was a violation of Article 5.1 of the Convention. (para 46). Even in regards to illegal overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of deportation by misleading people about the purpose of their need to contact a police station so as to deprive them of their liberty is contrary to article 5(1) of the ECHR (para 42). The Court also considered Article 35.1 regarding accessibility of a remedy in relation to article 5.1. In this case the remedies were insufficient as the written notice given to the applicants when they were being transferred to the ‘transit centre.’ The remedies were in tiny characters, the interpreter was only present for a limited time, there was little possibility of contacting their lawyer and the authorities offered no legal assistance either at the police station or the detention centre (para 44). Due to the above practices and even if their lawyer could have filed an appeal it would only have been heard after the applicants were deported. Thus the circumstances voluntarily created by the authorities did not afford applicants a realistic possibility of using the remedy (para. 45).</p> <p>H2. It was held that there was no violation of article 5.2. The information provided was an arrest order pursuant to section 7(1) (2) of ‘the Aliens Act’ and there was an interpreter present to translate. Even though those measures by themselves were not in practice sufficient to allow the applicants to lodge an appeal, the information furnished to them nonetheless satisfied the requirements of article 5.2 of the Convention (para 52).</p> <p>H3. It was held that there was a violation of article 5.4 of the Convention, as the applicants were prevented from making any meaningful appeal to the committals division. That review was confined to the procedural lawfulness of the detention and the committal division did not have regard to the proportionality of the detention in each individual case (para 55).</p> <p>H4. It was held there was a violation of Article 4 Protocol 4 of the ECHR, as the personal circumstances of each of those concerned had not been genuinely and individually taken into account. (para 63). The ECHR reiterates that any measure compelling aliens as a group to leave a country, unless there was a reasonable and objective review of each individual is prohibited by article 4 of Protocol 4 (para. 59). This was evidenced by the detention and arrest orders issued pursuant to section 7(1) (2) of the Aliens Act, which made no</p>

	<p>reference to the individuals' asylum applications and due to the large number of Slovaks who suffered the same fate. (para 61) This was reinforced by a series of factors firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; fifthly, the asylum procedure had not been completed (para. 62).</p> <p>H5. It was held there was no violation of Article 13 taken in conjunction with article 3 as the complaints of a violation of article 3 were not arguable as the Court declared them manifestly unfounded on 13th March 2001 as per <i>Chahal v United Kingdom</i> [1997] 23 EHRR 413, [1996] ECHR 54 (para 76).</p> <p>H6. It was held there was a violation of Article 13 taken in conjunction with article 4 of Protocol No.4 as the right to suspensive effect in the domestic law is too uncertain. The right to suspensive effect had to be applied for and was discretionary and so left the possibility that it may be refused wrongly. Even if the chance of this wrongful refusal was negligible the Court reiterated that the requirements of Article 13, take the form of a guarantee and not of a mere statement of intent (as per <i>Iatridis v. Greece</i> (2000) 30 EHRR 97; [1999] ECHR 14) or a practical arrangement. The Court noted that the domestic procedure set forth no guarantees as the onus was in practice on the <i>Conseil d'Etat</i> to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. The applicant has no guarantee that the <i>Conseil d'Etat</i> and the authorities will comply in every case with the practice of issuing internal directions, that the <i>Conseil d'Etat</i> will deliver its decision, or even hear the case, before the applicants expulsion, or that the authorities will allow a minimum reasonable period of grace. (para 83)</p> <p>H7. Judge Velaers dissented on the ruling on article 4 of protocol no.4. He found that the applicants had received a reasonable and objective examination of their personal circumstances so as not to amount to a collective expulsion within the meaning of article 4 Protocol 4. (para. 6) He also dissented on both article 35 and 13 as he considered that an application to the Belgian <i>Conseil d'Etat</i> for a stay of execution of the deportation orders of 29 September 1999 under the extremely urgent procedure was a remedy which the applicants were required to exercise before lodging the complaint with the European Court of Human Rights. (para 18)</p> <p>H8. Judge Jungwiert and Judge Kuris partly dissented on the rulings on article 4 Protocol 4 as they held an individual examination was</p>
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	<p>carried out; and article 13 taken in conjunction with article 4 Protocol 4 as the applicants could have made an application for a stay of execution under the extremely urgent procedure against the decisions of 29 September 1999, but failed to do so and that that remedy satisfies the requirements of Article 13.</p>
Legal instruments cited	<p>European Convention on Human Rights and Fundamental Freedoms articles 3, 5, 13 and Article 4 of Protocol No.4 Belgian Law on the entry, residence, settlement and expulsion of aliens. 15th December 1980 ‘the Aliens Act’ Section 7(2)(1) The Royal Decree on the entry, residence, settlement and expulsion of aliens. 8th October 1981.</p>
Cases cited by the Court	<p><u>European Court of Human Rights Cases cited</u> <i>Akdivar and Others v. Turkey</i> (1997) 23 E.H.R.R. 143; [1996] ECHR 35 <i>Andric v. Sweden</i> (Unreported, app. no. 45925/99, 23 February 1999) <i>Bozano v. France</i> (1987) 9 EHRR 29; [1986] ECHR 16 <i>Chahal v. United Kingdom</i> Application [1997] 23 EHRR 413; [1996] ECHR 54 <i>Fox, Campbell and Hartley v. the United Kingdom</i> (1991) EHRR 159; [1990] ECHR 18 <i>Iatridis v. Greece</i> (2000) 30 EHRR 97; [1999] ECHR 14 <i>Jabari v. Turkey</i> [2000] ECHR 369 <i>K-F v. Germany</i> (1998) 26 EHRR 390; [1997] ECHR 97 <i>Matthews v. the United Kingdom</i> (1998) 28 EHRR 261; [1999] ECHR 12 <i>Murray v. the United Kingdom</i> [1996] 22 EHRR 29; [1994] ECHR 39 <i>Soering v. the United Kingdom</i> (1989) 11 EHRR 439; [1989] ECHR 14 <i>Winterwerp v. The Netherlands</i> [1979] ECHR 4; [1979] ECHR 4 <i>Vilvarajah and Others v. the United Kingdom</i> (1991) 14 EHRR 248; [1991] ECHR 47</p> <p><u>Belgian Cases</u> Judgment nos. 40.383 of 20 September 1992, Judgment nos. 51.302 of 25 January 1995, Judgment nos. 57.807 of 24 January 1996, Judgment nos. 75.646 of 2 September 1998, Judgment nos. 81.912 of 26 July 1999, Judgment nos. 84.741 of 18 January 2000 Judgment nos. 85.025 of 1 February 2000. Judgment nos. 56.599 of 4 December 1995, Judgment nos. 57.646 of 19 January 1996, Judgment nos. 80.505 of 28 May 1999 Judgment nos. 85.828 of 3 March 2000</p>

8.	<i>Chahal v United Kingdom</i> [1997] 23 EHRR 413, [1996] ECHR 54
Application No.	22414/93
Date	15 November 1996
Applicants	Mr. Karamjit Singh Chahal Mrs. Darshan Kaur Chahal Miss Kiranpreet Kaur Chahal Mr. Bikaramjit Singh Chahal
Respondent State	United Kingdom
Articles of the ECHR cited	3 5 (1) 5 (4) 8 13
Finding of the Court	Violation Article 3 No Violation Article 5(1) Violation Article 5(4) Violation Article 13 in conjunction with Article 3
Procedural Stage and Previous Stages	There were a number of previous court cases involving the first applicant's detention and proposed deportation within the English courts which are outlined fully in the facts. This case originated in an application (no. 22414/93) against the United Kingdom lodged with the Commission under Article 25 of the European Convention on Human Rights (the Convention) on 27 th July 1993 by two Indian nationals and by two British nationals, who were all part of a family. The case was referred to the European Court of Human Rights (the Court) by the Government of the United Kingdom of Great Britain and Northern Ireland (the Government) on 23 rd August 1995 and by the European Commission of Human Rights (the Commission) on 13 th September 1995. The object of the application and the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 5, 8 and 13.
Keywords	Deportation Detention Family Unity Gross, flagrant or mass human rights violations National Security Political activities Terrorism

	Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the detention and intended deportation of Mr. Chahal by the U.K. Government violated Articles 3, 5, 8 and 13 of the Convention.
Facts and Issues	<p>F1. The first applicant is an Indian citizen. He entered the U.K. illegally in 1971 and in 1974 he was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1st January 1973. The second applicant is an Indian citizen. She came to the U.K. in 1975 following her marriage to the first applicant and currently lives in Luton with the two of the family, the third and fourth applicants. The two children have British nationality.</p> <p>F2. This case arises in the context of the conflict in Punjab that involved many Sikhs engaged in a political campaign for an independent homeland. In January 1984 Mr. Chahal travelled to Punjab with his wife and children. At around this time Mr. Chahal was baptised and began to adhere to the tenets of orthodox Sikhism. He also became involved in organising passive resistance in support of autonomy for Punjab. On 30th March 1984 he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in unsanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to mock execution. He was subsequently released without charge. He returned to the U.K. on 27th May 1984 and has not visited India since.</p> <p>F3. Mr. Chahal became a leading figure in the Sikh community in the U.K. He organised demonstrations and encouraged young Sikhs to be baptised. He was linked with two political activists, Mr. Jasbir Singh Rode and Dr. Sohan Singh and helped to form the International Sikh Youth Federation (ISYF). This group is reportedly still perceived as militant by the Indian authorities. Mr. Chahal was detained under the <i>Prevention of Terrorism (Temporary Provisions) Act 1984</i> (PTA) twice and on both occasions was released without charge. In March 1986 he was convicted of assault and affray but this conviction was subsequently quashed by the Court of Appeal.</p> <p>F4. On the 14th August 1990 the Home Secretary (Mr. Hurd) issued a deportation order against Mr. Chahal on the ground that his continued presence in the U.K. was unconducive to the public good for reasons of national security, including the fight against terrorism. On the 16th August 1990 a notice of intention to deport was served on Mr. Chahal and he was detained for deportation purposes pursuant to paragraph 2(2) of Schedule III of the Immigration Act 1971. He has remained in custody ever since.</p> <p>F5. Mr. Chahal claimed that if returned to India he had a well-founded fear of persecution within the terms of the <i>UN 1951</i></p>

	<p><u>Convention on the Status of Refugees</u> (1951 Convention) and applied for political asylum on 16th August 1990. He claimed that he would be subject to torture and persecution if returned to India relying upon a number of matters – his detention and torture in Punjab in 1984, his political activities in the U.K., his links with Sant Bhindranwale and Jasbir Singh Rode, the fact that his parents, other relatives and contacts had been detained, tortured and questioned in October 1989 and others connected to him had died in police custody, the interest shown in the Indian national press in his alleged Sikh militancy and proposed expulsion from the U.K. and consistent evidence from various groups including Amnesty International of the torture and murder of alleged Sikh militants.</p> <p>F6. On 27th March 1991 the Home Secretary refused Mr. Chahal's request for asylum. Because of national security elements of the case there was no right of appeal against the deportation order. However, on 10th June 1991, matter was considered by an advisory panel. The Home Office prepared statements on 5th April and 23rd May 1991 containing an outline of the grounds for the notice of intention to deport, principle points being as follows: Mr. Chahal central figure in support for terrorism organised by ISYF, played a leading role in ISYF's programme of intimidation directed against members of other groups within U.K.'s Sikh community, involved in supplying funds and equipment to terrorists in Punjab since 1985, had a public history of involvement in Sikh terrorism and that he had been involved in planning and directing terrorist attacks in India, the U.K. and elsewhere. Mr. Chahal was not informed of the sources of and the evidence for these views, which were put to the advisory panel. Mr. Chahal denied these allegations and appeared before the panel in person and was allowed to call witnesses on his behalf. He was not allowed to be represented by a lawyer or to be informed of the advice which the panel gave to the Home Secretary.</p> <p>F7. On 25th July 1991 the Home Secretary (Mr. Baker) signed an order for Mr. Chahal's deportation, which was served on 29th July 1991. On 9th August 1991 Mr. Chahal applied for judicial review of the Home Secretary's decision to refuse asylum and to make the deportation order. The asylum refusal was quashed on 2nd December 1991 and referred back to the Home Secretary. The court found that the reasoning behind it was inadequate. On 1st June 1992 the Home Secretary (Mr. Clarke) took a fresh decision to refuse asylum. The Home Secretary believed that the first applicant was not at risk of persecution and even if was at such risk he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security. In a letter dated 2nd July 1992, the Home Secretary informed the applicant that he declined to withdraw the deportation order and that he had sought and received a diplomatic assurance from the Indian Government that Mr. Chahal would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. An application for judicial review of this</p>
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	<p>decision was refused and the Court of Appeal dismissed Mr. Chahal's appeal on 22nd October 1993 (<i>R v. Secretary of State for the Home Department, ex parte Chahal</i> [1994] Immigration Appeal Reports, 107).</p> <p>F8. In the application of 27th July 1993 (no. 22414/93) to the Commission, the first applicant complained that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the Convention; that his detention had been too long and that the judicial control thereof had been ineffective and slow in breach of Article 5 paras. 1 and 4; and that, contrary to Article 13, he had had no effective domestic remedy for his Convention claims because of the national security elements in his case. All the applicants claimed that the deportation of the first applicant would breach their right to respect for family life under Article 8, for which Convention claim they had no effective domestic remedy, contrary to Article 13. In its report of 27th June 1995 the Commission expressed the unanimous opinion that there would be violations of Articles 3 and 8 if the first applicant were deported to India; that there had been a violation of Article 5 para. 1 by reason of the length of his detention; and that there had also been a violation of Article 13.</p> <p>F9. The applicants requested the Court to find violations of Articles 3, 5, 8 and 13 and to award them just satisfaction under Article 50. In relation to Article 3 the first applicant denied that he represented any threat to the national security of the U.K. and contended that, in any case, national security considerations could not justify exposing an individual to the risk of ill-treatment abroad any more than they could justify administering torture to him directly. In relation to Article 5 para. 1 the first applicant contended that his detention had ceased to be in accordance with a procedure prescribed by law for the purposes of this Article because of its excessive duration. He had been detained since 16th August 1990. In particular the first applicant complained about the length of time taken to consider and reject his application for refugee status; the period between his application for judicial review of the decision to refuse asylum and the national court's decision; and the time required for the fresh decision refusing asylum. All four of the applicants complained that if Mr. Chahal were deported to India this would amount to a violation of Article 8 of the Convention. The applicants conceded that the interference (deportation) would be in accordance with law and would pursue a legitimate aim for the purposes of Article 8 para. 2. The material question was whether the deportation would be necessary in a democratic society in the interests of national security, within the meaning of Article 8 para. 2. The applicants denied that Mr. Chahal's deportation could be justified on national security grounds and emphasised that, if there were cogent evidence that he had been involved in terrorist activity, a criminal prosecution could have been brought against him in the U.K. The applicants alleged</p>
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	<p>that they were not provided with effective remedies before the national courts, in breach of Article 13 of the Convention. The applicants contended that the only remedy available to them in respect of their claims under Articles 3, 5 and 8 of the Convention was judicial review, the advisory panel procedure being neither a remedy nor effective. They submitted that the powers of the English courts to put aside an executive decision were inadequate in all Article 3 asylum cases. The applicants asked the Court to grant them just satisfaction under Article 50. The applicants claimed compensation for non-pecuniary damage for the period of detention suffered by Mr. Chahal at a rate of £30,000 to £50,000 per annum. In addition, the applicants claimed the reimbursement of the legal costs of the Strasbourg proceedings, totalling £77,755.97 including VAT.</p> <p>F10. The Government invited the Court to hold that the deportation order, if implemented, would not amount to a violation of Articles 3 and 8 of the Convention, and that there had been no breaches of Articles 5 and 13. In relation to Article 3 the Government's primary contention was that no real risk of ill-treatment had been established and they emphasised that the reason for the intended deportation was national security. The Government contended that there was an implied limitation to Article 3 entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. In the alternative the Government contended that the threat posed by an individual to the national security of the Contract State was a factor to be weighed in the balance when considered the issues under Article 3. In this case it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr. Chahal constituted a serious threat to the Security of the U.K. justified his deportation. In relation to Article 5(1) the Government contended that the various proceedings brought by the applicant were dealt with as expeditiously as possible. In relation to Article 8 it was not contested by the Government that the deportation would constitute an interference with the Article 8 (1) rights of the applicants to respect for their family life. The material question was whether the deportation would be necessary in a democratic society in the interests of national security, within the meaning of Article 8 para. 2. The Government asserted that Mr. Chahal's deportation would be necessary and proportionate in view of the threat he represented to the national security of the U.K. and the wide margin of appreciation afforded to States in this type of case. In relation to Article 13 the Government accepted that the scope of judicial review was more limited where deportation was ordered on national security grounds, however the Court had held in the past that, where questions of national security were an issue, an effective remedy under Article 13 must mean a remedy that is effective as can be given the necessity of relying upon secret sources of information (<i>Klass and Others v Germany</i> (1979-80) 2 EHRR</p>
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	<p>214, [1978] ECHR 4). Furthermore, it had to be borne in mind that all the relevant material was examined by the advisory panel whose members included two senior judicial figures. In relation to Article 50 of the Convention and the issue of just satisfaction the Government submitted that a finding of violation would be sufficient just satisfaction in respect of the claim for non-pecuniary damage. In relation to the issue of legal costs and expenses the Government observed that a substantial proportion of these were not necessarily incurred because the applicants had produced a large amount of peripheral material before the Court, therefore they proposed a sum of £20,000 less legal aid.</p>
Held	<p>H1. The Court held by a twelve to seven majority that, in the event of the Secretary of State's decision to deport the first applicant to India being implemented, there would be a violation of Article 3 of the Convention. In reaching this decision the Court concluded the following: Contracting States have the right to control the entry, residence and expulsion of aliens and that the right to political asylum is not contained in either the Convention or its Protocols (para. 73). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (para. 74) (<i>Soering v United Kingdom</i> 11 EHRR 439, [1989] ECHR 14; <i>Cruz Varas and Others v Sweden</i> [1991] 14 EHRR 1, [1991] ECHR 26; <i>Vilvarajah and Others v United Kingdom</i> [1991] 14 EHRR 248, [1991] ECHR 47). The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (<i>Ireland v United Kingdom</i> [1978] 2 EHRR 25, [1978] ECHR 1) (para. 79). The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases (para. 80). Therefore, it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security (para. 82). In relation to the point of time for the assessment of the risk the Court concluded that the crucial question is whether it has been substantiated that there is a real risk that Mr. Chahal, if expelled, would be subjected to treatment prohibited by Article 3. Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case (para. 86). In relation to the assessment of the risk of ill-treatment the Court concluded that the evidence demonstrates that problems still persist in connection with the observance of human rights by the security forces in Punjab (para.</p>

102) and was not persuaded that diplomatic assurances from the Indian Government would provide Mr. Chahal with an adequate guarantee of safety (**para. 105**). The Court concluded that the applicant's high profile would be more likely to increase the risk to him of harm (**para. 106**). The Court found it substantiated that there is a real risk of Mr. Chahal being subjected to treatment contrary to Article 3 if he is returned to India. Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3 (**para. 107**).

H2. The Court held by a thirteen to six majority that there had been no violation of Article 5 (1) of the Convention. In reaching this decision the Court concluded the following: Any deprivation of liberty under Article 5 (1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 (1)(f) (**para. 113**) (*Quinn v France* (1995) 21 E.H.R.R. 529, [\[1995\] ECHR 9](#)). In relation to whether the duration of the deportation proceedings was excessive the Court noted that Mr. Chahal's case involves considerations of an extremely serious and weighty nature. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence. Against this background, none of the periods complained of can be regarded as excessive, taken either individually or in combination. Accordingly, there has been no violation of Article 5 (1)(f) of the Convention on account of the diligence, or lack of it, with which the domestic procedures were conducted (**para. 117**). In relation to whether Mr. Chahal's detention was "lawful" for the purposes of Article 5 (1)(f) the Court concluded that the advisory panel procedure provided an important safeguard against arbitrariness (**para. 122**). The Court accepted that the panel had agreed with the Home Secretary that Mr. Chahal ought to be deported on national security grounds and considered that this procedure provided an adequate guarantee that there were at least *prima facie* grounds for believing that, if Mr. Chahal were at liberty, national security would be put at risk and thus that the executive had not acted arbitrarily when it ordered him to be kept in detention (**para. 122**). In view of the exceptional circumstances of the case and the fact that the national authorities had acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5(1)(f). It follows that there has been no violation of Article 5 (1)(f) (**para. 123**).

H3. The Court held unanimously that there has been a violation of Article 5 (4) of the Convention. In reaching this decision the Court concluded the following: The notion of "lawfulness" under para. 4 of Article 5 has the same meaning as in Article 5(1), so that the

detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (*E v Norway* [1990] 17 EHRR 30, [\[1990\] ECHR 17](#)) (**para. 127**). The scope of the obligations under Article 5 (4) are not identical for every kind of deprivation of liberty (*Bouamar v Belgium* (1989) 11 EHRR 1; [\[1988\] ECHR 1](#)) (**para. 127**). Article 5 (4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law (**para. 128**). The relevant question is whether the available proceedings to challenge the lawfulness of Mr. Chahal's detention and the first applicant's ability to seek bail were provided for in the domestic courts (**para. 129**). The advisory panel could not be considered a "court" within the meaning of Article 5 (4) (**para. 130**) due to lack of legal representation, only outlined the grounds for deportation provided to applicant, had no power of decision, the decision was not binding on Home Secretary and the decision was not disclosed (**para. 130**). The use of confidential material may be unavoidable where national security is at stake. This does not mean that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved (*Murray v United Kingdom* (1994) 19 EHRR 193; [\[1994\] ECHR 39](#)) (**para. 131**). The Court considered that neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr. Chahal before the domestic courts, nor the advisory panel procedures, satisfied the requirements under Article 5 para. 4. This shortcoming was all the more significant given that Mr. Chahal had been deprived of his liberty for a length of time which is bound to give rise to serious concern (**para. 132**). In conclusion, there has been a violation of Article 5 para. 4 of the Convention (**para. 133**).

H4. The Court held by seventeen votes to two that, having regard to its conclusion with regard to Article 3, it is not necessary to consider the applicants' complaint under Article 8 of the Convention. In reaching this decision the Court concluded the following: The Court recalled its finding that the deportation of the first applicant to India would constitute a violation of Article 3 of the Convention. Having no reason to doubt that the respondent Government will comply with the present judgment, it considered that it was not necessary to decide the hypothetical question whether, in the event of expulsion to India, there would also be a violation of the applicants' rights under Article 8 of the Convention (**para. 139**).

H5. The Court held unanimously that there has been a violation of Article 13 in conjunction with Article 3 of the Convention. In reaching this decision the Court concluded the following: Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever

	<p>form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (para. 145) (<i>Vilvarajah and Others v United Kingdom</i> [1991] 14 EHRR 248, [1991] ECHR 47). The Court recalled that in its <i>Vilvarajah and Others</i> judgment it found judicial review proceedings to be an effective remedy in relation to the applicants' complaints under Article 3 (para. 148). The Court further recalled that in assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases such as the present, the fact that the person is perceived as a danger to the national security of the respondent State is not a material consideration (para. 149). The Court has held in the past that, where questions of national security were at issue, an "effective remedy" under Article 13 must mean "a remedy that is effective as can be", given the necessity of relying upon secret sources of information (para. 142) (<i>Klass and Others v Germany</i> (1979-80) 2 EHRR 214, [1978] ECHR 4). However this case related to Articles 8 and 10 of the Convention (para. 150). The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial (para. 150). In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person must have done to warrant expulsion or to any perceived threat to the national security of the expelling State (para. 151). Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective (para. 152). In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr. Chahal to India with reference solely to the question of risk, leaving aside national security considerations. It follows from the above considerations that these cannot be considered effective remedies in respect of Mr. Chahal's Article 3 complaint for purposes of Article 13 of the Convention (para. 153). The Court noted that the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13 (para. 154). Having regard to the extent of the deficiencies of both the judicial review proceedings and the advisory panel, the Court did not consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3. Accordingly, there has been a violation of Article 13 (para. 155).</p>
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	<p>H6. The Court held unanimously that the above findings of violation constitute sufficient just satisfaction as regards the claim for compensation for non-pecuniary damage. In reaching this decision the Court concluded the following: In view of its decision that there had been no violation of Article 5 (1), the Court made no award for non-pecuniary damage in respect of the period of time Mr. Chahal has spent in detention. As to the other complaints, the Court considered that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Article 5 para. 4 and 13 constitute sufficient just satisfaction (para. 158).</p> <p>H7. The Court regarded the applicants costs as excessive and only awarded a proportion of the figure claimed by the applicants (paras 160 & 161).</p> <p>H8. (Seven judge Dissent) In relation to Article 3 seven judges, dissented on two issues. The first is that in relation to the extra-territorial application of Article 3 the Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination (para. 1). The second is that in relation to the assessment of whether there is a real risk of ill treatment they concluded that the assessment of the majority leaves too much room for doubt and that it has not been substantiated that there is a real risk of the first applicant's being subjected to treatment contrary to Article 3 if he were not to be deported to India. A higher degree of foreseeability of such treatment than exists in this case should be required to justify the Court in finding a potential violation of Article 3 (para. 9).</p> <p>H9. (Six judge Dissent) In relation to Article 5 para. 1 two judges dissented on the basis that the procedure before the advisory panel could not constitute a sufficient guarantee against arbitrariness (para. 1(a)). Three judges dissented on the basis that the duration of Mr. Chahal's detention was clearly excessive and that the "considerations of an extremely serious and weighty nature" (para. 117) could not justify the length of detention (para. II A). Judge Pettiti dissented on the basis that as implemented by the British authorities, Mr. Chahal's detention can be likened to an indefinite sentence i.e. he is being treated more severely than a criminal sentenced to a term of imprisonment. The principle contained in Article 5 of immediately bringing a detained person before a court is intended to protect liberty and not to serve as "cover" for detention which has not been justified by a criminal court. Administrative detention under the Refugee Convention cannot be extended beyond</p>
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	<p>a reasonable – brief – period necessary for arranging deportation.</p> <p>H10. (Two judge Dissent) In relation to Article 8 and Article 13 in conjunction with Article 8 two judges, De Meyer and Pettiti dissented on the basis that the question of the violation of the rights set forth in Article 8 is no more “hypothetical” (paras. 139 and 146) than that concerning those under Article 3. If we consider one we must also consider the other (para. I B.) The Court’s observations concerning the violation of Article 13 in conjunction with Article 3 are equally valid as regards the alleged violation of Article 13 in conjunction with Article 8. In the instant case these two violations are closely connected and virtually inseparable.</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, article 1, article 5(1) and 5 (1)(4), article 8 and article 13.</p> <p><u>International</u> UN 1951 Convention on the Status of Refugees</p> <p><u>U.K.</u> Administration of Justice Act, 1960. Asylum and Immigration Appeals Act, 1993. Habeas Corpus Act, 1679. Habeas Corpus Act, 1816. Immigration Act, 1971. Prevention of Terrorism (Temporary Provisions) Act, 1984. Statement of Changes in Immigration Rules (House of Commons Paper 251 of 1990) at paras. 157 and 161.</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>Bouamar v Belgium</i> (1987) 11 EHRR 1, [1988] ECHR 1 <i>Cruz Varas and Others v Sweden</i> [1991] 14 EHRR 1, [1991] ECHR 26 <i>E v Norway</i> [1990] 17 EHRR 30, [1990] ECHR 17 <i>Ireland v United Kingdom</i> [1978] 2 EHRR 25, [1978] ECHR 1 <i>Klass and Others v Germany</i> (1979-80) 2 EHRR 214, [1978] ECHR 4 <i>Kolompar v Belgium</i> (1993) 16 EHRR 197, [1992] ECHR 59 <i>Leander v Sweden</i> (1987) 9 EHRR 433, [1987] ECHR 4 <i>Murray v United Kingdom</i> (1994) 19 EHRR 193, [1994] ECHR 39 <i>Quinn v France</i> (1995) 21 E.H.R.R. 529, [1995] ECHR 9 <i>Soering v United Kingdom</i> 11 EHRR 439, [1989] ECHR 14 <i>Tomasi v France</i> (1993) 15 EHRR 1, [1992] ECHR 53 <i>Vilvarajah and Others v United Kingdom</i> [1991] 14 EHRR 248, [1991] ECHR 47</p>

	<p><u>U.K. Courts</u></p> <p><i>R v Secretary of State for the Home Department, ex parte Chahal</i> [1994] Immigration Appeal Reports, 107.</p> <p><i>R v Secretary of State for the Home Department, ex parte Chahal (Queen's Bench Division) (Crown Office List), Co/3314/95, (10 November 1995)</i></p> <p><i>Charan Singh Gill v Secretary of State for the Home Department</i> (14th November 1994) unreported.</p> <p><i>Associated Provincial Picture Houses Ltd. v Wednesbury Corporation</i> [1948] 1 KB 223, [1947] 2 All ER 680</p> <p><i>Council of Civil Service Unions v Minister for the Civil Service</i> [1985] 1 AC 374, [1984] 3 All ER 935</p>
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9.	<i>Cruz Varas and Ors. v Sweden</i> [1992] 14 EHRR 1, [1991] ECHR 26
Application No.	15576/89
Date	20 March 1991
Applicant	Cruz Varas Magaly Maritz Bustamento Lazo Richard Cruz
Respondent State	Sweden
Articles of the Convention / Protocols cited	3 6 8 13 25
Finding of the Court	No Violation
Procedural Stage and Previous Stages	The first applicant requested political asylum in Sweden, having fled from Chile in January 1987. Having been interviewed by the Police Authority his request for asylum was referred to the National Immigration Board and later denied. An appeal to the Government (Ministry of Labour) invoking no new grounds and an expulsion order was issued. The first applicant later submitted new information to the Police Authority alleging torture and sexual abuse at the hands of the Chilean Authorities. Despite a Rule 36 Indication (which allows the Commission to indicate to the parties concerned any interim measure which in the Commissions view should be

	<p>adopted in the interests of the parties or the proper conduct of the proceedings before it) from the European Commission of Human Rights that the applicant should not be deported, the Swedish Government did deport him to Chile. The Commission found that in doing so that Sweden had failed to comply with Article 25. The case was then referred to the European Court of Human Rights.</p>
Keywords	<p>Deportation Family unity Gross, flagrant or mass human rights violations Political activities Sexual abuse Torture, cruel, inhuman or degrading treatment/punishment</p>
Core Issue	<ul style="list-style-type: none"> • Whether the expulsion of the applicant to Chile constituted inhuman and degrading treatment contrary to article 3 due to the risk that he may be tortured by Chilean authorities and because the trauma involved in being returned to a country where he had previously been tortured • Whether the possible expulsion of his son (third applicant) could amount to a breach of article 3 • Whether the expulsion of the third applicant lead to a separation of the family which violated their right to respect for family life contrary to article 8 • Whether Sweden's failure to follow the Commission's Rule 36 Indication not to expel the first applicant was in breach of article 25.
Facts and Issues	<p>F1. The first applicant was a Chilean national who fled to Sweden with his wife (second applicant) and son (third applicant). The first applicant sought political asylum in Sweden, initially on the grounds that he was a political activist with parties opposing the regime of General Pinochet. Having been denied asylum on political grounds, after 18 months he claimed that he had new grounds for consideration namely that he had been tortured and sexually abused by representatives of the Chilean authorities who suspected that he was a communist.</p> <p>F2. The first applicant had difficulty in supporting his claim with documentary evidence but claimed that this is frequently difficult to obtain in torture cases and that given his background the Court should allow a relaxation of the burden of proof. Several medical experts found the applicant's story to be credible considering physical injuries he had sustained and also that he appeared to be suffering from Post Traumatic Stress. When asked why he had fail to mention the true substance of his claim for asylum to Swedish Police during several previous interviews, he reasoned that he did not feel that he could trust them as he believed that Sweden co-operated with Chilean Police and as he had many times been betrayed previously in his life.</p>

	<p>F3. The Swedish Government did not find these allegations credible since he had not mentioned them previously, nor had they been able to verify his political activity in Chile. In fact Sweden's investigation seemed to indicate that he had never been politically active as none of the representatives of political parties questioned could confirm his involvement. Furthermore, the Swedish Government pointed out that in the past it has accepted a large number of Chilean refugees and that it was very familiar with the political situation there since it had strong relations with opposition groups through the Swedish Embassy in Santiago. Sweden also noted that the State of Emergency there had since been lifted with many exiles now returning to Chile. Also a democratic party candidate was elected President and many constitutional agreements were undertaken to reduce the influence of armed forces on civilian life.</p> <p>F5. The Commission issued a Rule 36 indication that the first applicant should not be returned to Chile that was not followed by the Swedish Government and the first applicant was deported. His whereabouts at the time the case came before the Court were unknown. The Commission later determined that his allegations of torture and sexual abuse were well founded but that there had been no breach of article 3 or 8. Sweden however was found to be in breach of article 25. The applications under article 6 and article 13 were declared inadmissible.</p>
Held	<p>H1. The Court held that there had been no violation of article 3 (18-1 majority), article 8 (unanimous) or article 25 (10-9 majority).</p> <p>H2. The Court held that its previous ruling in <i>Soering v UK</i> (1989) 11 EHRR 471, [1989] ECHR 14 which stated that the responsibility of a Contracting State will be engaged when substantial grounds have been shown that a person if <i>extradited</i> will be subject to torture or inhuman and degrading treatment in the requesting State. The Court found that the same principle applies in cases of expulsion by a Contracting State (para.69).</p> <p>H3. The Court noted that verification of facts was the task of the Commission but that it was not bound by its findings (para.74). It further noted that it was to assess the existence of a risk in light of what the Contracting State has known or ought to have known at the time of expulsion but could also consider information which came to light subsequent to expulsion (para.76).</p> <p>H4. In light of improvements in political stability in Chile (para.80) as well as the Court doubting the credibility of the first applicants' allegations (paras.77-79), no substantial grounds were found for</p>

	<p>believing that the first applicant faced a real risk of torture and inhuman and degrading treatment in Chile (para.82). Also despite his suffering from Post Traumatic Stress Disorder and the fact that his mental health had deteriorated since returning to Chile, the first applicant's claim that the trauma he suffered in being returned amounted to inhuman and degrading treatment contrary to article 3 was denied as the Court felt that there were not substantial grounds for this fears (para.84). Furthermore, the possible expulsion of the third applicant was not a breach of article 3 (para.85).</p> <p>H5. (Unanimously) The Court found that since there were no obstacles to continuing family life in Chile (<i>Abdulaziz, Cabales and Balkandali</i> (1985) 7 EHRR 471, [1985] ECHR 7) that a lack of respect for their family life under article 8 could not be imputed to Chile (paras.88-89).</p> <p>H6.(10-9 majority) The Court held in relation to article 25 that since the Convention did not contain a specific provision on interim measures (para.96) and since Rule 36 indications were only a rule of procedure (para.98), it could not be considered to be binding on a Contracting State.</p> <p>H7. The Court further held that article 25 imposed an obligation not to hinder the procedural right of an applicant to present and pursue his complaint but that this right was distinguishable from the substantive rights of an applicant set out under Section 1 of the Convention or its Protocols (para.99).</p> <p>H8. (Dissenting) Judge De Meyer found a violation of article three on the basis on the medical and psychological evaluation of the first applicants. He was also not assured that the political situation in Chile was so stable as to conclude that the applicant was not at risk.</p> <p>H9. (Dissenting) A violation of article 25 was found to have occurred when the Swedish government did not follow the Rule 36 indication of the Commission not to deport the applicant. The dissenting Judges noted that according to the <i>Soering</i> (above) ruling, extradition in certain cases can violate the Convention and hence the protection under the Convention would be rendered meaningless if Contracting States could extradite or expel without any possibility of prior clarification.</p>
Legal instruments cited	<p><u>Europe</u> European Convention on Human Rights and Fundamental Freedoms, article 3, 6,8,13,25 European Commission of Human Rights, Rules Of Procedure, rule 36</p> <p><u>International</u> Convention relating to the Status of Refugees 1951</p>

	United Nations Convention Against Torture 1984 <u>Sweden</u> Aliens Act, 1980, sections 3, 6, 38, 77, 80, 85, 86 Aliens Act, 1989
Cases cited	<u>ECHR Case Law</u> <i>Abdulaziz, Cabales and Balkandali</i> (1985) 7 EHRR 471, [1985] ECHR 7 <i>Johnston and Others v Ireland</i> (1987) 9 EHRR 203, [1986] ECHR 17 <i>Soering v UK</i> (1989) 11 EHRR 471, [1989] ECHR 14

10.	<i>D. v United Kingdom</i> [1997] 24 EHRR 423, [1997] ECHR 25
Application No.	146/1996/767/964
Date	April 21, 1997
Applicant	D.
Respondent State	United Kingdom
Articles of the Convention / Protocols cited	2, 3, 8, 13
Finding of the Court	Art.3: violation Art.2: In light of finding under Art.3, it was not necessary to examine this complaint Art.8: No separate issue arises Art.13: No violation
Procedural Stage and Previous Stages	Applicant denied leave to enter the UK. Application for leave to remain in the UK on compassionate grounds refused by Chief Immigration Officer. High Court refused leave to apply for judicial review of decision to refuse leave to enter. Refusal of application for leave too apply for judicial review was upheld by Court of Appeal Application to Commission lodged on February 15, 1996.

	<p>Application declared admissible on June 26, 1996. The Commission, in its report of October 15, 1996, expressed the opinion that Art.3 would be violated if D were removed from the UK, that it was unnecessary to examine Art.2, that no separate issue arose under Art.8 and that there was no violation of Art.13. The case was referred by the Commission and by the UK government to the Court on 28 October 1996 and 14 November 1996 respectively.</p>
Keywords	<p>Access to medical treatment Deportation Prohibition of torture and inhuman and degrading treatment and punishment</p>
Core Issue	<p>Whether the removal of the applicant from the United Kingdom would constitute a violation of Article 3, Article 2, Article 8 or Article 13 of the European Convention on Human Rights?</p>
Facts and Issues	<p>F1. D was born in St.Kitts and lived there most of his life. He arrived in the UK on 21 January 1993 and sought leave to enter for two weeks as a visitor. He was found to be in possession of a substantial amount of cocaine and was refused leave to enter on the ground that his exclusion was conducive to the public good. He was informed that he would be removed to St.Kitts within a matter of days.</p> <p>F2. D was not removed to St.Kitts but instead he was arrested, charged and convicted of importing Class A drugs and was sentenced to six years imprisonment. He was released on licence for good behaviour in January 1996 and was placed in immigration detention pending his removal to St.Kitts. Bail was granted in October 1996 after the Commission's report was made public.</p> <p>F3. While serving his prison sentence, D was diagnosed as suffering from AIDS. The infection appeared to have occurred some time before his arrival in the UK.</p> <p>F4. On 23 January 1996, D sought leave to remain on compassionate grounds on the grounds that his removal to St.Kitts would entail the loss of medical treatment, thereby reducing his life expectancy. This request was refused by the Chief Immigration Officer on 25 January 1996. On 2 February 1996, D was refused leave to apply for judicial review of the decision to refuse him leave to enter. On 15 February 1996, the UK Court of Appeal refused his renewed application for leave to apply for judicial review.</p> <p>F5. D instituted proceedings against the UK in the European Court</p>

	<p>of Human Rights by application dated 15 February 1996. The Commission in its report of October 15, 1996 expressed the opinion that Art.3 would be violated if he were removed from the UK, that it was unnecessary to examine Art.2, that no separate issue arose under Art.8 and that there was no violation of Art.13. The case was referred by the Commission and by the UK government to the Court on 28 October 1996 and 14 November 1996 respectively.</p> <p>F6. A medical report dated 13 June 1996 stated that the applicant was reaching the end of the average durability of effectiveness of the drug therapy which he was receiving and that his prognosis was very poor, being limited to eight to twelve months on present therapy. It was estimated that withdrawal of the therapy would reduce that prognosis to less than half. A report dated 9 December 1996 stated that his death would be hastened were he to be returned to St.Kitts. At the hearing before the Court on 20 February 1997, it was stated that his condition was causing concern and that the prognosis was uncertain. His Counsel stated that his life was drawing to close much as the experts had predicted.</p> <p>F7. Information was obtained to the effect that while there were two hospitals in St.Kitts which care for AIDS patients by treating them for opportunistic infections until they are well enough to be discharged, no health care providing for drug treatment of AIDS was available on St.Kitts.</p> <p>F8. In terms of the applicant's family situation, the only relative he had in St.Kitts was a cousin.</p> <p>F9. With regard to Art.3, it was argued on behalf of the applicant that his removal to St.Kitts would expose him to inhuman and degrading treatment in breach of Art. 3 of the Convention in that it would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. He had no accommodation, no financial support, and no access to any means of social support. Withdrawal of his medical treatment, it was argued, would hasten his death on account of the unavailability of similar treatment in St.Kitts. It was further argued that hospital facilities in St.Kitts were extremely limited and not capable of arresting the development of infections and that his death would not only be further accelerated, it would also come about in conditions which would be inhuman and degrading.</p> <p>F10. The Government argued that the applicant would not be exposed in the receiving country to any form of treatment which breached the standards of Art.3 and that he would merely find himself in the same position of other AIDS victims in St.Kitts. The Government also maintained that he had at least one cousin in St.Kitts and that there were hospitals there caring for AIDS patients. The Government further argued that even if the treatment and</p>
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	<p>medication fell short of that currently administered to the applicant in the UK, that did not in itself amount to a breach of Art.3 standards. The Government also gave an undertaking not to remove the applicant to St.Kitts until he was fit to travel.</p> <p>F11. With regard to Art.2, the applicant argued that since his removal to St.Kitts would hasten his death, there was a direct causal link between his expulsion and his death such as to give rise to a violation of the right to life. The applicant further submitted that Art.2 denoted a positive obligation to safeguard life which in the circumstances in issue required the Government not to take a measure which would further reduce his life expectancy.</p> <p>F12. The Government argued that the threat to the applicant's life expectancy stemmed not from factors for which the Government could be held responsible but from his own fatal illness in conjunction with the lack of adequate medical treatment in the receiving country and that Art.2 was therefore inapplicable.</p> <p>F13. In relation to Art.8, the applicant argued that his proposed removal to St.Kitts would amount to a disproportionate interference with his right to respect for his private life, in particular his right to respect for his physical integrity.</p> <p>F14. The Government argued that Art.8 was inapplicable since his private life was constituted in the receiving country where he had lived most of his life and that even if Art.8 were applicable, the interference with his medical interests by removing him to St.Kitts was justified in view of the seriousness of his offence, for reasons of the prevention of crime, and in the interests of the economic well-being of the United Kingdom.</p> <p>F15. With regard to Art.13, the applicant complained that in view of the limitations which circumscribed an effective review by courts in the UK of the decisions reached by the authorities in expulsion cases, no effective remedy existed in the UK in respect of his complaints of violations under Arts.2, 3 and 8.</p> <p>F16. The Government argued that judicial review proceedings afforded an effective remedy to challenge the legality of a decision to expel or deport an individual.</p> <p>F17. The applicant did not seek damages but claimed reimbursement of GB£49,443 and FRF 13,811 costs and expenses. The Government proposed the sum of GB£29,313.16 and FRF 9,194.</p>
Held	<p>H1. The Court held that, given the absolute nature of the requirements of Art.3, it was for the respondent state to secure to the applicant the rights guaranteed under Art.3, irrespective of the</p>

	<p>gravity of the offence he had committed. The decisions in <i>Ahmed v Austria</i> (1997) 23 EHRR 413, [1996] ECHR 63 and <i>Chahal v United Kingdom</i> (1997) 23 EHRR 413, [1996] ECHR 54 were referred to (para. 48).</p> <p>H2. The Court held that it was not prevented from scrutinising an applicant's claim under Art.3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country (<i>Ahmed v Austria</i> referred to), or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts however, the Court must subject all the surrounding circumstances to a most rigorous scrutiny, especially the applicant's personal situation in the expelling State (para. 49).</p> <p>H3. The Court held that in seeking to determine whether there was a real risk that the applicant's removal would be contrary to the standards of Art.3 in view of his present medical condition, it must assess the risk in the light of the material before it at the time of its consideration of the case (<i>Ahmed v Austria</i> referred to) (para. 50).</p> <p>H4. The Court held that, in view of the exceptional circumstances of the case, and bearing in mind the critical stage reached in the applicant's fatal illness, the implementation of the decision to remove the applicant to St.Kitts would amount to inhuman treatment in violation of Art.3. The exceptional circumstances referred to by the Court included: the fact that the abrupt withdrawal of medical treatment and other supports provided to him in the UK would hasten D's death, that the conditions of adversity awaiting him in St.Kitts would further reduce his limited life expectancy and subject him to acute mental and physical suffering, that there was no evidence that D's cousin would be willing or in a position to attend to the needs of a terminally ill man, that there was no evidence of the existence of any other form of moral or social support and that there was no evidence that D would be guaranteed a bed in either of the hospital caring for AIDS patients. The Court also noted that the UK had assumed responsibility for his treatment since 1994 and that he had become reliant on the care he was presently receiving. The Court took the view that, while it could not be said that the conditions which would confront him in the receiving country themselves amounted to a breach of Art.3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment. The Court noted, without questioning the good faith of the undertaking given by the Government, that the considerations referred to above must be seen as wider in scope than the question whether or not the applicant was fit to travel back to St.Kitts (paras. 52-53).</p> <p>H5. The Court emphasized that it had found in favour of the applicant in view of the exceptional circumstances of the case and</p>
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	<p>given the compelling humanitarian considerations at stake and that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison (para. 54).</p> <p>H6. The Court held that having regard to its conclusion under Art.3, it was not necessary to examine the applicant's complaint arose under Art.2 (paras. 55-59).</p> <p>H7. The Court held that Art.8 raised no separate issue (paras. 60-64).</p> <p>H8. The Court held that the applicant had an effective remedy available to him. The Court referred to earlier decisions in <i>Vilvarajah and Others v UK</i> and <i>Soering v UK</i> in which judicial review had been found to be an effective remedy in the contexts of deportation and extradition on the grounds that the English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. The Court took the view that although the source of the risk of prohibited treatment and the impugned measure were different in the instant case there was no reason to depart from the conclusion reached in the former cases (para. 73).</p> <p>H9. The Court awarded the applicant costs of GB£35,000 plus VAT less FRF33,216 already paid in legal aid by the Council of Europe (paras. 75-78).</p>
Legal instruments cited	European Convention on Human Rights and Fundamental Freedoms , articles 2, 3, 8, 13.
Cases cited	<p><i>Ahmed v Austria</i> (1997) 23 EHRR 413, [1996] ECHR 63</p> <p><i>Chahal v United Kingdom</i> (1997) 23 EHRR 413, [1996] ECHR 54</p> <p><i>Soering v United Kingdom</i> (1989) 11 EHRR 439, [1989] ECHR 14</p> <p><i>Vilvarajah v United Kingdom</i> (1992) EHRR 439, [1991] ECHR 47</p> <p><i>R v Secretary of State for the Home Department, ex parte D.</i>, (Unreported, 15 February 1996, Court of Appeal)</p>

11.	<i>Doğan and Others v Turkey</i> (Unreported, 29 June 2004) [2004] ECHR 296
Application No.	8803-8811/02, 8813/02 and 8815-8819/02
Date	10 th November 2004
Applicant	Mr Abdullah Doğan, Mr Cemal Doğan, Mr Ali Rıza Doğan, Mr Ahmet Doğan, Mr Ali Murat Doğan, Mr Hasan Yıldız, Mr Hıdır Balık, Mr İhsan Balık, Mr Kazım Balık, Mr Mehmet Doğan, Mr Hüseyin Doğan, Mr Yusuf Doğan, Mr Hüseyin Doğan and Mr Ali Rıza Doğan, Mr Müslüm Yılmaz.
Respondent State	Turkey
Articles of the ECHR cited	1 (inadmissible) 6 (inadmissible) 7 (inadmissible) 8 13 14 (inadmissible) 18 (inadmissible) Article 1 of Protocol No.1
Finding of the Court	Violation of Article 8 (unanimous) Violation of Article 13 (unanimous) Violation of Article 1 of Protocol No. 1 (unanimous)
Procedural Stage and Previous Stages	The case originated in 15 applications lodged with the Court under article 34 of the Convention. The applicants, all of whom are Turkish nationals allege that their exclusion from their village in the Hozat district in the Tunceli province of Turkey by security forces and the refusal to allow them to return there gave rise to a violation of the convention. Applicants were informed by authorities that a return to their village was prohibited for security reasons and that their petition would be considered under the ‘Return to the Village and Rehabilitation Project’.
Keywords	Eviction Family Life Lack of domestic remedies Peaceful enjoyment of possessions Terrorism
Core Issue	Whether the forced eviction of the applicants from their village by security forces and the refusal of authorities to allow them to return amount to a breach of articles 8 and 13 and article 1 of Protocol no. 1 of the Convention?

Facts and Issues	<p>F1. The applicants lived in a village in a designated ‘state-of-emergency’ region in Turkey. They claimed that they were forcibly evicted from their homes by security forces and now live in poor conditions in Istanbul and Elazig. The applicants argue that the forced eviction from their village by security forces and the refusal to allow them to return amounts to a breach of Article 1 of Protocol No. 1. The applicants argue that the expulsion from their village and their inability to return amounts to a violation of article 8. The applicants argue that the failure of authorities to conduct an effective investigation into their forced eviction and the lack of any remedy to challenge the refusal of access to their possessions constitutes a violation of article 13.</p> <p>F2. The government dispute the fact that the villagers were forced to leave at the behest of security forces and argue that they left as a result of terrorist intimidation. The applicants did not have ‘possession’ of the land within meaning of Article 1 of Protocol No.1 as they failed to produce title deeds, the identification of property rights was a matter for the national legal system according to rules set out in its civil code. The Government denies that the applicants were forced to leave their village by security forces and submit that they have no ‘genuine interest’ in returning to their village in its present state in addition to stating that there is nothing stopping them from returning. The government denies any violation of article 8 on the same grounds as those argued in relation to Article 1 of Protocol 1. The Government argues that there were civil and criminal remedies which the applicants could have availed of and they failed to exhaust local remedies.</p>
Held	<p>H1. The Court reiterated that Article 1 of Protocol 1 guarantees the right of property (<i>Marckx v. Belgium</i> (1979) 2 EHRR 330, [1979] ECHR 2) and possessions are not limited to ownership of ‘physical goods’ (<i>Gasus Dosier und Fordertechnik GmbH v. The Netherlands</i> (1995) 20 EHRR 403, [1995] ECHR 7 and <i>Mathos e Silva, Lda., and Others v. Portugal</i> (1997) 24 EHRR 573, [1996] ECHR 37) (para. 138). The court found that the applicants did have ‘possession’ of land within the meaning of the protocol (para. 139).</p> <p>H2. The court referred to jurisprudence where it was held that security forces deliberately destroyed houses and property in the designated ‘state of emergency’ region of Turkey (<i>Akdivar and Others v. Turkey</i> (1997) 23 EHRR. 143, [1998] ECHR 25, <i>Selcuk and Asker v. Turkey</i> (1998) 26 EHRR 477 [1998] ECHR 36, <i>Yoyler v. Turkey</i> (Unreported judgment of 24 July 2003) [2003] ECHR 398, <i>Dulas v. Turkey</i> (Unreported judgment of. 30 January 2001) [2001] ECHR 60 (para. 142) The court found that the denial of access to the village constitutes an interference with the right to the peaceful enjoyment of possessions (<i>Loizidou v. Turkey</i> (1997) 23</p>

E.H.R.R. 513, [\[1996\] ECHR 70](#)). Article 1 of Protocol 1 comprises of three connected rules: 1. General principle of peaceful enjoyment of property, 2. The deprivation of possessions is subject to certain conditions and 3. States are entitled to control the use of property in accordance with the general interest by law. **(para. 145)** Rules 2 and 3 are to be construed in light of the general principle in rule 1. (*James and Others v. the United Kingdom* (1986) 8 EHRR 123, [\[1986\] ECHR 2](#), *Sporrong and Lonnroth v. Sweden* (1982) 5 EHRR 85, [\[1982\] ECHR 5](#), *The Holy Monasteries v. Greece* (1995) 20 EHRR 1, [\[1994\] ECHR 45](#), *Iatridis v. Greece* (2000) 30 EHRR 97, [\[1999\] ECHR 14](#) and *Beyeler v. Italy* (Unreported judgment 5 January 2000), [\[2000\] ECHR 1](#)) The Court held that the applicants complaint came under the first sentence of the first paragraph of article 1 because ‘the impugned measures ...restricted the applicants’ rights to use and dispose of their possessions’ (*Cyprus v. Turkey* (2001) 35 EHRR 30, [\[2001\] ECHR 331](#)) **(para. 146)**

H3. The Court asked whether a fair balance was struck between the general interests of the community and the protection of the individual’s fundamental rights (*Sporrong and Lonnroth v. Sweden* (1982) 5 EHRR 85, [\[1982\] ECHR 5](#)) **(para. 153)**. The Court found that there was a basis to the inference complained of and finds the governments efforts to provide a remedy to internally displaced persons ‘inadequate’ and ‘ineffective’. **(para. 154)** The Court held that “*the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one’s property*” **(para. 155)**. The Court dismissed the government’s objection in relation to applicants who had not presented title deeds and finds that there was a violation of Article 1 of protocol 1. **(para. 156)**

H4. The court held that there was ‘no doubt’ that refusal of access to their homes and livelihoods constituted a ‘serious and unjustified inference with the right to respect for family lives and homes’ and was in violation of article 8. **(para. 159)**

H5. The Court finds that because it is held that there had been violations of article 1 of protocol no. 1 and of article 8 that the applicants complaints in relation to article 13 are ‘arguable’ (*Yoyler v. Turkey* (Unreported judgment of 24 July 2003) [\[2003\] ECHR 398](#), *Dulas v. Turkey* (Unreported judgment of. 30 January 2001) [\[2001\] ECHR 60](#)) **(para. 163)** The Court reiterates that the government did not discharge the burden of proving the availability of a remedy capable of providing redress. **(para. 164)**

H6. The Court will hear applications for relief at a later stage.

Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, articles 1, 6, 7, 8, 13, 14, and 18 Protocol to Convention for the Protection of Human Rights and Fundamental Freedoms 1952, article 1</p> <p><u>International</u> United Nations Guiding Principles on Internal Displacement, 11 February 1998, principles 18 and 28</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>Marckx v. Belgium</i> (1979) 2 EHRR 330, [1979] ECHR 2 <i>Gasus Dosier und Fordertechnik GmbH v. The Netherlands</i> 20 EHRR 403, [1995] ECHR 7 <i>Mathos e Silva, Lda., and Others v. Portugal</i> [1996] ECHR 37 <i>Akdivar and Others v. Turkey</i> (1997) 23 EHRR. 143, [1998] ECHR 25 <i>Selcuk and Asker v. Turkey</i> (1998) 26 EHRR 477, [1998] ECHR 36 <i>Yoyler v. Turkey</i> (Unreported judgment of 24 July 2003) [2003] ECHR 398 <i>Dulas v. Turkey</i> (Unreported judgment of. 30 January 2001) [2001] ECHR 60 <i>Loizidou v. Turkey</i> (1997) 23 E.H.R.R. 513, [1996] ECHR 70 <i>James and Others v. the United Kingdom</i> (1986) 8 EHRR 123, [1986] ECHR 2 <i>Sporrong and Lonnroth v. Sweden</i> (1982) 5 EHRR 85, [1982] ECHR 5 <i>The Holy Monasteries v. Greece</i> (1995) 20 EHRR 1, [1994] ECHR 45 <i>Iatridis v. Greece</i> (2000) 30 EHRR 97, [1999] ECHR 14 <i>Beyeler v. Italy</i> (Unreported judgment 5 January 2000), [2000] ECHR 1 <i>Cyprus v. Turkey</i> (2001) 35 EHRR 30, [2001] ECHR 331</p>

12.	<i>Gül v. Switzerland</i> (1996) 22 EHRR 93, [1996] ECHR 5
Application No.	23218/94
Date	19 th February 1996
Applicant	Gül
Respondent State	Switzerland

Articles of the ECHR cited	3 (not considered) 8
Finding of the Court	No Violation of Article 8 ECHR by seven votes to two
Procedural Stage and Previous Stages	<p>Mr Gul applied for political asylum in Switzerland in April 1983 on the grounds of being a Kurd and a member of the Turkish Social Democratic Party. In February 1989 his request was rejected on the grounds that he had not established that he had personally been a victim of persecution. He appealed to the Federal Justice and Police Department but later withdrew his appeal on advice that he had a limited chance of success. The Basle Rural Cantonal Aliens Police supported Mr Gul's request for a residence permit on humanitarian grounds in respect of himself, his wife and his daughter Nursal, and he was granted a residence permit by the Federal Aliens Office on the 15th February 1990 due to the length of time he had been in Switzerland and his wife's ill health. Mr Gul made an application to the Basle Rural Aliens Police to bring his two sons to Switzerland, his application was refused as he did not conform to the standards laid down for family reunification and he did not have the means to support his family. One of his sons was 18 and so exempt from the procedure. He appealed to the Basle Rural cantonal government on grounds of personal circumstance but his appeal was dismissed on the grounds that family reunification only applies when the applicant has a settlement permit not a residence permit under national legislation. As for the guarantees set in Article 8 of the Convention, only Swiss nationals or persons in possession of a settlement permit could rely on these. It was also found under article 39 of ONLA that the couple, were unable to financially support the family and that the fact that they are unable to care for their daughter would prevent them being eligible to bring more children. They also found there is no 'special reason' for treating Mr. Gul's son, Ersin differently as set forth in legislation. Mr Gul lodged an administrative law appeal on the 2nd of September 1991, arguing that there were 'special circumstances' and that the residence permit should be treated as a settlement permit due to this. His claim was found inadmissible. On the 10th October 1994, the Commission declared the application admissible and on the 4th April 1995 found by 14 votes to 10 that there had been a violation of article 8 of the ECHR.</p>
Keywords	Political activities Family Reunification Residence
Core Issue	Whether the Swiss authorities' refusal to allow Mr Gul's (a Turkish national with a valid residence permit) son, Ersin, to join him in Switzerland constitutes a violation of Article 8 (respect for family

	life) of the ECHR?
Facts and Issues	<p>F1. Mr Gul left Turkey in 1983 and made his way to Switzerland, where he applied for political asylum; this application was rejected by the Minister for Refugees in 1989. He worked in a restaurant until 1990 until he fell ill and is now in receipt of a partial- invalidity payment. In 1987 Mrs Gul who had remained in Turkey with their two sons seriously injured herself, she left for Switzerland in order to receive proper treatment which she did, having two fingers of her left hand amputated.</p> <p>F2. In September 1988 she gave birth to their third child Nursal, who she was unable to care for and was placed in a home where she has remained since. Mrs Gul presented a medical declaration that stated it may be fatal for her to return to Turkey. In 1990 Mr and Mrs Gul were granted a residence permit on humanitarian grounds and they then sought permission to bring their son Ersin to Switzerland.</p> <p>F3. Ersin has lived in Turkey since birth, the government states he lives with his elder brother but Mr Gul claims he stays with various Kurdish families and due to limited financial resources does not attend school regularly.</p> <p>F4. Mr Gul had visited his son regularly and both Mr and Mrs Gul visited their son in July and August 1995.</p> <p>F5. Mr Gul submitted that the result in practice of the authorities' persistent refusal to allow Ersin to join him in Switzerland had been to separate the family and make it impossible, owing to lack of sufficient financial resources, for the parents to maintain regular contact with their son. In addition, the length of time Mr Gul had lived in Switzerland, his invalidity and his wife's ill-health made family reunion in Turkey an unrealistic prospect, so that the family could only be brought together again in Switzerland.</p> <p>F5. The Government submitted that the application was inadmissible, failing that, there was no interference under Article 8 of the ECHR and that the concept of 'family life' was missing in this case. The lack of family life was evidenced they claimed from the absence of both parents for 8 and 3 years respectively. They also submit that the couple is incapable of caring for their daughter and this would lead to a belief that they would be equally incapable of caring for their son.</p> <p>F6. Switzerland submitted that Mr Gul had a residence permit and that this did not entitle him to family reunification. It also submitted that it had discharged its positive obligations under article 8 of the ECHR and that the authorities were not under any obligation to ensure that the applicant led an optimal family life in Switzerland.</p>

Held	<p>H1. The Court affirmed the decision of the Commission on the first issue that the bond between Mr Gul and his son Ersin amounted to ‘family life’, as Ersin was a child born of a marital union (<i>Berrehab v. the Netherlands</i> (1988) 11 EHRR 322, [1988] ECHR 14), as Mr Gul had repeatedly visited him and repeatedly asked the Swiss courts to allow his son join him (paras. 32, 33).</p> <p>H2. On the issue of whether the Swiss had interfered with Mr Gul’s rights, under article 8(1), or, was the interference within the meaning of that article, the Court overturned the Commissions decision and found that it did not amount to, an interference (para 43).</p> <p>H3. The reasons for the finding of no interference are as follows: The Court considered there was a fair balance to be drawn between the interests of the individual and the community as a whole, and in both contexts the State enjoys a certain margin of appreciation per <i>Keegan v. Ireland</i> (1994) 18 EHRR 342, [1994] ECHR 18. Especially in an immigration context as Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered as per <i>Abdulaziz Cabales and Balkandali v. United Kingdom</i> (1985) 7 EHRR 471, [1985] ECHR 7 and <i>Cruz Varas and Others v. Sweden</i>, (1991) 14 EHRR 1, [1991] ECHR 26 (para 38).</p> <p>H4. The Court then considered the particular factual situation relating to Mr Gul and whether to what extent it is true that Ersin's move to Switzerland would be the only way for Mr Gul to develop family life with his son. The Court noted: a)that the reasons of persecution claimed by Mr Gul no longer existed in Turkey; b)that there is the availability of equivalent welfare payments in Turkey under the Social Security Convention; c) Mrs Gul may be able to receive appropriate medical treatment in specialist hospitals in Turkey and that she is now capable of visiting Turkey with her husband; d) Mr and Mrs Gul are lawfully resident in Switzerland but do not possess a settlement permit to entitle them to family reunification; It would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. (para 39- 42)</p> <p>H4 The Court distinguished <i>Berrehab v. the Netherlands</i> (1988) 11 EHRR 322, [1988] ECHR 14 on its facts as Ersin has always lived in Turkey and had grown up in the cultural and linguistic environment of his country (para. 42).</p> <p>H5. Dissenting Opinion. (Judge Martens approved by Judge Russo). The Judge concluded that that a proper balance was not achieved between the interests involved, that the refusal of the Swiss</p>
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	<p>authorities is disproportionate and, as such, not necessary in a democratic society and that there was a violation of Article 8. He distinguished the application of the <i>Berrehab</i> judgment in the majority opinion and stated that the Court must examine cases like this not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicant, his wife and Ersin (para 15). He also considered it harsh that the Gul's were faced with the decision of renouncing their son or their Swiss residence and their daughter who had acquired a position being educated in a Swiss home or renouncing their son. Also he considered how Mrs Gul would have to give up the certainty of the medical care she would get in Switzerland for a debatable health care system that exists in Turkey. He also notes that just because Mr Gul has not been arrested while on holiday does not secure his safety if chose to reside in Turkey and finally he thought the applicants deserved compassion due to their disabilities.</p>
Legal instruments cited	<p>European Convention on Human Rights and Fundamental Freedoms, articles 3, 8 Social Security Convention 1 may 1969 bilateral treaty between Switzerland and Turkey Federal Council's Order Limiting the Number of Aliens (OLNA) article 13(f), 36, 38, 39 para 1 Federal Residence and Settlement of Aliens Act (RSAA) section 4, section 17(2) Federal Administration and Justice Act, section 100 (b) (3) United Nations Convention on the Rights of the Child</p>
Cases cited by the Court	<p><i>Abdulaziz Cabales and Balkandali v. United Kingdom</i> (1985) 7 EHRR 471, [1985] ECHR 7 <i>Berrehab v. the Netherlands</i> (1988) 11 EHRR 322, [1988] ECHR 14 <i>Cruz Varas and Others v. Sweden</i>, (1991) 14 EHRR 1, [1991] ECHR 26 <i>Hokkanen v. Finland</i> (unreported judgment of 23 September 1994, [1994] ECHR 32 <i>Keegan v. Ireland</i> (1994) 18 EHRR 342, [1994] ECHR 18 <i>Kroon and Others v. the Netherlands</i> (1994) 17 EHRR 263 [1994] ECHR 35</p>

13.	<i>Hilal v. The United Kingdom</i> (2001) 33 EHRR 2; [2001] ECHR 214
Application No.	45276/99
Date	06 March 2001
Applicant	Said Mohammed Hilal
Respondent State	United Kingdom
Articles of the Convention / Protocols cited	Article 3 Article 13 Article 6 & Article 8- were not considered as no separate issues arose under these provisions.
Finding of the Court (Violation / No Violation)	Violation Article 3 No separate issues arose under Arts, 6 & 8 No violation Article 13
Procedural Stage and Previous Stages	The applicant claimed asylum upon arrival in the UK. Complete details of his claim were furnished at the full asylum hearing. The Secretary of State acting under para 328 of <i>Immigration Rules</i> refused the application on the basis that his asylum claim was implausible, and inconsistent. His appeal to the special adjudicator under s.4 Immigration Act 1971 was dismissed. Considerable weight was placed on the fact that the applicant had not mentioned his arrest and torture at the outset. Leave to appeal to the Immigration Appeal Tribunal was refused. The applicant obtained further documentary evidence to support his claim. He made representations to the Secretary of State requesting a fresh asylum application. The request was denied but the original application was reconsidered and refused, as the authenticity of the documentation was doubted. A request to have the documentary evidence referred to the special adjudicator under section 4 of the Immigration Act 1971 was refused, as was leave to apply for judicial review. The High Court held that the Secretary of States actions were not unreasonable; the documentation was now irrelevant as an ‘internal flight’ option was available to the applicant. Reliance was placed on a letter from the British High Commission, which stated that it was safe for the applicant to return once he remained on the mainland. The Court of Appeal further refused leave to apply for judicial review. It noted that even assuming that the documentation was

	genuine there was no evidence to suggest that the applicant would be at risk if he remained in his homeland.
Keywords	Credibility Deportation Internal flight option No effective domestic remedy Political activities Torture, cruel, inhuman or degrading treatment
Core Issue	<p>Whether the ‘internal flight option’ offers a reliable guarantee against the risk of ill treatment in relation to article 3?</p> <p>Whether the domestic remedies available to the applicant were effective for the purposes of article 13?</p>
Facts and Issues	<p>F1. The applicant was a Tanzanian national and an active member of The Zanzibar Nationalist Opposition Party. Because of his political activities, Tanzanian state agents arrested him in Zanzibar in 1994. He alleged that he was tortured whilst held in detention. In 1995, he claimed asylum in the U.K. The applicant submitted that the Tanzanian Authorities continued to demonstrate an active interest in his whereabouts as evidenced by a police summons. He disputed the UK’s arguments that his claim lacked credibility, and argued that the option of “internal flight” was unsustainable. He argued that the U.K. Government had failed its a positive obligation under Article 3 to investigate properly all evidence to support his claim that he would be exposed to a real risk of ill treatment if returned to mainland Tanzania.</p> <p>F2. The UK Government argued that there were significant factual inconsistencies in the applicant’s account of events leading to a finding of lack of credibility. In particular, the fact that he failed to mention allegations of torture at his preliminary interview. His claim to ill treatment was rejected on the basis that his low-level involvement in the opposition movement would not expose him to risk if returned to mainland Tanzanian. They submitted that there was no basis to conclude that his expulsion would violate Article 3.</p> <p>F3. The applicant argued that he had no effective remedy to challenge the decision of the Secretary of State to deport him. Following the initial hearing, the Secretary of State refused to accede to the applicants request that fresh evidence obtained by him be made available to the independent adjudicator to reconsider his claim. The judicial review proceedings only challenged this decision and did not provide an opportunity to reexamine the claim in light of</p>

	<p>the all the evidence. The test of ‘irrationality’, which applied in the High Court and Court of Appeal, limited the scope of review to the examination of the rationality and reasonableness of the decision. He argued that this test was extremely high and denied him the opportunity of review of his claim in light of all the evidence. He argued that this inability to determine the substance of his Convention complaint rendered the procedure ineffective for the purpose of article 13.</p> <p>F4 The U.K. Government argued that judicial review provided an effective remedy, and argued that the domestic case law in particular <i>Vilvarajah and Others v United Kingdom</i> and <i>D. v United Kingdom</i> demonstrated that the courts carefully considered all the evidence before them. The UK Government cautioned the Court from taking a different view as the special adjudicator on the issue of credibility.</p>
Held	<p>H1. The Court held that the findings of credibility by adjudicating officers were made without the benefit of the substantiating documentary evidence subsequently provided by the applicant (para 62). The Court found no grounds to doubt the authenticity of the documentation and noted that the Government based their findings on a different basis. In considering the documents the court held that they gave further corroboration to the applicants account which the adjudicator found so lacking (para 64).</p> <p>H2 The Court found insufficient evidence to support the contention that the ‘internal flight option’ offered a reliable guarantee against the risk of ill treatment. It noted from Amnesty International Reports submitted that the situation on mainland Tanzania discloses a long-term endemic situation of human rights problems and that the police there are institutionally linked to the police in Zanzibar (para 67).</p> <p>H3. The Court held that the applicants claim to risk of persecution if expelled was ‘arguable’ for the purpose of article 13. Citing, <i>Vilvarajah and Others</i> and <i>Soering v the United Kingdom</i> The Court was satisfied that the domestic Courts gave careful scrutiny to the substance of claims before it. The fact that this scrutiny takes place against the background of rationality and perverseness does not deprive it of its effectiveness (para 78).</p> <p>H4. It noted that the Court of Appeal had the power to offer the relief sought. The fact that it chose not to do so was not a material consideration (para 78).</p> <p>H5. Applicant was awarded €12, 583.57 for costs and expenses.</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, articles 3, 6, 8 13, 41.</p>

	<p><u>International</u> Convention Relating to the Status of Refugees (1951)</p> <p><u>UK Legislation</u> Immigration Act 1971 Section 3, 20, 21 Immigration Rules (UK) Rule 346</p>
Cases cited	<p><u>European Convention on Human Rights Cases</u> <i>Soering v United Kingdom</i> (1989) 11 EHRR 439, [1989] ECHR 14 <i>Vilvarajah and others v. United Kingdom</i>. [1991] ECHR 47 <i>D v. the United Kingdom</i> [1997] EHRR 423, [1997] ECHR 25 <i>Ahmed v. Austria</i> (1997) 23 EHRR 413, [1996] ECHR 63 <i>Chahal v. The United Kingdom</i> (1997) 23 EHRR 413, [1996] ECHR 54</p> <p><u>United Kingdom Cases</u> <i>R v Secretary of State for the Home Department, ex parte D.</i>, (Unreported, 15 February 1996, Court of Appeal)</p>

14.	<i>H.L.R. v. France</i> [1998] 26 EHRR 29, [1997] ECHR 23
Application No.	24573/94
Date	27 April 1997
Applicant	H.L.R.
Respondent State	France
Article of the ECHR cited	3
Finding of the Court (Violation / No Violation)	No violation

Procedural Stage and Previous Stages	<p>HLR was convicted by the Bobigny Criminal Court (25 September 1989) for drug trafficking, and sentenced to 5 years imprisonment. An order was also made permanently excluding him from French territory. On the 24th July 1992 the Paris Court of Appeal upheld the judgement of the Bobigny Criminal Court. On 31 July 1992 the applicant, arguing that he had assisted the judicial authorities, petitioned the President of the Republic to have his exclusion order rescinded. His petition was dismissed on the 20 September 1994. Notwithstanding that the petition to the President was pending the Minister of the Interior directed that the applicants file be submitted to the Aliens Deportation Board for an opinion in accordance with section 23 of the Ordinance of 2 November 1945 as amended. On 17 February 1994, the Deportation Board expressed the opinion that HLR should not be deported as his presence does not constitute a serious threat to public order. On 26 April 1994 the Minister of the Interior nonetheless issued an order for the applicant's deportation.</p> <p>The applicant sought a judicial review of the deportation order but was unsuccessful at first instance (judgement of 18 April, Bordeaux Administrative Court). He appealed this decision, but the verdict was not known at the time the case came before the ECHR. In the meantime, the Minister of the Interior had issued a compulsory residence order on 12 July 1994. The Minister ordered the applicant to reside in a designated location until such time as he was in a position to comply with the deportation order against him. An application (no. 24573/94) was lodged with the European Commission of Human Rights against France by HLR. The Commission declared the application admissible on 2 March 1995. In its report on 7 December 1995 it expressed the opinion, by 19 votes to 10, that there would be a violation of Article 3 if the applicant were to be deported to Columbia. The case was referred to the Court by the Commission and by the Government of France on 25 January and 29 February respectively.</p>
Keywords	<p>Deportation</p> <p>Persecution by non-State actors</p> <p>Torture, cruel, inhuman or degrading treatment</p>
Core Issue	<p>Whether substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of article 3 of the ECHR?</p>

Facts and Issues	<p>F.1. The applicant, a Columbian national, was convicted of an offence under the misuse of drugs legislation, for trafficking cocaine. A five year prison sentence and a permanent exclusion order were handed down by the Bobigny Criminal Court. The Minister for the Interior issued an order for the applicant's deportation. However, pending a final determination of the issue the Minister of the Interior issued the applicant a compulsory residence order on 12 July 1994. The Minister ordered the applicant to reside in a designated location until such time as he was in a position to comply with the deportation order against him.</p> <p>F.2. During police interviews, the applicant provided information on the instigators of the trafficking operation. His information materially assisted in the identification and conviction of another individual, H.B. The applicant argued that arising from his co-operation; his life would now be under grave threat, in the event of his forced return to Columbia.</p> <p>F.3. The applicant's deportation has been stayed pending the outcome of this case. HLR argued that as the French State had sought and obtained from him information on the organisers of the traffic, and it was this fact that gave rise to an increased threat to his life, the French State had a duty to protect him. He maintained that the Columbian authorities would be unable to protect him.</p> <p>F.4. The government maintained that his application was incompatible with the provisions of Article 3 since the risk of inhuman or degrading treatment relied on by the applicant did not stem from the Columbian authorities.</p>
Held	<p>H.1. The Court observes firstly that the Contracting States have the right, as a matter of well-established international law, and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens <i>Vilvarajah and Others v. U.K.</i> (1991) 14 EHRR 248, [1991] ECHR 47 (para. 33).</p> <p>H.2. Article 3 may also apply where the danger emanates from persons or groups of persons who are not public officials. It must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (para. 40).</p> <p>H.3. Held by a 15-6 majority in dismissing the application, that the applicant has provided no relevant evidence of risk of ill-treatment by non-state agents, and has not shown in the evidence before the Court that the Columbian authorities are incapable of affording him protection (para. 44).</p> <p>H.4. (6 judges dissent) The threat posed to the applicant was of a similar severity to that posed in <i>Chahal v. U.K.</i> (1996) 23 EHRR</p>

	413 [1996] ECHR 54 (para. 4). Accordingly, Article 3 of the Convention would be violated if HLR were to be deported to Columbia (para. 5). Furthermore, his continued presence on French territory would not represent such a threat to public order as to outweigh the risk of his being subjected to treatment proscribed by Article 3, if deported to Columbia (dissenting opinion of judge Jambrek).
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, article 3</p> <p><u>International</u> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1.</p> <p><u>France</u> Ordinance no. 45-2658, as amended by Law no. 93-1027, sections 23, 24, 25, 27 and 28.</p>
Cases cited	<p><u>ECHR Case Law</u> <i>Vilvarajah and Others v. U.K.</i> (1991) 14 EHRR 248, [1991] ECHR 47 <i>Soering v. U.K.</i> (1989) 11 EHRR 403, [1989] ECHR 14 <i>Chahal v. U.K.</i> (1996) 23 EHRR 413 [1996] ECHR 54 <i>Cruz Varas and Others v. Sweden</i> (1991) 14 EHRR 1 [1991] ECHR 26 <i>Amhed v. Austria</i> (1996) 24 EHRR 278 [1996] ECHR 63</p>

15.	<i>Jabari v. Turkey</i> [2000] ECHR 369
Application No.	40035/98
Date	11 July 2000
Applicant	Jabari
Respondent State	Turkey
Articles of the Convention / Protocols	Article 3 ECHR Article 13 ECHR

cited	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (1998) Protocol Relating to the Status of Refugees (1967)
Finding of the Court (Violation / No Violation)	Violation Article 3 Violation Article 13
Procedural Stage and Previous Stages	The applicant was granted refugee status by the UNHCR. She faced expulsion from Turkey to her country of origin, Iran. She appealed to the Ankara Administrative Court against the deportation. The Court confined itself to the formal legality of the deportation. No examination was given to the merits of her claim that she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged if removed to Iran. The Court refused to suspend the deportation order as it was not tainted with any obvious illegality and its implementation would not cause irreparable harm to the applicant.
Keywords	Deportation Lack of domestic remedies Torture, cruel, inhuman or degrading treatment
Core Issue	The applicant alleged, that she would be subjected to a real risk of ill-treatment and death by stoning if expelled from Turkey and that she was denied an effective remedy to challenge her expulsion. She invoked Articles 3 and 13 of the Convention in respect of these two complaints.
Facts and Issues	<p>F1. The applicant was arrested in Iran for adultery. She entered Turkey illegally and attempted to fly to Canada via France. She was returned to Istanbul by the French Authorities as she was in possession of a forged passport.</p> <p>F2. She was detained in Istanbul pending deportation to Iran by the Istanbul Security Directorate.</p> <p>F3. She lodged an asylum application with the Aliens Department; the police rejected the application as it contravened section 4 of the <i>Asylum Regulation</i> 1994, requiring all non-European asylum applications to lodge their claim within 5 days of entering Turkish territory.</p> <p>F4. She was granted refugee status by the UNHCR on the basis that she had a well-founded fear of persecution if removed to Iran, as she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged.</p> <p>F5. She appealed to the Ankara Administrative Court against the</p>

	<p>deportation. The application was refused on the grounds that it was not tainted with illegality and its implementation would not cause irreparable harm to the applicant. No assessment was made of the applicants claim to be at risk if removed to Iran.</p> <p>F6. She appealed to the ECtHR arguing that; removal to Iran would expose her to treatment prohibited by Article 3 of the Convention. The applicant also states that she did not have an effective remedy to challenge the decision whereby her application for asylum was rejected as being out of time which violates Article 13.</p>
Held	<p>H1. The Court unanimously found that there would be a breach of article 3 if the applicant was to be returned to Iran. It gave due weight to the UNHCR's conclusion on the applicants claim and affirmed the undisputed findings of Amnesty International concerning the punishment of women found guilty of adultery. (para 41)</p> <p>H2. The Court accepted Turkey's geographical preference under the Geneva Convention and the 1967 optional protocol to limit the grant of refugee status to European applicants, and to grant all other applicants' temporary residency permits pending resettlement by UNHCR on humanitarian grounds. However it held that the 5 day time limit that applied to non-European applicants must be considered at variance with the absolute nature of Article 3. The Court criticized the Ankara Court for limiting the judicial review proceedings to the formal legality of the applicant's deportation rather than the substance of her fears (para 40).</p> <p>H3. The Court held given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged, materialised and the importance which it attaches to article 3, the notion of an effective remedy under article 13 requires independent and rigorous scrutiny of a claim that there exists substantial grounds for fearing a real risk of treatment contrary to article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court was led to conclude that the judicial review proceedings did not satisfy the requirements of article 13. (para 50)</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, (1950) Articles 3, 13. Protocol No.11 1 November (1998)</p>

	<p><u>International</u> Convention Relating to the Status of Refugees (1951) Protocol Relating To the Status Of Refugees (1967)</p> <p><u>Turkey</u> Constitution of The Republic of Turkey Articles 125, 155,5 Asylum Regulation 1994</p> <p><u>Iran</u> Islamic Penal Code Article102</p>
Cases cited	<p><i>Chahal v. the United Kingdom</i> 23 EHRR 413 [1996] ECHR 54 <i>Cruz Varajas v. Sweden</i> (1992) 14 EHRR 1, [1991] ECHR 26 <i>Soering v. the United Kingdom</i> (1989) 11EHRR 439 [1989] ECHR 14</p>

16.	S.C.C v Sweden (Unreported Judgment of the European Court of Human Rights, 15 February 2000)
Application No.	46553/99
Date	15 February 2000
Applicant	S.C.C.
Respondent State	Sweden
Articles of the ECHR cited	2 3 8
Finding of the Court (Violation / No Violation)	No violation of any of the articles.
Procedural Stage and Previous Stages	The applicant, upon returning to Sweden in 1996, applied for a work permit. This was refused and this refusal confirmed by the Aliens Appeal Board. In 1999 two further residence applications, on the

	basis of her HIV status and on the fact that she was living with her Somali partner, who had a Swedish resident permit, were rejected in a number of hearings by the Appeals Board.
Keywords	Access to medical treatment Deportation Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the deportation of the applicant to Zambia, where she may not be able not access the necessary HIV/AIDS drugs is contrary to articles 2, 3 or 8 of the ECHR?
Facts and Issues	<p>H1. The applicant entered Sweden in 1990 along with her husband who was the First Secretary of the Zambian embassy. In 1992 she was granted a one year work permit. The couple returned to Zamia in 1994. In 1996, S.C.C's husband died in Zambia and she the returned to Sweden stating that she feared her husband's family and wanted to work to pay off debts. She stated she would only stay in Sweden for one year. The National Immigration Board rejected the application and ordered the applicant's deportation to Sweden. Subsequent appeals and new applications on a variety of grounds, including a relationship with F.P., were also rejected. The applicant argued that if she can continue the anti-HIV treatment, she will live a much longer life than if she is unable to continue such treatment.</p> <p>F2. Sweden noted that anti-HIV treatment was available in Zambia and the applicant had the care and support of her family. Sweden also noted that they did consider a person's HIV/AIDS when deciding on whether to grant a residence permit. Sweden would look at the general state of health of the individual including an examination of clinical symptoms. The State would consider the effect of any deportation and whether this would likely lead to death or a serious deterioration of the applicant's condition.</p>
Held	<p>H1. The Court is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the deporting State (p.7).</p> <p>H2. The Court will determine the case in light of its previous case law in <i>D. v U.K.</i> [1997] EHRR 423; [1997] ECHR 25 and <i>B.B. v. France</i> [1998] ECHR 84. In these cases D. and B.B. were</p>

	<p>approaching the end of their illness, and the receiving countries precarious facilities as well as the compelling humanitarian circumstances of no social or moral support of the applicants. Unlike those cases, AIDS treatment is available in Zambia and the applicant would have the social and moral support of her family (p.8).</p> <p>H3. There is no article 8 violation on the basis of S.C.C's relationship with F.P. While the ECHR has found that expulsion from close family members may in certain circumstances constitute a violation of article 8 (<i>Boughanemi v. France</i>); in this case the applicant's expulsion was provided by law and the State party has a legitimate aim in protecting the countries immigration system and the 'economic well-being of the country. Furthermore the applicant's relationship commenced while she was an illegal immigrant and made no reference to the relationship for almost three and a half years (p. 9).</p>
Legal instruments cited	European Convention on Human Rights and Fundamental Freedoms , articles 2, 3, 8.
Cases cited by the Court	<p><i>B.B. v. France</i> (Unreported Judgement, 9 March 1998) [1998] ECHR 84</p> <p><i>Boughanemi v. France</i> (1996) 22 EHRR 228, [1996] ECHR 19</p> <p><i>D. v United Kingdom</i> [1997] EHRR 423, [1997] ECHR 25</p>

17.	<i>Soering v United Kingdom</i> [1989] 11 EHRR 439, [1989] ECHR 14
Application No.	14038/88
Date	7 July 1989
Applicant	Soering
Respondent State	United Kingdom
Articles of the ECHR cited	<p>Article 3</p> <p>Article 6 (1)</p> <p>Article 6 (3) (c)</p> <p>Article 6 (3) (d)</p> <p>Article 13</p>
Finding of the Court (Violation /	<p>Violation Article 3</p> <p>No Violation Article 6 (3) (c)</p>

No Violation)	<p>No Jurisdiction Article 6 (1)</p> <p>No Jurisdiction Article 6 (3) (d)</p> <p>No Violation Article 13</p>
Procedural Stage and Previous Stages	<p>Mr. Soering applied to the British Divisional Court in 1987 for a writ of habeas corpus in respect of his committal and for leave to apply for judicial review. Both applications were refused by the Divisional Court. On 30 June 1988 the House of Lords rejected the applicant's petition for leave to appeal against the decision of the Divisional Court. On 3 August 1988 the applicant's request to the Secretary of State to exercise his discretion not to make an order for the applicant's surrender under section 11 of the Extradition Act 1870 was rejected and the warrant ordering the applicant's surrender to the U.S. authorities was signed. The case was brought before the European Court of Human Rights (the Court) on 25 January 1989 by the European Commission of Human Rights (the Commission), on 30 January 1989 by the Government of the U.K. and on 3 February 1989 by the Government of Germany. It originated in an application (no. 14038/88) against the U.K. lodged with the Commission under Article 25 of the European Convention on Human Rights (the Convention) by a German national, Mr. Jens Soering, on 8 July 1988. The object of the Commission request and of the two governmental applications was to obtain a decision from the Court as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 6 and 13 of the Convention. The hearing took place in public in the Human Rights Building in Strasbourg.</p>
Keywords	<p>Death row phenomenon</p> <p>Extradition</p> <p>Torture, inhuman or degrading treatment or punishment</p>
Core Issue	<p>Whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State?</p>
Facts and Issues	<p>F1. The applicant Mr. Jens Soering is a German national who at the time of the case was detained in prison in England pending extradition to the U.S. to face charges of murder in the Commonwealth of Virginia. The U.S. requested the applicant's extradition under section 8 of the Extradition Act 1870 for the murders of two people in Virginia. The applicant's girlfriend, whose parents were the victims, had already been surrendered to the U.S. Mr. Soering also had German citizenship and the Federal Republic of Germany had also requested extradition for the crimes allegedly committed, as Soering could be tried in that country. It was alleged that Mr. Soering admitted to the killings in front of U.S and U.K. law enforcement officers, however a German prosecutor noted that Soering stated he never intended to kill the victims. The U.K. informed the German authorities that they would extradite to the U.S. The U.K. had a sworn affidavit from the prosecuting U.S.</p>

	<p>attorney where he recognised that they opposed the imposition or the carrying out of a death penalty sanction; however the prosecuting attorney was still going to argue for the imposition of the death penalty in any future court case on the issue.</p> <p>F2. Mr. Soering stated that notwithstanding the assurance given to the U.K. Government, there was a serious likelihood that he would be sentenced to death if extradited to the U.S. He maintained that in the circumstances and, in particular, having regard to the “death row phenomenon” he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 of the Convention. It was further submitted that his extradition to the U.S. would constitute a violation of Article 6 (3) (c) because of the absence of legal aid in the State of Virginia to pursue various appeals. Finally, he claimed that, in breach of Article 13, he had no effective remedy under U.K. law in respect of his complaint under Article 3. In its report adopted on 19 January 1989 the Commission expressed the opinion that there had been a breach of Article 13 (seven votes to four) but no breach of either Article 3 (six votes to five) or Article 6 (3) (c) (unanimously).</p> <p>F3. The U.K. Government requested the Court to hold that neither the extradition of the applicant nor any act or decision of the U.K. in relation thereto constitutes a breach of Article 3 of the Convention. The Government contended that Article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, that extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State’s jurisdiction. In the alternative the Government submitted that the application of Article 3 in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. The Government did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 into play. Their reasons were fourfold: the applicant has not acknowledged his guilt of capital murder; only a <i>prima facie</i> case has so far been made out against him and psychiatric evidence may be sufficient to amount to a defence of insanity under Virginia law; even if the applicant is convicted of capital murder it cannot be assumed that the death penalty will be imposed, particularly in light of mitigating factors such as the applicant’s age, his mental condition at the time of the offence and his lack of previous criminal activity; and the assurance received from the U.S. must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out. However, they did concede that there was “some risk”, which was “more than merely negligible” that the death penalty would be imposed.</p> <p>F4. In relation to Article 6 (3) (c) the Government concurred with</p>
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	<p>the Commission’s opinion that the proposed extradition of the applicant could not give rise to the responsibility of the U.K. under Article 6 (3) (c) and in the alternative that the applicant’s allegations were ill-founded. In relation to Article 13 the Government contended that this Article had no application in the circumstances of the present case or, in the alternative, that the aggregate of remedies provided for under domestic law was adequate. In relation to Article 50 the Government did not in principle contest the applicant’s claim for reimbursement of costs and expenses, but suggested that, in the event that the Court should find one or more of the applicant’s complaints of violation of the Convention to be unfounded, it would be appropriate for the Court, deciding on an equitable basis, to reduce the amount awarded accordingly (<i>Le Compte, Van Leuven and De Meyere v Belgium</i> [1982] ECHR 7).</p>
Held (unanimously)	<p>H1. The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (<i>Abdulaziz, Cabales and Balkandali v United Kingdom</i> [1985] 7 EHRR 471, [1985] ECHR 7) (para. 91). There is a significant risk that the applicant would be facing the death penalty if convicted (para. 94). The mitigating factors do reduce the likelihood of the death sentence being imposed. However, the Court held that there are substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experience the “death row phenomenon” (para. 98). The Court’s conclusion is therefore that the likelihood of the feared exposure of the applicant to the “death row phenomenon” has been shown to be such as to bring Article 3 into play (para. 99).</p> <p>H2. The Court considered whether in the circumstances the risk of exposure to the “death row phenomenon” would make extradition a breach of Article 3 and concluded the following: Ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (<i>Ireland v United Kingdom</i> [1978] 2 EHRR 25, [1978] ECHR 1; <i>Tyrer v United Kingdom</i> [1978] 2 EHRR 1, [1978] ECHR 2). In order for a punishment or treatment associated with it to be “inhuman or</p>

	<p>degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment (<i>Tyrer v United Kingdom</i> [1978] 2 EHRR 1, [1978] ECHR 2). In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person’s mental anguish of anticipating the violence he is to have inflicted on him. (para. 100). Capital punishment is permitted under certain conditions by Article 2 (1) of the Convention (para. 101). The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2 (<i>Klass and Others v Germany</i> [1978] ECHR 4). On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 (1). Article 3 cannot be interpreted as generally prohibiting the death penalty (para. 103). That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionately to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded (para. 104). The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years. This length of time is in a sense largely of the prisoner’s own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death (para. 106). In analysing the conditions of detention the Court based itself on facts uncontested by the U.K. and acknowledged the severity of a special regime consisting of extra security that operated on death row in Mecklenburg and concluded that this severity was compounded by the lengthy duration of detention (para. 107). At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he “was suffering from [such] and abnormality of mind ... as substantially impaired his mental responsibility for his acts”. As a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence. It is in line with the Court’s case law to treat disturbed mental health as having the same effect for the application of Article 3. The provisions of the Code of Virginia</p>
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[1950](#) do not remove the relevance of age and mental condition in relation to the acceptability, under Article 3, of the “death row phenomenon” for a given individual once condemned to death. Although it is not for this Court to prejudge the issues of criminal responsibility and appropriate sentence, the applicant’s youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 (**para. 109**). Extraditing the applicant to Germany rather than the U.S. would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row., which would violate article 3 (**para. 110**). Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the U.S. would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration. Accordingly, the Secretary of State’s decision to extradite the applicant to the U.S. would, if implemented, give rise to a breach of Article 3 (**para. 111**).

H2. There was no violation of Article 6 (3) (c) of the Convention. In reaching this decision the Court concluded the following: The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society (*Colozza v Italy* [\[1985\] ECHR 1](#)). The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk. Accordingly, no issue arises under Article 6 (3) (c) in this respect (**para. 113**).

H3. It has no jurisdiction to entertain the complaint under Article 6 (1) and 6 (3) (d) (**para. 115**).

H4. There is no violation of Article 13. The Court is satisfied that the English courts can review the “reasonableness” of an extradition decision in the light of the kind of factors relied on by Mr. Soering before the Convention institutions in the context of Article 3 (**para. 121**). There was nothing to have stopped Mr. Soering bringing an application for judicial review at the appropriate moment and arguing “Wednesbury unreasonableness” on the basis of much the same material that he adduced before the Convention institutions in relation to the “death row phenomenon”(**para. 123**). The Court concludes that Mr. Soering did have available to him under English law an effective remedy in relation to this complaint under Article

	<p>(para. 124). H5. The Court considers that in equity the applicant should recover his costs and expenses in full.</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, articles 3, 6, 13 European Convention on Extradition, article 11</p> <p><u>International</u> UN 1951 Convention on the Status of Refugees, article 33 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, article 3 International Covenant on Civil and Political Rights</p> <p><u>U.K.</u> Extradition Act 1870 Homicide Act, 1957 Murder (Abolition of the Death Penalty) Act, 1965</p> <p><u>U.S.</u> American Convention on Human Rights Code of Virginia 1950</p>
Cases cited by the Court (only the most relevant to the judgment have been cited)	<p><u>ECHR Case Law</u> <i>Abdulaziz, Cabales and Balkandali v United Kingdom</i> [1985] 7 EHRR 471, [1985] ECHR 7 <i>Boyle and Rice v United Kingdom</i> [1988] ECHR 3, [1988] ECHR 3 <i>Colozza v Italy</i> (1985) 7 EHRR 516, [1985] ECHR 1 <i>Ireland v United Kingdom</i> [1978] 2 EHRR 25, [1978] ECHR 1 <i>Johnston and Others v Ireland</i> (1987) 9 EHRR 203, [1986] ECHR 17 <i>Klass and Others v Germany</i> (1979-80) 2 EHRR 214, [1978] ECHR 4 <i>Le Compte, Van Leuven and De Meyere v Belgium</i> (1981) 4 EHRR 1, [1982] ECHR 7 <i>Schiesser v Switzerland</i> (1979) 2 EHRR 417, [1979] ECHR 5 <i>Silver and Others v United Kingdom</i>, (1981) 3 EHRR 475, [1983] ECHR 5 <i>Swedish Engine Drivers' Union v Sweden</i> (1979-80) 1 EHRR 617, [1976] ECHR 2 <i>Tyrer v United Kingdom</i> [1978] 2 EHRR 1, [1978] ECHR 2</p>

18.	<i>Venkadajalasarma v The Netherlands</i> [2004] ECHR 80
Application No.	58510/00
Date	17 May 2004
Applicant	Venkadajalasarma
Respondent State	The Netherlands
Articles of the Convention / Protocols cited	3
Finding of the Court	No Violation
Procedural Stage and Previous Stages	The applicant was tortured by Sri Lankan Authorities for suspected membership of the LTTE. On arrival in Amsterdam he requested asylum or alternatively a residence permit on humanitarian grounds. His request was denied on the basis that his scars were believed to be more than two months old and because it did not appear to the Immigration Authority in the Netherlands that the Sri Lankan authorities were pursuing the applicant in such a manner as he could be said to have a well founded fear of persecution. The Regional Court of the Hague rejected his subsequent appeals. The Deputy Minister claimed that merely belonging to a risk category was not sufficient to conclude that the applicant might be exposed to ill treatment contrary to article 3 if returned and this was upheld by the Regional Court of the Hague in his final appeal.
Keywords	Deportation Political activities Terrorism Torture, cruel, inhuman or degrading treatment/punishment
Core Issue	Whether the proposed expulsion of the applicant by the Netherlands to Sri Lanka would expose him to a real risk of torture or inhuman and degrading treatment contrary to Article 3 of the Convention.
Facts and Issues	F1. The applicant was a Sri Lankan National who belonged to the Tamil population group and lived in Jaffna, an area controlled by the

	<p>LTTE terrorist organization, which was involved in an armed struggle for independence. He was forced to provide low-level practical assistance to the LTTE and was later arrested and tortured by the Sri Lankan authority for suspicion of LTTE membership. Upon his release he fled to Amsterdam using his own passport. Due to his involvement with the LTTE he claimed that returning to his country would expose him to torture or death.</p> <p>F2. In Sri Lanka at the time it was usual for the Authorities to round up and inspect men for body scars, which might indicate LTTE training. The applicant feared that if returned to Sri Lanka that the scars obtained by him during torture would also expose him to further torture or death on this basis.</p> <p>F3. For reasons relating to population control and employment the immigration policy of the Netherlands was a restrictive one. Under the Aliens Act, 1965, it only granted admission of aliens when required to do so under international law, where it is in the essential interests of the Netherlands or where there were compelling humanitarian reasons.</p> <p>F4. The government of the Netherlands maintained that, the applicant was not politically active as his activities were peripheral and done under duress. The applicant was unlikely to attract the attention of Sri Lankan officials. Furthermore, by his own admission, he had been released from his previous detention as the Sri Lankan authorities could not confirm its suspicion that he was a member of the LTTE, therefore the Court felt that he would not be a high priority to the Sri Lankan Government. The Netherlands also claimed that the applicant could find safety in the Colombo region of Sri Lanka. Following a ceasefire in Sri Lanka, round ups, random arrests and border controls were far less frequent. Though the country was still politically unstable conditions in Sri Lanka has significantly improved.</p>
Held	<p>H1. The Court held by a 6-1 majority that the expulsion of the applicant to Sri Lanka would not violate article 3.</p> <p>H2. There is an obligation on Contracting States not expel the alien in question where that person would face a real risk of being subjected to treatment contrary to article 3 (<i>Hilal v UK</i> (2001) 33 EHRR 2, [2001]ECHR 214). The Court noted in <i>Hilal</i> that expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel an individual to that country.</p>

	<p>H3. Ill treatment must attain a minimum level of severity to fall within the scope of Article 3. The assessment of minimum is relative to factors including the circumstances of the case, the duration of the treatment, its physical and mental effects and in some cases the age, sex and state of health of the victim (<i>Ireland v UK</i> (1978) 2 EHRR 25, [1978] ECHR 1)</p> <p>H4. Where the applicant has already been expelled the Court must consider what facts were known or ought to have been known to the Contracting State at the time of expulsion (<i>Vilvarajah and Ors v UK</i> (1991) 14 EHRR 248, [1991] ECHR 47). Where the applicant has not yet been expelled the Court must consider whether at the present time and in the present situation there is a real risk that the applicant will be subjected to treated contrary to article 3 (para.63).</p> <p>H5. The Court found that it would not be possible for the applicant to settle in areas controlled by either the LTTE or the government (para.64).</p> <p>H6. The Court found that while previously the presence of scars on his person may have exposed him to suspicion of LTTE membership and subsequently arrest and possible mistreatment, that in the current political climate of Sri Lanka it is unlikely that such scars would lead to such an arrest or mistreatment (para.66). Furthermore, since his involvement with the LTTE was low level and done under duress it is unlikely that he would face arrest and torture as a result (para.68)</p> <p>H7. (Dissent of Judge Mularoni) There was a real risk that if returned to Sri Lanka the applicant would be exposed to inhuman and degrading treatment based on medical evidence of his previous exposure to torture and the majority's failure to give adequate weight to documents provided by NGOs as to the human rights situation in Sri Lanka.</p>
Legal instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, article 3</p> <p><u>International</u> United Nations Convention relating to the Status of Refugees, 1951</p> <p><u>The Netherlands</u> Aliens Act, 1965 General Administrative Law Act</p>

Cases cited	<p><u>ECHR Case Law</u></p> <p><i>Ahmed v Austria</i> (1996) 24 EHRR 278, [1996] ECHR 63</p> <p><i>Chahal v UK</i> (1996) 23 EHRR 413, [1996] ECHR 54</p> <p><i>Hilal v UK</i> (2001) 33 EHRR 2, [2001] ECHR 214</p> <p><i>H.L.R v France</i> (1997) 26 EHRR 29 [1997] ECHR 23.</p> <p><i>Ireland v UK</i> (1978) 2 EHRR 25 [1978] ECHR 1</p> <p><i>Vilvarajah and Ors v UK</i> (1991) 14 EHRR 248, [1991] ECHR 47</p> <p><u>The Netherlands</u></p> <p><i>Raad van State, Decision of the Judicial Division</i>, 16 October 1980, <u>Immigration Law Reports 1981, no.1</u></p>
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19.	<i>Vilvarajah and Ors v UK</i> [1992] 14 EHRR 248; [1991] ECHR 47
Application Nos.	13163/87,13164/87,13165/87,13447/87,13448/87
Date	30 October 1991
Applicant	Vilvarajah Skandarajah Sivakumaran Navratnasingam Rasalingam
Respondent State	United Kingdom
Articles of the Convention / Protocols cited	3 13 33
Finding of the Court	No Violation
Procedural Stage and Previous Stages	The applicants upon arrival in the UK requested asylum under the Convention relating to the Status of Refugees 1951 . Asylum was denied as they had not established that they had a well founded fear of persecution in Sri Lanka. The applicants were returned to Sri Lanka where they claim to have each suffered further incidents of ill treatment. From there, they lodged an appeal against refusal for

	<p>asylum under s. 13 of the Immigration Act, 1971. An adjudicator in the UK found in favour of the applicants and they subsequently returned to the UK. They were each granted exceptional leave to remain in the UK for twelve months. Each renewed an application for asylum, which was still under consideration when the case came before the Court. The European Commission of Human Rights considered the applications declaring them admissible on July 7 1989 but did not make a <u>Rule 36</u> indication (which allows the Commission to indicate to the parties concerned any interim measure which in the Commissions view should be adopted in the interests of the parties or the proper conduct of the proceedings before it) to the UK as requested by the applicants.</p>
Keywords	<p>Deportation Refolement Terrorism Torture, cruel, inhuman or degrading treatment/punishment</p>
Core Issue	<ul style="list-style-type: none"> • Whether the returning of the applicants to Sri Lanka amounted to inhuman and degrading treatment contrary to Article 3? • Whether or not the applicants had an effective remedy in the UK to address their complaint under Article 3 contrary to Article 13?
Facts and Issues	<p>F1. Each of the applicants' are members of the Tamil population group in Sri Lanka who had suffered ill treatment during the political unrest. They had lost their homes and family members and had been arrested and detained for suspicion of membership of the LTTE terrorist organization. Many of them had been beaten and tortured during several periods of detainment.</p> <p>F2. The applicants claimed that being young male Tamils', they were particularly vulnerable to ill treatment as such persons were routinely rounded up, detained and tortured for fear that they would have militant sympathies. Furthermore, the fourth and fifth applicants claimed they were at even greater risk as they had to travel without identity cards which the UK Home Department had lost.</p> <p>F3. The first applicant claimed that he feared ill treatment from Indian Peace Keeping Forces in particular due to his previous involvement with the Peoples Liberation Organisation of Tamil Eelam. Similarly the third applicant claimed that he had been a member of the LTTE until leaving Sri Lanka, but had not been involved in any violent activities.</p> <p>F4. The UK, mindful of its non-refoulment obligation reasoned that the ill treatment of applicants was the result of civil unrest in Sri Lanka and that these men had only been subjected to what every Sri Lankan, particularly Tamils, are at risk of encountering. The</p>

	<p>incidents had all been random acts resulting from a political struggle and so were not personalized risks to the safety of these individuals. The applications for asylum were refused on the basis that the applicants personally could not have a well founded fear of persecution.</p> <p>F5. The applicants were each returned to Sri Lanka following the UK's denial of asylum. However, on return the applicants claimed to have again suffered ill treatment. The first applicant while enjoying an initial period of safety due to the publicity surrounding his case feared for his life as he was denounced by the IPKF for suspicion of membership of the LTTE. The second applicant was detained for a period of two months by the IPKF during which he was beaten on several occasions and was badly malnourished when his release was obtained by a bribe. Similarly, the third applicant was detained for a period of six months during which he was tortured regularly. Having been released, again due to bribery, he was hospitalized. He was later re-arrested and badly beaten. Upon his release, he went into hiding. The fourth applicant was arrested also on his return and was beaten severely until his release while the fifth applicant having escaped re-arrest fled to France when his father and brother who were members of the LTTE were arrested by the IPKF by whom he was also being sought out.</p> <p>F6. All applicants renewed their claim for asylum in the UK through their solicitors. These claims were upheld by an Adjudicator and all applicants were allowed to return to the UK where they were each granted exceptional leave to remain for 12 months.</p> <p>F7. The applicants claimed before the Court that their return to Sri Lanka where many of them again suffered ill treatment amounted to inhuman and degrading treatment in contravention of article 3. They also claimed that since judicial review proceedings considered the manner in which their case was considered and not the substance of their claim that they were denied a remedy for their complaint under article 3 contrary to article 13.</p>
Held	<p>H1. The Court held by an 8-1 majority that there had been no violation of Article 3. It held by a 7-2 majority that there had been no violation of article 13.</p> <p>H2. The Court confirmed its previous ruling that expulsion of an asylum seeker by a Contracting State can give rise to an issue under article 3, and so engage the responsibility of that State where there are substantial grounds to believe that a person may be subject to torture or inhuman and degrading treatment if returned to their country of origin (<i>Cruz Varas and Ors v Sweden</i> [1992] 14 EHRR 1, [1991] ECHR 26 (para. 103).</p> <p>H3. In considering whether substantial grounds have been shown,</p>

	<p>the Court will assess the issue in light of the material placed before it or material obtained <i>proprio motu</i> if necessary. The Court is not precluded from considering information which comes to light subsequent to expulsion. (<i>Cruz Varas and Ors v Sweden</i> (1991) 14 EHRR 1, [1991] ECHR 26 (para.107). The Court further held that the examination of the issue in question however must focus on the issue of foreseeable consequences of expulsion and the personal circumstances of the applicants (para. 108)</p> <p>H4. The Court found that the applicants did not establish that their personal position was any worse than the generality of members of the Tamil Community or other young male Tamils returning to Sri Lanka. There were no distinguishing features in their cases that would have enabled the UK Secretary of State to foresee that they would be ill treated on their return.(para. 112)</p> <p>H5. According to the Court a mere possibility of ill treatment is not sufficient in itself to give rise to a breach of article 3.(para. 111)</p> <p>H6. As regards article 13, the Court found that it guarantees a remedy at national level to enforce the Convention in whatever form they are secured at in the domestic legal order of the Contracting State. It does require the remedy to take any particular form and Contracting States have discretion as to how they fulfil their obligations under article 13 (para. 122).</p> <p>H7. The Court noted that it had already considered and approved the judicial review process in the UK in relation to claims for asylum (<i>Soering v UK</i> (1989) 11 EHRR 471, [1989] ECHR 14). Finding no material differences between <i>Soering</i> and the present case, the Court did not see that it could reach a different conclusion.(para. 124)</p> <p>H8. Finally the Court held that while there did exist certain limitations to the power of the UK courts in judicial review, it provided sufficient control over the decisions of administrative authorities to satisfy article 13 (para. 126).</p> <p>H9. (Two Judge Dissent) The minority felt that there had been a breach of Article 13. This was based on a distinction of <i>Soering</i> (<i>above</i>) from the present case. In <i>Soering</i> the facts of the case were not in dispute. In the present case they were in dispute and judicial review does not, according to the minority exist to resolve such disputed issues.</p> <p>H10. (One Judge Dissent) While admitting that all Tamils by virtue of membership of an ethnic group should not receive asylum, the minority felt that based on their personal circumstances they did have a well founded fear of persecution and so found a violation of article 3.</p>
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Legal Instruments cited	<p><u>European</u> European Convention on Human Rights and Fundamental Freedoms, article 3,13</p> <p><u>International</u> United Nations Convention relating to the Status of Refugees, 1951</p> <p><u>United Kingdom</u> Immigration Act 1971, s.13</p>
Cases cited	<p><u>ECHR Case Law</u> <i>Cruz Varas and Ors v Sweden</i> (1991) 14 EHRR 1, [1991] ECHR 26 <i>Soering v UK</i> (1989) 11 EHRR 471, [1989] ECHR 14</p> <p><u>United Kingdom</u> <i>Chief Constable of North Wales Police v Evans</i> (1982) 1 WLR 1155 <i>Council of Civil Service Unions v Minister for Civil Service</i> (1984) 3 All ER 935 <i>Gaima v Secretary of State</i> [1989] Immigration Appeals Reports <i>Provincial Picture Houses Ltd v Wednesbury Corporation</i> [1948] 1 KB 223 <i>R v Immigration Appeals Tribunal and Anor. ex parte Secretary of State for the Home Department</i> [1990] 1 WLR 1126 <i>R v Secretary of State for Education and Science, ex parte Avon County Council</i> [1991] 88 Local Government Reports 737 <i>R v Secretary of State for the Home Secretary, ex parte Bugdaycay and Ors</i> [1987] 1 All ER 940 <i>R v Secretary of State, ex parte Jeyakumaran</i> (High Court, 28 June 1985) <i>R v Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals</i> [1988] All ER 193</p>

COMMITTEE AGAINST TORTURE DECISIONS

Decision of the Committee Against Torture	Communication No 34/1995 <i>Aemei v. Switzerland</i> (9 May 1997)
Citation	CAT/C/18/D/34/1995
Date	9 May 1997
Applicant	Seid Mortesa Aemei Mrs. Aemei
The Respondent State,	Switzerland
Articles of the Convention Against Torture Cited	Article 3 and 22
Finding of the Court	Violation of article 3.
Procedural Stage and Previous Stages	<p>The applicant, an Iranian citizen, sought asylum in Switzerland for reasons of political opinion. His application was refused at first instance by the Federal Office of Refugees due to his claims lacking credibility and being generally inconsistent; his subsequent appeal was rejected by the Appeal Commission. The Commission found his evidence to be illogical, contradictory and revealed no practical experience of illegal political activities. Aemei sought to have his claim reconsidered based on activities since his arrival in Switzerland as a member of the Armenian and Persian Aid Organisation (APHO), which he claimed was an illegal organization in Iran monitored by the Iranian secret police. He claimed that this membership would expose him to treatment contrary to Article 3 of CAT if he was returned to Iran. In May 1993 the Federal Office for Refugees refused to consider his asylum request and this decision was affirmed by the Appeal Commission in August 1994. Aemei lodged his communication with the Committee Against Torture on 26th of October 1995.</p> <p>Switzerland contested the admissibility of the communication as Aemei was not within an ordinary asylum procedure, as the applicant</p>

	<p>had not exhausted domestic remedies. In line with Federal Courts jurisprudence, Aemei's activities in APHO did not constitute a new development in his asylum claim as it was not mentioned until his reconsideration request. Aemei argues that his physical integrity must not be endangered for procedural reasons. He noted that articles 17(2) and 18(1) of the Swiss Asylum Act provide alternative remedies of residence permit for humanitarian reasons and temporary admission respectively. He argued that he had not mentioned his activities in APHO sooner as he had not considered it a determining factor. Switzerland contests Mrs. Aemei's status as author of the communication. The applicants refute this claim arguing that Mrs. Aemei would be subject to the same risks as Mr. Aemei if she was returned to Iran. In August 1996 the Committee Against Torture suspended consideration of the communication pending the outcome the requests for reconsideration. The committee requested that the State suspend any deportation of Aemei and his family while his communication was being considered.</p>
Keywords	<p>Activities in host state contributing to one's refugee status</p> <p>Political activities</p> <p>Torture, cruel, inhuman or degrading treatment/punishment</p>
Core Issue	<p>Whether the expulsion, return or extradition of the applicant and his family to Iran would violate Switzerland's obligation under Article 3 of CAT, not to expel or return an individual to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture?</p>
Facts and Issues	<p>F1. Aemei fears treatment contrary to Article 3 of CAT if returned to Iran due to his political activities in Iran as a member of the Mojahedin prior to residing in Switzerland and his political involvement in APHO subsequent to his arrival in Switzerland. He fears torture during interrogation, sentencing to long-term imprisonment or the death penalty. He claimed to be a member of the Mojahedin and was involved in demonstrations and activities that led to his arrest, detention, ill-treatment during interrogations, and conviction. He served a two year sentence and was prevented from seeing his wife for the first six months. He fled Iran as he feared being recognized by the police for his involvement in throwing a Molotov cocktail. He also claims the mere act of requesting asylum is considered an offence in Iran.</p> <p>F2. Due to his membership of the APHO, he claimed that he and others were threatened by the Iranian Consul in May 1991 and June 1992.</p> <p>F2. Switzerland accepts the admissibility of the communication in August 1996 and submit that articles 3 and 12(a) of the Asylum Act</p>

	<p>as interpreted by the Appeals Commission establish similar criteria to those of article 3 of the Convention, the existence of serious concrete and personal danger of persecution (Mutombo v. Switzerland (27 April 1994)) and that Swiss legislation essentially uses the same conditions for prohibiting return as those laid down in article 3 of the Convention.</p> <p>F3. Switzerland rejects Aemei's claims of political activity with the People's Mojahedin in Iran as not sufficiently substantiated due to inconsistencies and due to non-production of evidentiary documentation of his political activities or torture. They consider his claim 'manifestly ill-founded' and that his knowledge of illegal political activities as 'totally unrealistic'. The State contest, his sentencing to a two year prison term due to the judge's respect for his origins as contradictory to the Swiss Authorities information. They also note that his wife did not corroborate his statements.</p> <p>F4. The State are unable to confirm if his identity is known to the Iranian authorities due to his political activities with APHO in May 1991 and June 1992. The Bern Police have no recollection of the alleged threats in May 1991, with regards the June 1992 incident, a Bern policeman recalls a skirmish but is unsure of the details and so the Swiss consider it doubtful whether the events occurred and so they cannot automatically be considered a decisive ground under Article 3 of CAT.</p> <p>F5. The Swiss rejected the argument that the filing of an asylum claim in and of itself amounting to an offence in Iran as unsubstantiated. Finally, it observes that "the European Commission of Human Rights has deemed that the general situation in Iran was not characterised by mass violations of human rights [application No. 21649/93, DR, 75/282]" and that, "the author himself does not claim that there is a consistent pattern of human rights violations in Iran".</p> <p>F6. Aemei stated that it was not possible to get documentary proof from Iran of his involvement in the and in any case his membership ceased after his release from prison. Aemei claims his two year prison sentence was due to his being a descendant of Mohammad. He also claims his statements were not contradictory on the major points and that his wife's discrepancies were irrelevant.</p> <p>F7. Aemei claims his statements about his political activities in APHO are true and this is confirmed by the policeman's recollection of the skirmish in June 1992. He claims that State's refusal to accept his case for reconsideration based on his activities with APHO is a serious procedural error and contrary to his right to have his fear of being tortured considered by the competent authorities.</p>
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	<p>F8. Aemei further submits that the application for asylum can be considered a relevant ground under Article 3(1) of the Convention and he refers to documents by Schweizerisches Flüchtlingswerk.</p>
Held	<p>H1. The Committee found the communication admissible under Article 22 of CAT, and that the State has not disputed admissibility. (para 9.1)</p> <p>H2. The Committee in determining whether Aemei and his family will be exposed to treatment contrary to Article 3 of CAT the committee must consider all relevant considerations under article 3(2) of CAT and whether that lends force to the belief that substantial grounds exist within the meaning of article 3(1) and additional grounds must exist in order to conclude that Aemei is personally at risk. The Committee has to determine whether the expulsion of Aemei and his family to Iran would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured.(para 9.3)</p> <p>H3. The substantial grounds for belief may be based not only on Aemei actions in Iran but also on his actions in the receiving country Switzerland, as the wording of Article 3 of CAT does not distinguish between these acts. (para 9.5)</p> <p>H4. Even if there is some doubt about the veracity of Aemei facts, it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable. The Committee considers that there may be doubt about Aemei's political activity in Iran but there is no doubt about the nature of the activities he engaged in, in Switzerland for the APHO, which is substantiated by the State's confirmation of his activities in APHO and it's lack of denial of the skirmishes in June 1992. The Committee reminds Switzerland that the nature of the activities in which the person engaged in, is not a relevant consideration in the taking of a decision in accordance with article 3 of CAT. (para 9.7)</p> <p>H5. Recalling that the protection afforded by article 3 is absolute, the Committee notes that the refusal of Switzerland to take up the author's request for review, based on reasoning of a procedural nature, is not justified under article 3 of CAT (para 9.8)</p> <p>H6. In considering article 3(2) whether there is the existence of a consistent pattern of gross, flagrant or mass violations of human rights in Iran, the Committee notes the concern expressed by the United Nations Commission on Human Rights (Commission's Special Representative on the situation of Human Rights in the Islamic Republic of Iran.) about the large number of cases of cruel, inhuman and degrading treatment or punishment.(para9.9)</p> <p>H7. In light of H1 to H6 the Committee believes there would be</p>

	substantial grounds for believing Aemei and his family would be exposed to treatment contrary to Article 3 of CAT if returned. The finding of a violation of article 3 has a declaratory character. The State does not have to modify its decision on asylum but does have an obligation to apply measures that are compliant with article 3 of CAT.(para10)
Legal instruments cited	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment The Swiss Asylum Act
Cases cited	Communication No. 13/1993, Mutombo v. Switzerland , 27 April 1994 Communication No 39/1996, Tapia Paez v. Sweden , 28 April 1997.

21.	Communication No 89/1997, A.F. v. Sweden , 8 th May 1998
Citation (Application No.)	CAT/C/20/D/89/1997
Date	8 th May 1998
Applicant	A.F.
Respondent	Sweden
Articles of the Convention / Protocols cited	Article 3 and 22 of Convention against Torture
Finding of the Court	Violation of articles 3 and 22.
Procedural Stage and Previous	A.F. sought asylum on the 23 rd February 1995, this claim was rejected at first instance by the Swedish Board of Immigration on the

Stages	<p>21st April 1995, and this decision was affirmed by the Aliens Appeal Board on the 7th February 1996. The 1989 Alien Act as amended on 1st January 1997 allows for in exceptional cases reference by either board to the government but the government is prohibited from interfering in the administrative decisions similar to a court. Chapter 2 section 5(b) allows for consideration of new circumstances but only on application. Chapter 8 section 1 corresponds to Article 3 of CAT. Sweden explains that A.F. can at any time lodge a new application for re-examination of his case to the Aliens Appeals Board, based on new factual circumstances. AF lodged two new applications to the Aliens Appeal board in March 1996 and February 1997 respectively based on his political activities in Sweden, his distribution of political material to Iran from Sweden and his mother's ill health. Both were rejected.</p> <p>A.F. submitted a fourth application on medical evidence from the Centre for Torture and Trauma Survivors Stockholm which was rejected, since the matter of AF's imprisonment and alleged torture in that connection had previously been reviewed by the Aliens Appeal Board and failed due to lack of credibility. Sweden suspended the deportation order against AF pending the consideration by the Commission of the communication. Sweden contends that the communication is inadmissible as being incompatible with the provisions of the Convention.</p>
Keywords	<p>Deportation</p> <p>Gross, flagrant or mass violations of human rights</p> <p>Political activities</p> <p>Torture, cruel, inhuman or degrading treatment</p>
Core Issue	Whether the forced return of A.F. to Iran would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture?
Facts and Issues	<p>F1. AF is an Iranian citizen who sought asylum in Sweden for reasons of persecution due to political opinion. AF claimed he came from a politically active family.</p> <p>F2. AF was politically active in the Nehzat Azadi (the freedom Movement which was declared illegal in 1999-91) and was well known to the Iranian authorities, he had been suspended from university due to his involvement in the party and meetings in the university were regularly raided by the <i>Pasdaran</i> which resulted in him being detained 30 times but released due to insufficient evidence.</p> <p>F3. On October 23rd 1993 he was arrested and detained for one month during this detention he was allegedly tortured during interrogation. He states he was severely beaten, kept in a one meter cell, his ribs were broken, his back was hurt, his fingernails pulled</p>

	<p>out and he was subjected to a fake execution as a result of his political activities. He was released without charge on condition he did not involve himself in any political activities AF believes he was released due to the fact that he had not made any confessions and that the authorities would watch him in the hope that he would eventually lead them to his father who was in hiding and other members of the group.</p> <p>F4. AF refrained from political activity initially but eventually started distributing flyers, he realised he came to the attention of the police and decided to flee the country using his passport and bribes.</p> <p>F5. He applied for asylum two weeks after arrival in Sweden on the 23rd of February 1995 and he made three subsequent applications all of which were rejected. The fourth application which was on medical evidence from the Centre for Torture and Trauma Survivors Stockholm, shows that the findings are consistent with the author's claims of torture and ill-treatment. Furthermore, according to the medical report, the author is suffering from a post-traumatic stress disorder.</p> <p>F6. AF became politically active in Sweden and joined the Iranian Social Democratic Movement, demonstrating, publicly criticising the Iranian government and publishing the organizations newspaper. He forwarded his political opinions to Iran through his sister and a friend both of which have been arrested and were in detention at the time of the communication.</p> <p>F7. AF claims that he faced a real risk of being subjected to torture or that his security would be endangered if he were to be returned to Iran.</p> <p>F8. Sweden accepts the Committee's jurisprudence in the cases of Mutombo v. Switzerland (27 April 1994) and Tapia Paez v. Sweden, (28 April 1997) and the criteria they established therein. Under article 3 of CAT Sweden considers the following relevant (a) the general situation of human rights in the receiving country, which under article 3(2) it will leave to the Committee to consider (b) the personal risk of the individual concerned of being subjected to torture in the country and(c) the risk of the individual of being subject to torture if returned must be a foreseeable and necessary consequence. In assessing the personal risk Sweden submits the findings of both the Swedish Immigration Board and the Aliens Appeals Board and noted that AF failed due to lack of credibility and trustworthiness. Two of his subsequent applications failed due to the facts been previously reviewed and credibility. The fourth and final application failed due to the facts being previously reviewed by the board.</p> <p>F9. Sweden called AF's credibility into question by the fact that he</p>
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	<p>travelled on a valid passport, that he was released without trial, that bribes would enable him leave Iran and that he as an individual is not of particular concern to the authorities. In relation to AF's arrest warrant, Sweden considered that he did not give a reasonable explanation of how he acquired this document. There is nothing to support his claims that he distributed politically sensitive information in Iran. Sweden also noted it took him two weeks after his arrival to apply for asylum, which indicated that he was not in need of protection.</p> <p>F10. AF claimed that Sweden has not directly questioned his political activities, his father's political activities or the fact he was detained for a month but base their decisions on stereotypes and an arbitrary assessments of the author's general trustworthiness. Reports from the Alien Appeals Board show that according to the Iranian lawyer normally engaged in the Swedish Embassy in Tehran that it is difficult but nevertheless possible to bribe yourself out of Iran, and AF further claims he has given reasonable explanations of how he attained the internal documentation and also how he distributed politically sensitive material in Iran.</p>
Held	<p>H1. The Committee considers the claim admissible under Article 22, paragraph 5(a) and all domestic remedies have been exhausted (para. 6.1)</p> <p>H2. The Committee notes that while Chapter 8 section 1 of the Swedish Aliens Act corresponds to Article 3 of CAT, but notes from the text of the decisions of both the Swedish Board of Immigration and the Aliens Appeal Board, does not show the test as required by article 3 of CAT was in fact applied in AF's case (para.6.4)</p> <p>H3. The Committee considers that the presentation of the facts by AF do not raise significant doubts as to the trustworthiness or the general veracity of his claims, especially considering the medical evidence of PTSD supporting his claim of torture while detained (para 6.5).</p> <p>H4. In considering article 3(2) whether there is the existence of a consistent pattern of gross, flagrant or mass violations of human rights in Iran, the Committee notes the concern expressed by the United Nations Commission on Human Rights (Commission's Special Representative on the situation of Human Rights in the Islamic Republic of Iran.) about the large number of cases of cruel, inhuman and degrading treatment or punishment (para 6.6).</p> <p>H5. Sweden is under an obligation not to return the applicant to Iran (para. 7).</p>
Legal instruments cited	<p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3</p>

	Swedish Aliens Act as amended on January 1 1997.
Cases cited	Communication No. 13/1993, Mutombo v. Switzerland , 27 April 1994 Communication No 39/1996, Tapia Paez v. Sweden , 28 April 1997.

22.	Communication No 279/2005, C.T. and K.M v. Sweden , 17 th November 2006
Citation	CAT/C/37/D/279/2005
Date	17 th November 2006
Applicant	C.T. K.M.
Respondent	Sweden
Articles of the Convention / Protocols cited	Article 3 and 22 of Convention against Torture
Finding of the Court	Violation
Procedural Stage and Previous Stages	CT is a Rwandan national who arrived in Sweden on the 17 th of October 2002 where she sought asylum on the grounds of political opinion. On 23 March 2004, her request was denied by the Migration Board on grounds of lack of credibility and developments in Rwanda following the elections of 2003. In 2003, her son was born. On 29 June 2005, the Migration Board's decision was confirmed on appeal to the Aliens Appeals Board. Two new applications were lodged, on humanitarian and medical grounds, however, both were rejected.
Keywords	Political activities Non-Refoulement Rape (including sexual abuse) Torture, cruel, inhuman or degrading treatment

Core Issue	Whether the removal of the CT and KM to Rwanda would violate Sweden's obligation under article 3 of the Convention not to expel or to return a person to another State where there are grounds for believing that he or she would be in danger of being subjected to torture?
Facts and Issues	<p>F1. CT is a Rwandan national of Hutu ethnicity who gave birth to her son KM in Sweden in 2003, both are awaiting deportation after being refused asylum in Sweden which was sought for political opinion.</p> <p>F2. In Rwanda, CT claimed to have become a member of the PDR-Ubuyanja party in early 2002. Following attendance at her first meeting in April 2002 the leaders of the party were arrested, CT and her brother were also arrested and she was detained in a container in Remera, in Kigali, with six other women. She has not seen her brother since then, she was interrogated and repeatedly raped which resulted in her pregnancy with KM. In October 2002, a soldier helped her escape and she fled to Sweden where she sought asylum. CT fears that if returned to Rwanda, she will be immediately detained and tortured by the Rwandan Directory of Military Intelligence (DMI), on account of her membership of the PDR-Ubuyanja party. She fears she would be raped again and interrogated in order to make her reveal how she escaped. She fears that she and her son could even be killed. CT further claims that she will be tried by the Gacaca courts, which were set up by the Government to avenge the genocide of 1994. She claims to be one of the 760,000 Hutus who are due to be tried by these courts, in particular for her alleged involvement in a massacre at Kigali Hospital. As evidence of these facts CT produced a letter from MU, a woman who was detained and repeatedly raped alongside CT, who confirmed CT's allegations and a publication of a magazine by a reputable Rwandan human rights organisation (LIPRODHOR) which mentioned the detention of CT and her brother. CT produced evidence before the Migration Board in 2006 which confirmed her rape and that she was suffering from PTSD.</p> <p>F3. Sweden claimed CT 's evidence contained a number of factual inconsistencies namely with the dates of meetings, and the veracity of a Rwandan human rights organisation's document presented by CT as confirmation of her and her brothers abduction. As regards CT's fear towards the Gacaca (Community) Tribunal, Sweden refers to the acceptance of the international community at large of that system. Sweden rejects as unreliable evidence a letter by MU submitted by CT confirming her fear of the Gacaca tribunal as undated, unsigned and containing no specific details.</p> <p>F4. Sweden restates the need to determine whether the complainants would risk being subjected to torture if returned to their country at</p>

	<p>the present time as per X, Y and Z v. Sweden (6 May 1998). Sweden submits that Rwanda has undergone significant changes since the 2003 elections and therefore they see no risk for CT and KM. Sweden claims that the submission by KM and CT is inadmissible as manifestly ill- founded. Sweden claims that the Swedish Aliens Act has provisions which reflect the same principle as article 3 of CAT.</p> <p>F5. Regarding the claims of CT’s vagueness about her political party the applicant referred to a Danish report which confirms that PDR- Ubuyanja never developed into a political party and this information was available to the Migration Board. She further claims the Migration Board paid little attention to the UNHCR reports which confirmed her risk and the fact that “the crime of rape itself and the manner in which it was committed qualify as a serious form of torture and may warrant continued international protection.” CT submitted the original letter by MU to the Committee and MU has stated she will not be of any more assistance in relation to the Gacaca claims.</p> <p>F6. CT and KT submit that a return to Rwanda in light of the heinous circumstances of the first complainant’s pregnancy, where they have no immediate family, may have serious consequences for CT’s son as his mother may not be able to give him the help and support that he needs. He is currently attending a pre-school and is being investigated to ascertain whether he suffers from a form of autism.</p>
Held	<p>H1. . The Committee considers the claim admissible under Article 22, paragraph 5(a) and all domestic remedies have been exhausted. (para. 6.1)</p> <p>H2. The Committee without wishing to consider whether the Gacaca courts meet international standards of due process, considers that fear of a future trial before them is in itself insufficient to amount to a reasonable fear of torture. (para 7.3)</p> <p>H3. The Committee notes Sweden questions CT’s credibility but it further notes they did not contest her claims of repeated rape (which was confirmed by medical evidence) while in detention which resulted in pregnancy and birth of her son in Sweden. Considering these undisputed claims the Committee finds that CT was subjected to torture in the past and that her son remains a constant reminder of her rape. (para 7.5)</p> <p>H4. The Committee considers the credibility of CT and reminds Sweden that inconsistencies in the CT's presentation of the facts are not material and do not raise doubts about the general veracity of her claims, especially since it has been demonstrated that she was repeatedly subjected to rape in detention. The Committee confirms this with the uncontested evidence of LIPRODHOR which confirms</p>

	<p>CT's story. (para 7.6)</p> <p>H5. The Committee considers that information provided by CT and KM demonstrates that ethnic tensions continue to exist, thus increasing the likelihood that CT may be subjected to torture on return to Rwanda. The Committee found that there were substantial grounds for believing that the CT and KM would be in danger of being subjected to torture if returned to Rwanda and that the removal of the complainants to Rwanda would amount to a breach of article 3 of the Convention. (para. 7.7)</p>
Legal instruments cited	<p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p> <p>Swedish Aliens Act as amended by temporary amendments enacted on 15th November 2005</p> <p>New Swedish Aliens Act of the 31st March 2006</p>
Cases cited	<p>Communication No. 21/1995 Alan v. Switzerland, 8 May 1996</p> <p>Communication No. 41/1996, Kisoki v. Sweden, 8 May 1996</p> <p>Communication No. 43/1996, Tala v Sweden, 15 November 1996</p> <p>Communication No. 61/1996, X, Y and Z v. Sweden, 6 May 1998</p>

23.	Communication No. 15/1994 Khan v Canada , 15 November 1994
Citation	CAT/C/13/D/15/1994
Date	4 July 1994
Applicant	Khan, Tahir Hussain
Respondent	Canada
Articles of the Convention / Protocols cited	Article 3 CAT
Finding of the Court	Violation

Procedural Stage and Previous Stages	<p>The applicant's asylum claim was refused by the Immigration and Refugee Board of Canada on 14 January 1992. Leave to institute judicial review proceedings was refused by the Canadian Federal Court on 17 April 1992. A stay on humanitarian grounds was refused on 10 May 1994 and a deportation order was issued for 17 July 1994.</p> <p>Mr. Khan submitted his complaint to the Committee Against Torture. On the 15 July 1994 the communication was transmitted to Canada together with a request that the applicant would not be removed until the Committee reached a decision under rule 108 of the rules of procedure. Canada did not contest the admissibility of the communication. The submission is considered under article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.</p>
Keywords	<p>Criminal proceedings Deportation Political activities Gross, flagrant or mass violations of human rights Non-party to CAT Terrorism Torture, cruel, inhuman or degrading treatment</p>
Core Issue	<p>Whether the forced return of Mr. Khan to Pakistan would violate the obligation of Canada under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture?</p>
Facts and Issues	<p>F1. Mr. Khan submits that he fears persecution from Islamic fundamentalists, the Pakistan Inter-Service Intelligence (ISI) and the Government of Pakistan because of his membership of the Baltistan Student Federation (BSF). As a local leader of the BSF he states that he organised many demonstrations and was arrested on several occasions by the ISI and alleges that he was subjected to torture before being released on bail. A letter from a doctor in Montreal confirms that marks and scars on the applicant's body are consistent with the alleged torture. Mr. Khan claims that the central facts of his asylum case were not addressed and that his claim was not justly dealt with by Canadian authorities.</p> <p>F2. Mr. Khan is in charge of the BSF overseas and claims that return to Pakistan will result in a threat to his life. He referred to Amnesty International and Asia Watch reports as evidence of torture on the part of Pakistani authorities. An affidavit from a Kashmiri human rights lawyer testifies that BSF demonstrations have been repressed by Pakistani authorities and that BSF leaders are at risk of being arrested or killed. A letter from the BSF advises the applicant to remain in Canada as the circumstances under which he was arrested</p>

	<p>continue to prevail.</p> <p>F3. Canada submitted that a ‘post-claim risk-assessment’ in September 2004 concluded that the applicant ‘would not face a danger to life, extreme sanction or inhumane treatment’ on return to Pakistan. The State argues that at no time during the determinations process did the applicant allege ill treatment or torture or any future fear thereof.</p> <p>F4 An application for leave to remain on humanitarian grounds was refused on 29 January 1993. No reference was made to a personal risk of torture on the part of the applicant. Following the applicants conviction for assault, removal was rescheduled for 17 March 1994, this was delayed following threats made by the applicant in relation to immigration officers. A further application for humanitarian leave to remain was made on 15 April 1994, no reference was made to previous ill treatment in Pakistan. An application to reconsider the applicant’s refugee claim was refused and no attempt was made on the part to the applicant to appeal this decision.</p> <p>F5. After being informed of the applicants communication to the Committee Against Torture, the State party conducted a review of the case by a post-claim determination officer and a negative decision was reached on the basis that the Pakistani government had supported ‘secessionist’ groups and an adverse credibility finding due to the fact that torture was not alleged until 1994. The State relied on Mutombo v. Switzerland (27 April 1994) in determining the application of Article 3, where it was held that relevant considerations are (a) the general situation of human rights in a country must be taken into account, but the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in and of itself determinative; (b) the individual concerned must be personally at risk of being subjected to torture in the country to which he would return; and (c) “substantial grounds” in article 3(1) means that the risk of the individual being tortured if returned is a foreseeable and necessary consequence”. Following an examination of these grounds the State party concluded that the application was not in danger.</p> <p>F6. The State Party argues that inconsistencies impact on the veracity of the applicant’s story and to a finding of personal risk and submits that the Committee should be ‘extremely hesitant’ to reverse the findings of fact by the Refugee Division in accordance with principles of international law. There was no reason why the applicant could not have submitted medical evidence at an earlier stage. The state argues that ‘the generally applicable principles relating to the reception of new evidence militate strongly against the Committee accepting it now as a basis for overriding the prior findings of the Canadian tribunals’. The State argues that article 3 should not be interpreted to offer protection to persons who</p>
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	<p>voluntarily place themselves at risk and that Mr. Khan would not attract any particular attention should he be returned to Pakistan.</p> <p>F7. In response to the State party's argument that the applicant received a fair hearing, the applicant emphasizes that an appeal is only allowed on matters of law and not on the merits of the case and as a result there is no possibility to correct errors on facts. The applicant further argues that the basis of his claim was not examined and that the transcript shows that he was constantly interrupted and his experiences in Pakistan was not examined, instead the board focused on the contradictions in dates and events. The applicant also argues that the review conducted in June 1994 was not an independent review</p> <p>F8. The applicant agrees with the State party's interpretation of the application of article 3 but that 'it is an exaggeration to say that torture must be a necessary and foreseeable consequence'. The submission of an arrest warrant was presented to support the applicant's contention that he faces torture along with the fact that his brother has fled to England and his parents have also left Baltistan. The applicant also refers to the medical evidence which he suggests could have been examined by State party experts in order to dispel any doubts. He claims that the evidence shows that he 'faces immediate detention and torture on his return'.</p>
Held	<p>H1. No obstacles to admissibility under article 22 paragraph 5(a) of the Convention (para. 11)</p> <p>H2. The Committee examines whether in the present case Canada complied with its obligation under the Convention. The Committee is not required to examine whether Pakistan has violated the applicants rights under the Convention. In deciding whether substantial grounds exist for believing that the applicant would be in danger of torture the Committee considers factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The existence of a consistent pattern of gross, flagrant or mass violations of human rights is not alone a sufficient ground for determining that a person would be in danger of torture. Additional grounds must indicate that the individual concerned would be personally at risk. (para. 12.2)</p> <p>H3. ".... the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances." (para. 12.2)</p> <p>H4. It is not uncommon for torture victims to submit evidence after the determination of an asylum claim. Even if there are doubts about the facts of the claim the Committee must ensure that his security is not endangered. The Committee accepts that there is evidence that</p>

	<p>torture is widely practiced in Pakistan against political dissenters and common detainees.(para.12.3)</p> <p>H5. The Committee finds that there are substantial grounds in this case that a political activist like the applicant would be in danger of being subjected to torture. The Committee refers to the fact that the complainant produced an arrest warrant made against him and a letter from the President of the Baltistan Student Federation advising that it was too dangerous for him to return to Pakistan. (para 12.4) If the applicant was to be forcibly returned he would face the danger of being subjected to torture and would not have the opportunity to apply to the Committee for protection as Pakistan is not a party to the Convention. (para. 12.5)</p>
Legal instruments cited	<p><u>International/European Instruments</u></p> <p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3, article 22</p>
Cases cited	<p><u>Committee Against Torture</u></p> <p>Communication No. 13/1993 Mutombo v. Switzerland (27 April 1994)</p>

24.	Communication No. 262/2005 Losizkaja v. Switzerland (20 November 2006)
Citation	CAT/C/37/D/262/2005
Date	20 November 2006
Applicant	Losizkaja, Valentia
Respondent	Switzerland
Articles of the Convention / Protocols cited	Article 3 CAT
Finding of the Court	Violation

Procedural Stage and Previous Stages	<p>The applicant had gone through an asylum process, first along with her husband, and they stated that they feared persecution due to their political opinions. After the applicant and husband parted, the applicant wanted her case re-considered on the basis of sexual abuse and rape she suffered at the hands of the Belarusian authorities. This new claim was also rejected. The Committee, through its Rapporteur on New Complaints and Interim Measures under rule 108, paragraph 1 of its rules of procedure, informed the State party of the complaint and requested that the complainant not be returned to Belarus while her case was being considered by the Committee. The request was accepted by the State Party on 25 February 2005.</p>
Keywords	<p>Deportation Failure to disclose information at original refugee determination hearing Rape (including sexual abuse) Torture, cruel, inhuman and degrading treatment</p>
Core Issue	<p>Whether the forced return of the complainant to Belarus would violate the State party's obligations under article 3 of the Convention not to expel or return an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture?</p>
Facts and Issues	<p>F1. The complainant's husband fled Belarus in June 2001 as a result of his political activities and continual police interrogation. Following the rejection of his asylum claim in Belgium, he travelled to Switzerland. The complainant was frequently interrogated by the police in Belarus as to her husbands' whereabouts and her passport was confiscated. She left Belarus to join her husband in Switzerland where they lodged a joint claim for asylum based on the husband's political persecution. The Swiss Federal Office for Refugees (BFF) refused to grant asylum and found documentary evidence submitted not to be credible. A subsequent appeal to the Swiss Asylum Review Board (ARK) was rejected. Following the appeal the applicant requested a revision of the decision and mentioned for the first time that she had suffered sexual abuse and rape by the police (Miliz) and asked that her application be considered separate from her husbands as they had separated.</p> <p>F2. The complaint argues that she failed to disclose the alleged sexual abuses at an earlier stage because her husband humiliated her and forbade her from informing the authorities. In response to a request for more information from the ARK the applicant claimed that she had been interrogated and raped by three officers, she was beaten and penetrated with objects. Following medical treatment she did not return to work for over three weeks. She was subjected to rape for complaining the three men and threatening with mutilation and death.</p>

	<p>F3. The ARK found the complainants claim not to be plausible as she had not in its view ‘substantiated nor proven psychological obstacles to at least mentioning the rape in the initial interview’. The ARK also found her story and behaviour to be ‘unconvincing’ and were suspicious of the ‘sudden ability of the complainant to provide details about the alleged rape’. In response to the submission of a medical report confirming sexual abuse to the ARK the complainant was informed that her case was closed and that she was to be removed from the country.</p> <p>F4. Switzerland refers to K.N. v. Switzerland (19 May 1998) which held that existence of a consistent pattern of human rights violations is not a sufficient ground upon which to determine that a person would be in danger of torture if returned and pursuant to J.U.A. v. Switzerland (10 November 1998), the risk of torture must be ‘foreseeable, real and personal’. Switzerland refers to N.P. v. Australia (6 May 1999) and noted that the situation in Belarus alone is not a sufficient ground for concluding that the applicant would be in danger of torture on return. Switzerland argues that the complainant has not proved that she would a ‘foreseeable, real and personal risk’ of being subjected to torture.</p> <p>F5. Switzerland accepts that past abuse must be taken into account when assessing future risk. The State doubts the authenticity of the medical report and argues that the complainants claim is full of factual inconsistencies which further undermine her credibility. Switzerland points to the fact that the complainant argued that the rapes were related to her husbands’ political activities but the husbands’ claim of persecution was found not to be credible.</p> <p>F6. The complainant argues that belonging to a political family makes her politically active in the eyes of the government in addition to the fact that she distributed pre election propaganda materials. She also claims that she mentioned the threat of arrest at initial interview. In relation to a personal risk she argues that she has received numerous specific threats and that upon return she would have to register with the police.</p> <p>F7. In relation to the delay in presenting the medical report the complainant argues that the report was still in Belarus. She argues that if her husband did not face persecution that he would have returned to Belarus and in fact he is in Belgium. In the appeal application the applicant argues that she only briefly mentioned sexual abuse because she expected to be called for a new interview. Documentation concerning her complaint to the police is confidential in Belarus and she will not be able to get access to them.</p>
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Held	<p>H1. The complaint is admissible under article 22 of the Convention. The Committee refers to A.K. v. Switzerland (8 May 2006) and recalls that it has been constant practice to treat similar communications as complaints despite the fact that the complainant does not specifically mention article 3 in her initial submission. Other considerations that are taken into account are the fact that she is not represented and the seriousness of the allegation. (para. 8.1)</p> <p>H2. When assessing the substantial grounds for personal risk the Committee takes into account considerations pursuant to <i>article 3 para 2</i> including the existence of a pattern of gross, flagrant or mass violations of human rights in Belarus. However the aim is to determine personal risk.</p> <p>H3. “The Committee is aware of the poor human rights situation in Belarus” The police have been responsible for instances of torture against persons participating in alternative election campaigns. The Committee refers to the report of the Special Rapporteur on the situation of human rights in Belarus which notes that there have been several attacks on members of the opposition. The Committee has also noted several allegations of torture by Belarus authorities. The report of the Special Rapporteur on violence against women is also referred to and it notes the “rather frequent” reports of abuse, including sexual attacks, by female detainees’.. The Committee also refers to data from the Belarus Ministry of Labour and Social Security in 2004 which states that 20% of women reported experiencing sexual abuse at least once. (para. 8.4)</p> <p>H4. “...the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk need not be highly probable, but must be personal and present”. (para. 8.5)</p> <p>H5. In relation to the falsification of documents and the subsequent adverse finding of credibility, the Committee finds that the husband was in control of materials presented in the original application. The authenticity of the medical report is not questioned and the Committee finds that the State Party considered it to be falsified on the basis that earlier documents were deemed to be falsified. (para. 8.6)</p> <p>H6. The Committee finds separation from her husband would not prevent the authorities from harming her as she still can still contact him. The Committee refers to a US State Department Human Rights Report which states that divorced women still face harassment in Belarus. (para. 8.7)</p> <p>H7. The Committee notes that the complainant was raped a second time after she made a complaint to the police and on return would be at risk of ill treatment independently of her relationship to her husband. (para. 8.7)The Committee finds that the complainant</p>
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	<p>would still be of interest to the police.</p> <p>H8. In relation to the State party's argument that the complainant is not credible because of the late submission of allegations of sexual abuse and the medical report, the Committee finds that she is credible and the delay is 'totally reasonable'. "It is well known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary". (para. 8.8) The Committee finds that further evidence as to her 'psychological state' is unnecessary. The fact that the complainant did not mention sexual abuse at earlier proceedings is not a ground upon which to make an adverse finding of credibility, especially in light of the fact that she was not represented in the proceedings. (para. 8.8)</p> <p>H9. The States argument as to inconsistencies has not been substantiated. (8.9)</p> <p>H10. In assessing the risk of torture the Committee notes that the complainant was under the physical control of police even though the acts were perpetrated outside formal detention facilities. The committee refers to the acts concerned and finds that the sexual abuse constitutes torture. The failure of the authorities in Belarus to act in response to her complaint increases the risk that she will be ill-treated upon return as the perpetrators of the rapes have never been investigated. (para. 8.10)</p>
Legal instruments cited	<p><u>International/European Instruments</u> Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, articles 3 and 22</p>
Cases cited	<p><u>Committee Against Torture</u> Communication No. 248/2004 A.K. v. Switzerland (8 May 2006) Communication No. 100/1997 J.U.A. v. Switzerland (10 November 1998) Communication No. 94/1997 K.N. v. Switzerland (19 May 1998) Communication No. 106/1998 N.P. v. Australia (6 May 1999)</p>

25.	Communication No. 259/2004 M.N. v. Switzerland , 22 November 2006
Application No.	CAT/C/37/D/259/2004
Date	17 November 2006
Applicant	M.N.
Respondent	Switzerland
Articles of the Convention / Protocols cited	Article 3 CAT
Finding of the Court	No Violation
Procedural Stage and Previous Stages	The complainant failed in his asylum application and is currently awaiting deportation from Switzerland. He claims that his deportation to Bangladesh would constitute a violation of article 3. The Committee informed the State party of the applicant's complaint on 17 December 2004 in accordance with article 22, paragraph 3 of the Convention. The Committee acting under rule 108, paragraph 1, of its rules of procedure, decided that the circumstances of this case did not justify interim protection measures.
Keywords	Deportation Gross, flagrant, or mass violations of human rights Political activities Torture, cruel, inhuman or degrading treatment
Core Issue	Whether by sending the complainant back to Bangladesh, the State party would fail to meet its obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subject to torture?
Facts and Issues	F1. The complainant is a Bangladesh national and states that he was a member of the Jatiya Party (JP) and claims that he was arrested on numerous occasions following protest demonstrations organized by the party.

	<p>F2. In 1992 the complainant secured a lease for a fish farm. In 2002, the complainant managed to renew the lease over the bid of E.S. who was a member of the Awami League (AL). He subsequently received a letter from E.S. demanding that he pay protection, when he refused he was beaten by A., J. and C, all of whom were in the pay of E.S. and his fish were all killed, he alleges that the same three men poisoned the water. The police refused to listen to his complaint and he alleges that this is because he was a member of the JP.</p> <p>F3. Following arrest by police on the possession of illegal weapons which the complainant alleges were found in a JP office by E.S., A., J., C., and the police, the complainant was detained in a Dhaka prison where he alleges that he was tortured and as a result suffered physical and psychological after-effects that are confirmed by medical certificates. He was eventually released on bail. The complainant alleges that he was subsequently attacked by AL supporters including E.S. after a JP protest demonstration. One of the complainants' friends was killed in the attack and the next day he found out that E.S. had lodged a complaint with the police against him for the murder of his friend. The complainant fled from Dhaka to Gazipur.</p> <p>F4. Following leaving Dhaka the police visited his home in an attempt to find out where the complainant was and allegedly caused injuries to the complainant brother which resulted in him losing an arm. The complainant then moved to Silhet. The complainant was advised by two lawyers that he would be found guilty on the charges and that he should leave the country. The complainant arrived in Switzerland on 21 September 2000 and lodged an asylum claim on the same day. The Federal Office for Refugees (ODR) refused the application and this decision was upheld by the Asylum Review Board (CRA) and a decision to deport was confirmed.</p> <p>F5. The complainant alleges that his claim was refused on credibility grounds and that documentary evidence proves all of his account. In response to the CRA's finding that the complaint and his group were not attacked following the demonstration but that both groups set upon each other the complainant states that it was difficult to say who had attacked whom once the fight had started and this should not detract from his credibility.</p> <p>F6. The complainant rejects the argument that JP members are no longer persecuted because they still constitute a political minority despite the fact that they are represented in Government. He argues that both of the criminal proceedings issued against him are probably linked to his political activities. In response to the argument that the higher courts operate independently he argues that he would endure many years in prison, where he would risk being tortured, while awaiting access to the higher courts.</p>
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	<p>F7. The complainant states that torture is commonly used by the police, complainants are not investigated and that there are problems with the independence of the lower courts.</p> <p>F8. Switzerland argues that the complaint to the Committee confirms the contradictions and inconsistencies in his allegations and provides no new element to question the appeal decision of the CRA.</p> <p>F9. The State relies on K.N. v. Switzerland (19 May 1998) and J.U.A. v. Switzerland (10 November 1998) in relation to a consistent pattern of gross, flagrant or mass violations of human rights as an insufficient ground upon which to find that a particular individual faces the risk of torture and points out that the complainant only vague references to various reports documenting human rights abuses in Bangladesh. The State refers to M.M.K v. Sweden (18 May 2005) and argues that the fact the torture is practiced in places of detention does not necessarily lead to the conclusion that article 3 will be violated in a case where the complainant fails to demonstrate that he faces a personal risk. With reference to N.P. v. Australia (6 May 1999), the State argues that the situation in Bangladesh as advanced by the complainant does not ‘in itself’ justify a conclusion that there are sufficient grounds to conclude that the complainant faces a personal risk of torture on return.</p> <p>F10. Switzerland observes that it has not contested the serious physical and psychological disorders that the complainant is suffering from but argue that such disorders are not related to ill treatment during detention, he was found not to be credible on this ground and furthermore he does not prove that he would still be tortured on return.</p> <p>F11. The State argues that the complainant fails to explain the relevance of his previous alleged arrests to the extent with which they expose him to the risk of torture. The fact that the authenticity of documents submitted has been confirmed by a notary is not considered as decisive. Investigations conducted by the Swiss Embassy in Dhaka failed to find any proof of criminal proceedings pending against the complainant.</p> <p>F12. In response the complainant reiterates that he is wanted for murder and that he would be imprisoned upon arrival and submits a new medical certificate which he acknowledges does not prove that he has been tortured but makes it highly probable. In response to who lodged the murder complaint he argues that he has never seen it and that it is possible that it was not officially recorded under the name of E.S. To support his credibility he submits a photograph of his brother who has clearly lost one of his arms.</p>
Held	H1. The complaint is found to be admissible under article 22 of the

	<p>Convention.</p> <p>H2. The Committee recalls that risk of torture must be assessed on ‘grounds that go beyond mere theory or suspicion’ but does not have to be ‘highly probable’. (para. 6.4)</p> <p>H3. The Committee finds that the main reason why the complainant fears torture upon return is because he was allegedly tortured there while being held in Dhaka prison in May and June 2000 and that he would be at risk of being arrested on his return because of the criminal charges against him. (para. 6.5)</p> <p>H4. The medical reports do not lead to the conclusion that the physical and psychological after-effects were caused by torture and the Committee finds that the complainant has not proven that injuries were a result of actions by the State. (para. 6.5)</p> <p>H5. The Committee also notes that the AL are now in political opposition and as a result there is no longer a high risk that the complainant would be harassed by the authorities at the instigation of AL members.(para. 6.6)</p> <p>H6. The Committee finds that “...the fact that torture is practiced in places of detention does not, in itself, warrant the conclusion that there would be a violation of article 3, given that the complainant has not shown that he is personally at risk of being subjected to torture”. (para. 6.7) The Committee refers to General Comment No. 1 and states that the burden is on the complainant to present a convincing case. The Committee notes that investigations carried out by Swiss authorities in Dhaka did not find that criminal proceedings were pending against the complainant. The Committee finds that the complainant has not ‘sufficiently substantiated’ the allegation that two cases are pending against him. (para. 6.7)</p> <p>H7. The complainant also failed to explain the reasons for which he reportedly lodged a complaint and was subsequently forced to leave Bangladesh (para.6.7)</p>
Legal instruments cited	<p><u>International/European Instruments</u> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 3 and 22</p>
Cases cited	<p><u>Committee Against Torture</u> Communication No. 100/1997 J.U.A. v. Switzerland (10 November 1998) Communication No. 94/1997 K.N. v. Switzerland (19 May 1998) Communication No. 221/2002 M.M.K. v. Sweden (18 May 2005) Communication No. 106/1998 N.P. v. Australia (6 May 1999) Communication No. Ruben David v. Sweden (20 September 2005) Communication No. S.U.A. v. Sweden (29 November 2004)</p>

	Communication No. 226/2003 T.A. v. Sweden (27 May 2005)
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26.	Communication No. 286/2006 M.R.A v Sweden (22 November 2006)
Citation (Application No.)	CAT/C/37/D/286/2006
Date	17 November 2006
Applicant	M.R.A
Respondent State	Sweden
Articles of the CAT cited	3
Finding of the Court	No violation
Procedural Stage and Previous Stages	In 1999 the Swedish Immigration Board rejected the applicant's asylum claim on the grounds that the complainant provided false and contradictory information and had absconded from the Dutch asylum determination procedures. On March 7 2001 a Swedish Court found the complainant guilty of drugs offences and along with imposition of a prison sentence, ordered the applicant be sent to the Netherlands under the Dublin Convention. This was confirmed by a Court of Appeal. In 2003 the applicant requested the Swedish Government not to send him to the Netherlands as he would not have his asylum application heard and he would be sent back to Iraq. This request was denied. Finally in 2004 the applicant lodged a new application for asylum however this was rejected by the Immigration Board and the Aliens Appeal Board.
Keywords	Criminal conviction Gross, flagrant or mass violations of human rights Non-Refoulement Torture, cruel, inhuman or degrading treatment

Core Issue	Whether the expulsion of M.R.A to the Netherlands, who may then expel the applicant to Iraq, would constitute a violation of Article 3 of the Torture Convention where the applicant claimed he would be tortured or put to death for claiming asylum in Israel?
Facts and Issues	<p>F1. The complainant fled Iraq and was granted refugee status in Lebanon in 1995. He left Lebanon in 1997 and after his boat went astray he landed in Israel, M.R.A. claimed asylum in Israel. The complainant alleged that a Fatwa was issued against him as his former wife accused him of ‘complicity with Jews and converting to Judaism.’ The applicant left Israel, as he claimed to be interrogated by the Israeli authorities and in any case did not consider Jews to be human beings. In 1999 he went to Sweden via the Netherlands and claimed asylum. The Swedish authorities wanted to transfer the applicant to the Netherlands under the Dublin Convention. In 2000 the complainant was convicted of importing heroin and was to be expelled from Sweden to the Netherlands upon completion of his sentence. The applicant claimed that the Netherlands would refuse him entry and he would be in danger of <i>refoulement</i> to Iraq.</p> <p>F2. The complainant’s second claim for asylum in 2004 was rejected by the Migration Board as they found that there was no oppression of individuals by the new Iraqi regime and the Iraqi government could provide M.R.A. with protection. This decision was upheld by the Aliens Appeal Board. This decision was approved by higher courts.</p> <p>F3. The State quoting CAT’s own jurisprudence in Communication No.213/2002, E.J.V.M. v. Sweden stated that the applicant must prove an individual risk to his own life from flagrant or gross human rights abuses. Sweden in any case noted that after several different judicial asylum procedures, M.R.A. could not prove that he was in danger of being tortured and questioned the veracity of the complainant and of the allegation that a fatwa was issued against him. The complainant was from Northern Iraq, so if there was violence in the South, he could return to this area.</p> <p>F4. The complainant was released from prison in October 2005. On 17 January 2006 the Committee requested Sweden not to remove the complainant from its territory. Sweden acceded to this request.</p>
Held	H1. The existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned

	<p>would be personally at risk (para. 7.3.).</p> <p>H2. The Committee recalls its general comment on the implementation of article 3, that “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (para. 7.4.).</p> <p>H3. The applicant failed to prove any of the assertions about his time in Israel or that he risks death because people believe that he had converted to Judaism. The Committee noted that the applicant was going to be returned to the Netherlands, however were satisfied that the Swedish authorities adequately examined the possibility of refolement to Iraq and concluded that there was no risk of torture or inhuman and degrading treatment. Accordingly there is no violation of Article 3 of CAT (paras. 7.5-7.6.).</p>
Legal instruments cited	<p>Convention Against Torture, article 3.</p> <p>General Comment No. 1 Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22) U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003).</p> <p>Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention Official Journal C 254, 19/08/1997</p>
Cases cited	<p>Communication No.213/2002, E.J.V.M. v. Sweden CAT (14 November 2003)</p> <p>Communication No.150/1999, S.L. v. Sweden CAT (11 May 2001)</p> <p>Communication No.103/1998, S.M.R. and M.M.R. v. Sweden CAT (5 May 1999)</p>

27.	Communication No. 13/1993 Mutombo v. Switzerland (27 April 1994)
(Application No.)	Communication No. 13/1993
Date	27 April 1994
Applicant	Mutombo
Respondent State	Switzerland
Articles of the CAT cited	3
Finding of the Court	Violation
Procedural Stage and Previous Stages	The authors claim for asylum was rejected at first instance and on appeal by the Swiss authorities.
Keywords	Gross, flagrant or mass violations of human rights Political activities Non-party to CAT Non-refoulement Torture, cruel, inhuman or degrading treatment Unlawful departure from home country
Core Issue	Whether the expulsion or return of the author to Zaire would violate the obligation of Switzerland under article 3 of the CAT not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture?
Facts and Issues	F1. The author, a former member of the armed forces, claimed to be a member of a banned political party in Zaire. He joined this movement as he felt that he was discriminated against due to his ethnicity (Luba). He attended several illegal meetings and demonstrations. He claimed to have been beaten and tortured by Zairian officials because of his political activities and gave the names of his alleged torturers and the military base where the torture took place. He arrived to Switzerland via Italy after entering Switzerland illegally. Medical evidence certified that the injuries which the author had received may have come from

	<p>torture. The author stated that after he left Zaire, his father was arrested. It was claimed that his father was also a member of this political organization. Amnesty International supported the author, noting that his claims were credible in light of the general country information available on Zaire.</p> <p>F2. Switzerland questioned the veracity of the author's claims and some of the documents that he provided to them. The Swiss noted the produced evidence from the International Red Cross which stated that the facility which the author claimed to have been tortured in was not a facility which held political prisoners. Switzerland also referred to evidence it received from the political movement which the author claimed to be involved in and noted author's father was not on any membership list of the organisation. Even presuming the author's story to be true, he failed to prove that he would be subjected to ill treatment on his return to Zaire, and from his communication with the Committee seemed to fear that his return would endanger family and friends rather than himself. The State party further referred to the decision of the European Court of Human Rights in <i>Vilvarajah et al. v. The United Kingdom</i>, where it was held that a mere possibility of ill-treatment because of the general situation in a country was not in itself sufficient to give rise to a violation of article 3. Switzerland noted that UNHCR, while recommending prudence in returning failed asylum applicants, did not recommend a suspension on expulsions.</p>
Held	<p>H1. The Committee must be satisfied that the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk (para. 9.3).</p> <p>H2. Given the author's ethnic background, alleged political affiliation, his detention, desertion from the army; illegal departure from Zaire and to have adduced arguments during the course of his refugee determination which may be considered defamatory towards Zaire, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured (para. 9.4).</p> <p>H3. Zaire is not a party to CAT, and the Committee must be mindful that the author will no longer be able to make an application to the Committee to ensure his protection (para. 9.6).</p>
Legal instruments cited	Convention Against Torture , article 3

Cases cited	<i>Vilvarajah et al. v. The United Kingdom</i> [1992] 14 EHRR 248, [1991] ECHR 47
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28.	Communication No. 43/1996, Tala v Sweden , (15 November 1996)
Application No.	CAT/C/17/D/43/1996
Date	15 November 1996
Applicant	Kaveh Yaragh Tala
Respondent State	Sweden
Articles of the CAT cited	3
Finding of the Court	Violation
Procedural Stage and Previous Stages	On 26 November 1990 the author's asylum application was refused on the ground of contradictory statements by the Migration Board. In 1992 his appeal was rejected by the Aliens Appeals Board. Subsequent applications for recognition as a refugee were also rejected.
Keywords	Gross, flagrant or mass violations of human rights Political activities Non-Refoulement Torture, cruel, inhuman or degrading treatment
Core Issue	Whether the return of Mr. Tala to Iran would constitute a violation of article 3 of the Torture Convention?
Facts and Issues	<p>F1. The author, who was undertaking compulsory military service, claimed that he was part of a revolutionary Iranian movement and he had to flee Iran as his involvement in this organization became known to the Iranian authorities. He claimed that he was already tortured by Iranian officials who suspected his involvement in a subversive movement.</p> <p>F2. The applicant claimed that inconsistencies in his story arose from his poor relationship with previous counsel and his initial</p>

	<p>weariness in telling his story. The author also pointed to medical evidence which suggested that injuries were not self-inflicted, but caused by torture. Counsel for the author relied on the UNHCR handbook and in particular paragraphs 198 and 199.</p> <p>F3. Sweden argued that the prohibition of torture is fully reflected and implemented within its asylum determination procedures. The author's testimony was, in the opinion of the status determination bodies, contradictory and inconsistent. Sweden noted that the author used a false Spanish passport to enter the country and could not explain a letter addressed to the applicant and sent to a Swiss address. The determination bodies noted in particular that the author could not consistently describe the methods used to torture him. Overall, the State was satisfied that there would be no breach of article 3 of CAT if the author was returned to Iran.</p>
Held	<p>H1. In a climate of gross human rights violations an individual must show that s/he is personally at risk of being subjected to torture (para. 10.1). The refugee status procedures in this case, do not show evidence that article 3 of CAT was considered by the determination bodies (para. 10.2).</p> <p>H2. Torture victims can rarely give a completely accurate account of their experience. Given the complainants political affiliation, history of detention and torture, and the medical evidence as a whole are factors to be taken into account before the author could be returned to Iran (para. 10.3).</p> <p>H3. The Committee is aware of the serious human rights violations that currently occur in Iran (para. 10.4).</p> <p>H4. Substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Iran (para. 10.5).</p> <p>H5. In light of current circumstances, the State party has an obligation to refrain from forcibly returning the author to Iran, or to any other country where he runs a real risk of being refouled to Iran (para. 11).</p>
Legal instruments cited	<p>Convention Against Torture, Article 3 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paras. 198 & 199</p>
Cases cited	<p>Communication No. 13/1993 Mutombo v. Switzerland (27 April 1994)</p>