



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF SAADI v. ITALY

(Application no. 37201/06)

JUDGMENT

STRASBOURG

28 February 2008

In the case of Saadi v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Corneliu Bîrsan,
Nina Vajić,
Vladimiro Zagrebelsky,
Alvina Gyulumyan,
Khanlar Hajiyev,
Dean Spielmann,
Egbert Myjer,
Sverre Erik Jebens,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 11 July 2007 and 23 January 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37201/06) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Tunisian national, Mr Nassim Saadi (“the applicant”), on 14 September 2006.

2. The applicant was represented by Mr S. Clementi and Mr B. Manara, lawyers practising in Milan. The Italian Government (“the Government”) were represented by their Agent, Mr I.M. Braguglia, and their deputy co-Agent, Mr N. Lettieri.

3. The applicant alleged that enforcement of a decision to deport him to Tunisia would expose him to the risk of being subjected to treatment contrary to Article 3 of the Convention and to a flagrant denial of justice (Article 6 of the Convention). In addition, the measure concerned would infringe his right to respect for his family life (Article 8 of the Convention)

and had been taken in disregard of the procedural safeguards laid down in Article 1 of Protocol No. 7.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 October 2006 the President of that Section decided to give notice of the application to the Government. By virtue of Article 29 § 3 of the Convention, it was decided that the admissibility and merits of the application would be examined together and that the case would be given priority (Rule 41).

5. On 29 March 2007 a Chamber of the Third Section, composed of Boštjan M. Zupančič, Corneliu Bîrsan, Vladimiro Zagrebelsky, Alvina Gyulumyan, Egbert Myjer, Ineta Ziemele and Isabelle Berro-Lefèvre, judges, and Santiago Quesada, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed a memorial on the merits. The parties replied in writing to each other's memorials. In addition, third-party comments were received from the United Kingdom Government, which had exercised its right to intervene (Article 36 § 2 of the Convention and Rule 44 § 2).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 11 July 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr N. LETTIERI, officer of the State legal service, Ministry of Foreign Affairs,	<i>Deputy co-Agent,</i>
Ms E. MAZZUCO, prefect,	
Mr A. BELLA, senior police officer,	
Mr C. GALZERANO, deputy chief constable,	<i>Advisers;</i>

(b) *for the applicant*

Mr S. CLEMENTI, lawyer,	<i>Counsel;</i>
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(c) *for the United Kingdom Government*

Mr D. WALTON,	<i>Agent,</i>
Mr J. SWIFT, barrister,	<i>Counsel,</i>
Mr S. BRAVINER-ROMAN, Ministry of the Interior,	
Ms A. FITZGERALD, Ministry of Justice,	
Mr E. ADAMS, Ministry of Justice,	<i>Advisers.</i>

The Court heard addresses by Mr Clementi, Mr Lettieri and Mr Swift and their replies to questions by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1974 and lives in Milan.

10. The applicant, who entered Italy at some unspecified time between 1996 and 1999, held a residence permit issued for “family reasons” by the Bologna police authority (*questura*) on 29 December 2001. This permit was due to expire on 11 October 2002.

A. The criminal proceedings against the applicant in Italy and Tunisia

11. On 9 October 2002 the applicant was arrested on suspicion of involvement in international terrorism (Article 270 *bis* of the Criminal Code), among other offences, and placed in pre-trial detention. He and five others were subsequently committed for trial in the Milan Assize Court.

12. The applicant faced four charges. The first of these was conspiracy to commit acts of violence (including attacks with explosive devices) in States other than Italy with the aim of spreading terror. It was alleged that between December 2001 and September 2002 the applicant had been one of the organisers and leaders of the conspiracy, had laid down its ideological doctrine and given the necessary orders for its objectives to be met. The second charge concerned falsification “of a large number of documents such as passports, driving licences and residence permits”. The applicant was also accused of receiving stolen goods and of attempting to aid and abet the entry into Italian territory of an unknown number of aliens in breach of the immigration legislation.

13. At his trial the prosecution called for the applicant to be sentenced to thirteen years’ imprisonment. The applicant’s lawyer asked the Assize Court to acquit his client of international terrorism and left determination of the other charges to the court’s discretion.

14. In a judgment of 9 May 2005, the Milan Assize Court altered the legal classification of the first offence charged. It took the view that the acts of which he stood accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months’ imprisonment for that offence, and for the forgery and receiving offences. It acquitted the applicant of aiding and abetting clandestine immigration, ruling that the acts he stood accused of had not been committed.

15. As a secondary penalty, the Assize Court banned the applicant from exercising public office for a period of five years and ordered that after serving his sentence he was to be deported.

16. In the reasons for its judgment, which ran to 331 pages, the Assize Court observed that the evidence against the applicant included intercepts of telephone and radio communications, witness statements and numerous false documents that had been seized. Taken together, this evidence proved that the applicant had been engaged in a conspiracy to receive and falsify stolen documents, an activity from which he derived his means of subsistence. On the other hand, it had not been established that the documents in question had been used by the persons in whose names they had been falsely made out to enter Italian territory illegally.

17. As regards the charge of international terrorism, the Assize Court firstly noted that a conspiracy was “terrorist” in nature where its aim was to commit violent acts against civilians or persons not actively participating in armed conflict with the intention of spreading terror or obliging a government or international organisation to perform or refrain from performing any act, or where the motive was political, ideological or religious in nature. In the present case it was not known whether the violent acts that the applicant and his accomplices were preparing to commit, according to the prosecution submissions, were to be part of an armed conflict or not.

18. In addition, the evidence taken during the investigation and trial was not capable of proving beyond a reasonable doubt that the accused had begun to put into practice their plan of committing acts of violence, or that they had provided logistical or financial support to other persons or organisations having terrorist aims. In particular, such evidence was not provided by the telephone and radio intercepts. These proved only that the applicant and his accomplices had links with persons and organisations belonging to Islamic fundamentalist circles, that they were hostile to “infidels” (and particularly those present in territories considered to be Muslim) and that their relational world was made up of “brothers” united by identical religious and ideological beliefs.

19. Using coded language the defendants and their correspondents had repeatedly mentioned a “football match”, intended to strengthen their faith in God. For the Assize Court it was quite obvious that this was not a reference to some sporting event but to an action applying the principles of the most radical form of Islam. However, it had not been possible to ascertain what particular “action” was meant or where it was intended to take place.

20. Moreover, the applicant had left Milan on 17 January 2002 and, after a stopover in Amsterdam, made his way to Iran, from where he had returned to Italy on 14 February 2002. He had also spoken of a “leader of the brothers” who was in Iran. Some members of the group to which the applicant belonged had travelled to “training camps” in Afghanistan and had procured weapons, explosives, and observation and video-recording equipment. In the applicant’s flat and those of his co-defendants, the police

had seized propaganda about jihad – or holy war – on behalf of Islam. In addition, in telephone calls to members of his family in Tunisia made from the place where he was being detained in Italy, the applicant had referred to the “martyrdom” of his brother Fadhal Saadi; in other conversations he had mentioned his intention to take part in holy war.

21. However, no further evidence capable of proving the existence and aim of a terrorist organisation had been found. In particular, there was no evidence that the applicant and his accomplices had decided to channel their fundamentalist faith into violent action covered by the definition of a terrorist act. Their desire to join a jihad and eliminate the enemies of Islam could very well be satisfied through acts of war in the context of an armed conflict, that is, acts not covered by the concept of “terrorism”. It had not been established whether the applicant’s brother had really died in a suicide bombing or whether that event had been the “football match” which the defendants had repeatedly referred to.

22. The applicant and the prosecution appealed. The applicant asked to be acquitted of all the charges, while the prosecution wanted him to be convicted of international terrorism and aiding and abetting clandestine immigration as well.

23. In the prosecution’s appeal it was submitted that, according to the case-law of the Court of Cassation, the constituent elements of the crime of international terrorism were made out even where no act of violence had occurred, the existence of a plan to commit such an act being sufficient. In addition, an action could be terrorist in nature even if it was intended to be carried out in the context of an armed conflict, provided that the perpetrators were not members of the “armed forces of a State” or an “insurrectionary group”. In the present case, it was apparent from the documents in the file that the applicant and his associates had procured for themselves and others false documents, weapons, explosives and money in order to commit violent acts intended to affirm the ideological values of fundamentalist Islam. In addition, the accused had maintained contacts with persons and organisations belonging to the sphere of international terrorism and had planned a violent and unlawful action, due to be carried out in October 2002 as part of a “holy war” and in a country other than Italy. Only the defendants’ arrest had prevented the plan from being implemented. Furthermore, at that time the armed conflict in Afghanistan had ended and the one in Iraq had not yet started.

24. The prosecution further submitted that the applicant’s brother, Mr Fadhal Saadi, had been detained in Iran; the applicant had visited him there in either January or February 2002. After his release Mr Fadhal Saadi had settled in France and stayed in contact with the applicant. He had then died in a suicide bombing, a fact which was a source of pride for the applicant and the other members of his family. That was revealed by the

content of the telephone conversations intercepted in the prison where the applicant was being held.

25. Lastly, the prosecution requested leave to produce new evidence, namely letters and statements from a person suspected of terrorist activities and recordings transmitted by radio microphone from inside a mosque in Milan.

26. On 13 March 2006 the Milan Assize Court of Appeal asked the Constitutional Court to rule on the constitutionality of Article 593 § 2 of the Code of Criminal Procedure. As amended by Law no. 46 of 20 February 2006, that provision permitted the defence and the prosecution to appeal against acquittals only where, after the close of the first-instance proceedings, new evidence had come to light or been discovered. The Assize Court of Appeal stayed the proceedings pending a ruling by the Constitutional Court.

27. In judgment no. 26 of 6 February 2007, the Constitutional Court declared the relevant provisions of Italian law unconstitutional in that they did not allow the prosecution to appeal against all acquittals and because they provided that appeals lodged by the prosecuting authorities before the entry into force of Law no. 46 of 20 February 2006 were inadmissible. The Constitutional Court observed in particular that Law no. 46 did not maintain the fair balance that should exist in a criminal trial between the rights of the defence and those of the prosecution.

28. The first hearing before the Milan Assize Court of Appeal was set down for 10 October 2007.

29. In the meantime, on 11 May 2005, two days after delivery of the Milan Assize Court's judgment, a military court in Tunis had sentenced the applicant in his absence to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. He was also deprived of his civil rights and made subject to administrative supervision for a period of five years. The applicant asserted that he had not learned of his conviction until its operative part was served on his father on 2 July 2005, when the judgment had already become final.

30. The applicant alleged that his family and his lawyer were not able to obtain a copy of the judgment by which the applicant had been convicted by the Tunis military court. In a letter of 22 May 2007 to the President of Tunisia and the Tunisian Minister of Justice and Human Rights, his representatives before the Court asked to be sent a copy of the judgment in question. The result of their request is not known.

B. The order for the applicant's deportation and his appeals against its enforcement and for the issue of a residence permit and/or the granting of refugee status

31. On 4 August 2006, after being imprisoned uninterruptedly since 9 October 2002, the applicant was released.

32. On 8 August 2006 the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of Legislative Decree no. 144 of 27 July 2005 (entitled "Urgent measures to combat international terrorism" and later converted to statute law in the form of Law no. 155 of 31 July 2005). He observed that "it was apparent from the documents in the file" that the applicant had played an "active role" in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. Consequently, his conduct was disturbing public order and threatening national security.

33. The Minister made it clear that the applicant could not return to Italy except on the basis of an *ad hoc* ministerial authorisation.

34. The applicant was taken to a temporary holding centre (*centro di permanenza temporanea*) in Milan. On 11 August 2006 the deportation order was confirmed by the Milan justice of the peace.

35. On 11 August 2006 the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and "political and religious reprisals". By a decision of 16 August 2006, the Head of the Milan police authority (*questore*) declared the request inadmissible on the ground that the applicant was a danger to national security.

36. On 6 September 2006 the Director of the non-governmental organisation World Organisation Against Torture (known by its French initials – OMCT) wrote to the Italian Prime Minister to tell him the OMCT was "extremely concerned" about the applicant's situation, and that it feared that, if deported to Tunisia, he would be tried again for the same offences he stood accused of in Italy. The OMCT also pointed out that, under the terms of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

37. On 12 September 2006 the President of the non-governmental organisation Collective of the Tunisian Community in Europe appealed to the Italian government to "end its policy of mass deportation of Tunisian immigrants [who were] practising adherents of religious faiths". He alleged that the Italian authorities were using inhuman methods and had grounded a number of decisions against Tunisians on their religious convictions. He

went on to say that it was “obvious” that on arrival in Tunisia the persons concerned would be “tortured and sentenced to lengthy terms of imprisonment, on account of the fact that the Italian authorities falsely suspect them of terrorism”. The applicant’s name appeared in a list of persons at imminent risk of expulsion to Tunisia which was appended to the letter of 12 September 2006.

38. The Chief Constable’s decision of 16 August 2006 (see paragraph 35 above) was served on the applicant on 14 September 2006. The applicant did not appeal. However, on 12 September 2006 he had produced documents, including the OMCT’s letter of 6 September 2006 and the reports on Tunisia by Amnesty International and the US Department of State, requesting that these be passed on to the local refugee status board. On 15 September 2006 the Milan police authority informed the applicant orally that as his asylum request had been refused the documents in question could not be taken into consideration.

39. On 14 September 2006, pleading Rule 39 of the Rules of Court, the applicant asked the Court to suspend or annul the decision to deport him to Tunisia. On 15 September 2006 the Court decided to ask the Government to provide it with information, covering in particular the question whether the applicant’s conviction by the Tunis military court was final and also whether in Tunisian law there was a remedy whereby it was possible to obtain the reopening of proceedings or a retrial.

40. The Government’s reply was received at the Registry on 2 October 2006. According to the Italian authorities, in the event of a conviction in the absence of the accused, Tunisian law gave the person convicted the right to have the proceedings reopened. The Government referred in particular to a fax of 29 September 2006 from the Italian ambassador in Tunis stating that, according to the information supplied by the Director of International Cooperation at the Tunisian Ministry of Justice, the applicant’s conviction was not final since a person convicted in his absence could appeal against the relevant judgment.

41. On 5 October 2006 the Court decided to apply Rule 39. It asked the Government to stay the applicant’s expulsion until further notice.

42. The maximum time allowed for the applicant’s detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However, on 6 October 2006 a new deportation order had been issued against him. On 7 October 2006 this order was served on the applicant, who was then taken back to the Milan temporary holding centre. As the applicant had stated that he had entered Italy from France, the new deportation order named France as the receiving country, not Tunisia. On 10 October 2006 the new deportation order was confirmed by the Milan justice of the peace.

43. On 3 November 2006 the applicant was released because fresh information indicated that it was impossible to deport him to France. On the same day the Milan Assize Court of Appeal ordered precautionary

measures, to take effect immediately after the applicant's release: he was forbidden to leave Italian territory and required to report to a police station on Mondays, Wednesdays and Fridays.

44. In the meantime, on 27 September 2006, the applicant had applied for a residence permit. On 4 December 2006 the Milan police authority replied that this application could not be allowed. It was explained that a residence permit could be issued "in the interests of justice" only at the request of the judicial authorities, where the latter considered that the presence of an alien in Italy was necessary for the proper conduct of a criminal investigation. The applicant had in any case been forbidden to leave Italian territory and was therefore obliged to stay in Italy. Moreover, to obtain a residence permit it was necessary to produce a passport or similar document.

45. Before the Court the applicant alleged that the Tunisian authorities had refused to renew his passport, so that all his further attempts to regularise his situation had come to nothing.

46. On a date which has not been specified, the applicant also asked the Lombardy RAC (Regional Administrative Court) to set aside the deportation order of 6 October 2006 and stay its execution.

47. In a decision of 9 November 2006, the Lombardy RAC held that there was no cause to rule on the application for a stay of execution and ordered the file to be transmitted to the Lazio RAC, which had the appropriate territorial jurisdiction.

48. The Lombardy RAC pointed out among other observations that the European Court of Human Rights had already requested a stay of execution of the deportation order and had consequently provided redress for any prejudice the applicant might allege.

49. According to the information supplied by the applicant on 29 May 2007, the proceedings in the Lazio RAC were still pending on that date.

50. On 18 January 2007 the applicant sent a memorial to the Milan police authority pointing out that the European Court of Human Rights had requested a stay of execution of his deportation on account of a real risk that he would be subjected to treatment contrary to Article 3 of the Convention. He therefore asked for a hearing before the local refugee status board with a view to being granted political asylum. According to the information supplied by the applicant on 11 July 2007, there had been no reply to his memorial by that date. In a memorandum of 20 July 2007, the Italian Ministry of the Interior stated that the memorial of 18 January 2007 could not be regarded as a new asylum request or as an appeal against the refusal given by the Milan Chief Constable on 16 August 2006 (see paragraph 35 above).

C. The diplomatic assurances requested by Italy from Tunisia

51. On 29 May 2007 the Italian embassy in Tunis sent a *note verbale* to the Tunisian government, requesting diplomatic assurances that if the applicant were to be deported to Tunisia he would not be subjected to treatment contrary to Article 3 of the Convention and would not suffer a flagrant denial of justice.

52. The note in question, written in French, reads as follows:

“The Italian embassy presents its compliments to the Ministry of Foreign Affairs and, following the meeting between the Italian ambassador Mr Arturo Olivieri and his Excellency the Minister of Justice and Human Rights Mr Béchir Tekkari, on the occasion of the visit of the Italian Minister of Justice Mr Clemente Mastella, on 28 May 2007, has the honour to request the invaluable cooperation of the Tunisian authorities in reaching a positive development in the following case.

The Tunisian national Nassim Saadi, born in Haidra (Tunisia) on 30 November 1974, was served with an order for his deportation from Italy, issued by the Ministry of the Interior on 8 August 2006.

After the above order had been issued, Mr Saadi lodged an application with the European Court of Human Rights on 14 September 2006, requesting and obtaining the decision to stay execution of the deportation order.

His application is based on the argument that, after he had been tried in his absence, he was sentenced to twenty years' imprisonment for terrorist-related offences, in a judgment given by the Tunis military court on 11 May 2005, served on Mr Saadi's father on 2 July 2005. Because of his conviction, Mr Saadi contends that if the deportation order were to be enforced he would run the risk of being imprisoned in Tunisia on his arrival, on the basis of an unfair trial, and of being subjected to torture and inhuman and degrading treatment (please find enclosed a copy of the document by which the judgment was served supplied by Mr Saadi).

In order to gather all the information necessary to assess the case, the European Court of Human Rights has asked the Italian government to supply a copy of the judgment and wishes to ascertain whether the Italian government intends, before deporting Mr Saadi, to seek diplomatic guarantees from the Tunisian government.

In the light of the foregoing, the Italian embassy, counting on the sensitivity of the Tunisian authorities on the question, has the honour to formulate, subject to the judicial prerogatives of the Tunisian State, the following urgent request for guarantees, as an indispensable formal prerequisite for the solution of the case now pending:

– if the information given by Mr Saadi concerning the existence of a judgment of 11 May 2005 in which he was found guilty by the Tunis military court corresponds to the truth, please send a full copy of the judgment in question (before 11 July 2007, the date of the hearing before the Court) and confirm that he has the right to appeal, and to be judged by an independent and impartial tribunal, in accordance with a procedure which, taken as a whole, complies with the principles of a fair and public trial;

– please give assurances that the fears expressed by Mr Saadi of being subjected to torture and inhuman and degrading treatment on his return to Tunisia are unfounded;

– please give assurances that if he were to be committed to prison he would be able to receive visits from his lawyers and members of his family.

In addition, the Italian embassy would be grateful if the Tunisian authorities would keep it informed of the conditions of Mr Saadi's detention if he were to be committed to prison.

The way this case is determined will have significant implications for future security policy.

The information mentioned above, which the European Court of Human Rights has requested from the Italian government, are indispensable if the deportation is to go ahead.

To a certain extent, this case forms a precedent (in relation to numerous other pending cases) and – we are convinced – a positive response by the Tunisian authorities will make it easier to carry out further expulsions in future.

While perfectly aware of the delicate nature of the subject, the Italian embassy counts on the understanding of the Tunisian authorities, hoping that their reply will be in the spirit of effective action against terrorism, as part of the friendly relations between our two countries.”

53. The Italian government observed that such assurances had never before been requested from the Tunisian authorities.

54. On 4 July 2007 the Tunisian Ministry of Foreign Affairs sent a *note verbale* to the Italian embassy in Tunis. Its content was as follows:

“The Minister for Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to the ambassador's *note verbale* no. 2533 of 2 July 2007 concerning Nassim Saadi, currently imprisoned in Italy, has the honour to inform the ambassador that the Tunisian government confirms that it is prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.

The Minister for Foreign Affairs would like once again to convey to the Italian ambassador in Tunis his sincere regards.”

55. A second *note verbale*, dated 10 July 2007, was worded as follows:

“The Minister for Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to his *note verbale* no. 2588 of 5 July 2007, has the honour to confirm to him the content of the Ministry's *note verbale* no. 511 of 4 July 2007.

The Minister for Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.

The Minister for Foreign Affairs would like once again to convey to the Italian ambassador in Tunis his sincere regards.”

D. The applicant’s family situation

56. According to the applicant, in Italy he lives with an Italian national, Mrs V., whom he married in a Muslim marriage ceremony. They have an eight-year-old child (born on 22 July 1999), an Italian national, who attends school in Italy. Mrs V. is unemployed and is not at present in receipt of any family allowance. She suffers from a type of ischaemia.

57. According to a memorandum of 10 July 2007 from the Ministry of the Interior, on 10 February 2007 the applicant married, in a Muslim marriage ceremony, a second wife, Mrs G. While officially resident in via Cefalonia, Milan, at the address occupied by Mrs V., the applicant is said to be separated *de facto* from both his wives. Since the end of 2006 he has been habitually resident in via Ulisse Dini, Milan, in a flat which he apparently shares with other Tunisians.

II. RELEVANT DOMESTIC LAW

A. Remedies against a deportation order in Italy

58. A deportation order is subject to appeal to the RAC, the court having jurisdiction to examine the lawfulness of any administrative decision and set it aside where it disregards an individual’s fundamental rights (see, for example, *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I). An appeal to the *Consiglio di Stato* lies against decisions of the RAC.

59. In proceedings before the RAC, a stay of execution of the administrative decision complained of is not automatic, but may be granted if requested (see *Sardinas Albo*, cited above). However, where – as in the applicant’s case – deportation has been ordered under the terms of Legislative Decree no. 144 of 2005, appeals to the RAC or the *Consiglio di Stato* cannot stay enforcement of the deportation order (Article 4 §§ 4 and 4 *bis* of the Legislative Decree).

B. Reopening of a trial conducted in the defendant’s absence in Tunisia

60. In the French translation produced by the Government, the relevant provisions of the Tunisian Code of Criminal Procedure read as follows:

Article 175

“Where a defendant fails to appear on the appointed date, having been personally informed of the obligation to do so, the court shall proceed to judgment, giving a decision which is deemed to follow adversarial proceedings. Where a defendant who fails to appear has been lawfully summoned, though not informed in person, judgment is given by default. Notification of judgment by default shall be given by the registrar of the court which gave judgment.

An appeal against a judgment by default must be lodged by the appellant in person, or his representative, with the registry of the court which has given judgment, within the ten days following service of the defendant’s copy.

If the appellant lives outside Tunisian territory, the time allowed for appeal shall be increased to thirty days.

An appeal shall be lodged either by means of a verbal declaration, which shall be formally recorded forthwith, or by means of a written declaration. The appellant must sign; if he refuses or is unable to sign, that circumstance shall be formally recorded.

The registrar shall immediately fix a date for the hearing and inform the appellant thereof; in all cases the hearing must be held within one month from the date of the appeal.

The appellant or his representative shall inform the interested parties, with the exception of State counsel, and have them summoned by an officer of the court, at least three days before the date of the hearing, failing which the appeal shall be dismissed.”

Article 176

“Where judgment has not been served on the defendant in person or where it does not appear from the documents recording enforcement of the judgment that the defendant had knowledge of it, an appeal shall lie until expiry of the limitation period applicable to the penalty concerned.”

Article 180 (as amended by Law no. 2004-43 of 17 April 2000)

“On appeal, execution of a judgment shall be stayed. Where the sentence is capital punishment, the appellant shall be committed to prison and the sentence shall not be enforced before the judgment has become final.”

Article 213

“An appeal shall no longer be admissible, save where the appellant has been prevented from appealing by circumstances beyond his or her control, unless lodged within ten days of the date of delivery of the judgment deemed to be adversarial within the meaning of the first paragraph of Article 175, or after expiry of the time allowed where judgment has been given by default, or after notification of the judgment likewise by default.

For State counsel and assistant State counsel at courts of appeal the time allowed for appeal shall be sixty days from the date of delivery of the judgment. In addition, on pain of inadmissibility, they must give notice of their appeal within that time to the defendant and any persons found liable towards civil parties.”

III. INTERNATIONAL TEXTS AND DOCUMENTS

A. The cooperation agreement on crime prevention signed by Italy and Tunisia and the association agreement between Tunisia, the European Union and its member States

61. On 13 December 2003 the Italian and Tunisian governments signed in Tunis an agreement on crime prevention in which the Contracting Parties undertook to exchange information (particularly with regard to the activities of terrorist groups, migratory flows and the production and use of false documents) and to work towards harmonisation of their domestic legislation. Articles 10 and 16 of the agreement read as follows:

Article 10

“The Contracting Parties, in accordance with their respective national legislation, agree that cooperation to prevent crime, as contemplated in the present agreement, will extend to searching for persons who have sought to evade justice and are responsible for criminal offences, and recourse to expulsion where circumstances so require and in so far as compatible with application of the provisions on extradition.”

Article 16

“The present agreement is without prejudice to rights and obligations arising from other international, multilateral or bilateral agreements entered into by the Contracting Parties.”

62. Tunisia also signed in Brussels, on 17 July 1995, an association agreement with the European Union and its member States. The agreement mainly concerns cooperation in the commercial and economic sectors. Article 2 provides that relations between the Contracting Parties, like the provisions of the agreement itself, must be based on respect for human rights and democratic principles, which form an “essential element” of the agreement.

B. Articles 1, 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees

63. Italy is a party to the 1951 Convention on the Status of Refugees. Articles 1, 32 and 33 of this Convention read as follows.

Article 1

“For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Article 32

“1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law ...”

Article 33

“1. No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

C. Guidelines of the Committee of Ministers of the Council of Europe

64. On 11 July 2002, at the 804th meeting of the Ministers’ Deputies, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism. Point IV of the guidelines, entitled “Absolute prohibition of torture”, reads as follows:

“The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.”

According to point XII § 2 of this document,

“It is the duty of a State that has received a request for asylum to ensure that the possible return (*‘refoulement’*) of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.”

D. Amnesty International report on Tunisia

65. In a report concerning the situation in Tunisia in 2006, Amnesty International noted that following a large number of unfair trials at least twelve persons facing terrorism charges had been sentenced to lengthy prison sentences. Cases of torture and ill-treatment continued to be reported. Hundreds of political prisoners sentenced after unfair trials remained in prison after more than ten years and their state of health was said to have deteriorated. A group of 135 prisoners had been released as a result of an amnesty; they had been imprisoned for more than fourteen years after being convicted in unfair trials of belonging to the banned Islamist organisation Ennahda. Some of these prisoners were in poor health as a result of harsh prison conditions and torture they had undergone before standing trial.

66. In December 2006 there had been exchanges of fire to the south of Tunis between the police and alleged members of the Salafist Group for Preaching and Combat. Dozens of people had been killed and police officers had been injured.

67. In June 2006 the European Parliament had called for a meeting of the European Union and Tunisia to discuss the human rights situation in the country. In October 2006 the European Union had criticised the Tunisian government for cancelling an international conference on employment and the right to work.

68. As regards the “war on terror”, Amnesty International noted that no answer had been given by the Tunisian authorities to a request to visit the country made by the United Nations Special Rapporteur on the promotion and protection of human rights. Persons suspected of terrorist activities had been arrested and tried under what was described as the “controversial” 2003 anti-terrorism law. This anti-terrorism law and the Code of Military Justice had been used against Tunisians repatriated against their will from Bosnia and Herzegovina, Bulgaria and Italy, who were accused of belonging to terrorist organisations operating abroad. In such cases, sometimes decided by the military courts, lawyers’ contact with their clients had been subjected to constantly increasing restrictions. The report mentioned cases of prisoners being held incommunicado or being tortured while in police custody; those referred to included Mr Hicham Saadi, Mr Badreddine Ferchichi (who had been deported from Bosnia and Herzegovina) and six members of the “Zarzis group”.

69. Amnesty International went on to criticise severe restrictions of the right to freedom of expression and a risk of harassment and violence against human rights defenders and their families, women wearing Islamic headscarves, and opponents and critics of the government.

70. On the question of the independence of the judiciary, Amnesty International noted that lawyers had publicly protested against a bill then before Parliament creating the “Higher Institute for Lawyers”, to be

responsible for training future lawyers (which had previously been done by the Lawyers' Association and the Association of Tunisian Judges). In October 2006 the Head of the European Commission delegation in Tunis had publicly criticised the slow pace of political reform and called for better training for judges and lawyers to consolidate the independence of the judiciary. Judges required the permission of the Secretary of State for Justice to leave the country.

71. On 19 June 2007 Amnesty International issued a statement concerning the applicant which reads as follows:

“Amnesty International is concerned that Nassim Saadi would be at risk of torture or other grave human rights violations, should he be removed to Tunisia by the Italian authorities. This concern is based upon our continuous monitoring of human rights violations in Tunisia, including violations committed against people forcibly returned from abroad within the context of the ‘war on terror’.

Nassim Saadi was sentenced *in absentia* by the Permanent Military Court in Tunis to twenty years' imprisonment on charges of belonging to a terrorist organisation operating abroad at a time of peace and incitement to terrorism. Although he will be afforded a retrial before the same military court, military courts in Tunisia violate a number of guarantees for a fair trial. The military court is composed of a presiding judge and four counsellors. Only the president is a civilian judge. There are restrictions on the right to a public hearing. The location of the court in a military compound effectively limits access to the public. Individuals convicted before a military court can seek review only before the Military Court of Cassation. Civilian defendants have frequently reported that they had not been informed of their right to legal counsel or, particularly in the absence of a lawyer, have not realised that they were being questioned by an examining judge as he was in military uniform.

Defence lawyers have restrictions placed on access to their clients' files and are obstructed by not being given information about the proceedings such as the dates of hearings. Unlike the ordinary criminal courts, military courts do not allow lawyers access to a register of pending cases. (For more information see Amnesty International report, Tunisia: the cycle of Injustice, AI Index MDE 30/001/2003.)

The Tunisian authorities also continue to use the controversial 2003 anti-terrorism law to arrest, detain and try alleged terrorist suspects. Those convicted have been sentenced to long prison terms. The anti-terrorism law and provisions of the Military Justice Code have also been used against Tunisian nationals who were returned to Tunisia against their will by authorities in other countries, including Bosnia and Herzegovina, Bulgaria and Italy. Those returned from abroad were arrested by the Tunisian authorities upon arrival and many of them were charged with links to ‘terrorist organisations’ operating outside the country. Some were referred to the military-justice system.

People who have been recently returned to Tunisia from abroad have been held in incommunicado detention, during which time they have been subjected to torture and other ill-treatment. They have also been sentenced to long prison sentences following unfair trials. In this connection, we provide the following case information for illustration:

– Houssine Tarkhani was forcibly returned from France to Tunisia on 3 June 2007 and detained on arrival. He was kept in secret detention in the State Security Department of the Ministry of Interior in Tunis for ten days, during which he was reportedly tortured or otherwise ill-treated. He is currently detained in Mornaguia prison awaiting further investigation. Houssine Tarkhani left Tunisia in 1999, and subsequently lived in Germany and, between 2000 and 2006, in Italy. He was arrested at the French-German border on 5 May 2007 as an irregular migrant, and held in a detention centre in the French city of Metz, pending the execution of an expulsion order. On 6 May he was brought before a judge, who authorised his detention for a further fifteen days, and informed him that he was being investigated by the French police on suspicion of ‘providing logistical support’ to a network which assists individuals to travel to Iraq to take part in the armed conflict with the US-led coalition forces there – an allegation which he denies. No charges were ever brought against him in France. On the same day, he made a claim for asylum and on 7 May 2007 was taken to the detention centre at Mesnil-Amelot to be detained while his asylum claim was processed. Houssine Tarkhani’s application for asylum had been assessed under an accelerated procedure (*‘procédure prioritaire’*), and was rejected on 25 May. Although he appealed before the Commission des Recours des Réfugiés (CRR), Refugees Appeals Board, decisions taken under the accelerated procedure are not delayed while appeals to the CRR are considered, and people who have appealed may be forcibly returned before their appeal has been ruled on. Houssine Tarkhani also made appeals against the decision to the administrative court, but these have failed.

– In May 2004, Tunisian national Tarek Belkhirat was returned against his will to Tunisia from France after his request for asylum was rejected. He was arrested upon his return to Tunisia and charged under the 2003 anti-terrorism law. In February 2005, the Council of State (*Conseil d’Etat*), the highest administrative court in France, quashed the order to expel Tarek Belkhirat to Tunisia. In March 2005, he was sentenced in an unfair trial in Tunisia to ten years’ imprisonment for membership of the Tunisian Islamist Front, charges for which he had already served a thirty-six month prison sentence in France. The sentence was reduced to five years on appeal in October 2005. He remains in prison in Tunisia.

– Tunisian national Adil Rahali was deported to Tunisia from Ireland in April 2004 after his application for asylum was refused. He was arrested on arrival in Tunisia and taken to the State Security Department of the Ministry of the Interior, where he was held in secret detention for several days and reportedly beaten, suspended from the ceiling and threatened with death. Adil Rahali, who had worked in Europe for more than a decade, was charged under the 2003 anti-terrorism law with belonging to a terrorist organisation operating abroad. No investigation is known to have been conducted into Adil Rahali’s alleged torture despite the fact that his lawyer filed a complaint. In March 2005, Adil Rahali was convicted on the basis of ‘confessions’ extracted under torture and sentenced under anti-terrorism legislation to ten years’ imprisonment. This sentence was reduced to five years on appeal in September 2005. He remains in prison in Tunisia.

– In April 2004, seven young men were convicted, following an unfair trial, of membership of a terrorist organisation, possessing or manufacturing explosives, theft, using banned websites and holding unauthorised meetings. Two others were convicted *in absentia*. They were among dozens of people arrested in Zarzis, southern Tunisia, in February 2003, most of whom had been released the same month. The trial failed to respect international fair-trial standards. According to defence lawyers, most arrest

dates in police reports were falsified, and in one case the place of arrest was falsified. There were no investigations into allegations that the defendants were beaten, suspended from the ceiling and threatened with rape. The convictions rested almost entirely on confessions extracted under duress. The defendants denied all charges brought against them in court. In July 2004 the Tunis Appeal Court reduced the sentences of six of them from nineteen years and three months to thirteen years' imprisonment. Their appeal was rejected by the Court of Cassation in December 2004. Another defendant, who was a minor at the time of the arrest, had his sentence reduced to twenty-four months in prison. They were all released in March 2006 following a presidential pardon.

The human rights violations that were perpetrated in these cases are typical of the sort of violations that remain current in Tunisia and affect people arrested inside the country as well as those returned from abroad in connection with alleged security or political offences. We consider, therefore, that Nassim Saadi would be at serious risk of torture and unfair trial if he were to be transferred to the custody of the Tunisian authorities.”

72. A similar statement was issued by Amnesty International on 23 July 2007.

E. Report on Tunisia by Human Rights Watch

73. In its 2007 report on Tunisia, Human Rights Watch asserted that the Tunisian government used the threat of terrorism and religious extremism as a pretext for repression of their opponents. There were constant, credible allegations of the use of torture and ill-treatment against suspects in order to obtain confessions. It was also alleged that convicted persons were deliberately subjected to ill-treatment.

74. Although many members of the proscribed Islamist party Ennahda had been released from prison after an amnesty, there were more than 350 political prisoners. There had been mass arrests of young men, who had then been prosecuted under the 2003 anti-terrorism law. Released political prisoners were monitored very closely by the authorities, who refused to renew their passports and denied them access to most jobs.

75. According to Human Rights Watch, the judicial system lacked independence. Investigating judges questioned suspects without their lawyers being present, and the prosecution and judiciary turned a blind eye to allegations of torture, even when made through a lawyer. Defendants were frequently convicted on the basis of confessions made under duress or of statements by witnesses whom they had not been able to examine or have examined.

76. Although the International Committee of the Red Cross was continuing its programme of visits to Tunisian prisons, the authorities were refusing independent human rights defence organisations access to places of detention. The undertaking given in April 2005 to allow visits by Human Rights Watch had remained a dead letter.

77. The 2003 anti-terrorism law gave a very broad definition of “terrorism”, which could be used to prosecute persons merely for exercising their right to political dissent. Since 2005 more than 200 persons had been charged with planning to join jihadist movements abroad or organising terrorist activities. The arrests had been carried out by plain-clothes police and the families of those charged had been left without news of their relatives for days or sometimes weeks. During their trials these defendants had overwhelmingly claimed the police had extracted their statements under torture or threat of torture. These defendants had been sentenced to lengthy terms of imprisonment, but it had not been established that any of them had committed a specific act of violence or that they possessed weapons or explosives.

78. In February 2006, six persons accused of belonging to the “Zarzis” terrorist group had been granted a presidential amnesty after serving three years of their prison sentences. They had been convicted on the basis of confessions which they alleged they had been forced into making, and of the fact that they had copied from the Internet instructions for making bombs. In 2005 Mr Ali Ramzi Bettibi had been sentenced to four years’ imprisonment for cutting and pasting on an online forum a statement by an obscure group threatening bomb attacks if the President of Tunisia agreed to host a visit by the Prime Minister of Israel.

79. Lastly, Human Rights Watch reported that on 15 June 2006 the European Parliament had adopted a resolution deploring the repression of human rights activists in Tunisia.

F. Activities of the International Committee of the Red Cross

80. The International Committee of the Red Cross signed an agreement with the Tunisian authorities on 26 April 2005 giving them permission to visit prisons and assess conditions there. The agreement came one year after the authorities’ decision to permit prison visits by only the International Committee of the Red Cross, an organisation – described as “strictly humanitarian” – which was required to maintain confidentiality about its findings. The agreement between the Tunisian government and the International Committee of the Red Cross concerned all prison establishments in Tunisia, “including remand prisons and police cells”.

81. On 29 December 2005 Mr Bernard Pfefferlé, the regional delegate of the International Committee of the Red Cross for Tunisia/North Africa, said that the Committee had been able to visit “without hindrance” about a dozen prisons and meet prisoners in Tunisia. Mr Pfefferlé said that, since the beginning of the inspection in June 2005, a team from the International Committee of the Red Cross had travelled to nine prisons, two of them twice, and had met half of the prisoners scheduled to be visited. Refusing to

give further details, “on account of the nature of [their] agreements”, he nevertheless commented that the agreements in question authorised the International Committee of the Red Cross to visit all prisons and meet prisoners “quite freely and according to [its own] free choice”.

G. Report of the US Department of State on human rights in Tunisia

82. In its report on human rights practices published on 8 March 2006, the US Department of State criticised violations of fundamental rights by the Tunisian government.

83. Although there had been no politically motivated killings attributable to the Tunisian authorities, the report commented critically on two cases: Mr Moncef Ben Ahmed Ouahichi had died while in police custody and Mr Bedreddine Rekeii after being released from police custody.

84. Referring to the information gathered by Amnesty International, the US Department of State described the various forms of torture and ill-treatment inflicted by the Tunisian authorities in order to secure confessions. These included: electric shocks; forcing the victim’s head under water; beatings with fists, sticks and police batons; hanging from the cell bars until loss of consciousness; and cigarette burns. In addition, police officers sexually assaulted the wives of Islamist prisoners as a means of obtaining information or imposing a punishment.

85. However, these acts of torture were very difficult to prove, because the authorities refused to allow the victims access to medical treatment until the traces of ill-treatment had faded. Moreover, the police and the judicial authorities regularly refused to follow up allegations of ill-treatment, and confessions extracted under torture were regularly admitted as evidence by the courts.

86. Political prisoners and religious fundamentalists were the main targets of torture, which was usually inflicted while the victims were in police custody, particularly inside the Ministry of the Interior. The report referred to a number of cases of torture complained of in 2005 by non-governmental organisations, including the Conseil national pour les libertés en Tunisie and the Association pour la lutte contre la torture en Tunisie. In spite of complaints by the victims, no investigation into these abuses had been conducted by the Tunisian authorities and no agent of the State had been prosecuted.

87. The conditions of incarceration in Tunisian prisons fell well below international standards. Prisoners were held in cramped conditions and had to share beds and toilets. The risk of catching contagious diseases was very high on account of the overcrowding and the unhygienic conditions. Prisoners did not have access to appropriate medical treatment.

88. Political prisoners were often transferred from one establishment to another, which made visits by their families difficult and discouraged any investigation of their conditions of detention.

89. In April 2005, after lengthy negotiations, the Tunisian government had signed an agreement permitting the International Committee of the Red Cross to visit prisons. These visits had begun in June. In December the Red Cross declared that the prison authorities had respected the agreement and had not placed obstacles in the way of the visits.

90. On the other hand, the same possibility was not extended to Human Rights Watch, despite a verbal undertaking given in April 2005 by the Tunisian government. The government had also undertaken to prohibit prolonged periods of solitary confinement.

91. Although explicitly forbidden by Tunisian law, arbitrary arrest and imprisonment occurred. By law, the maximum period allowed for detention in police custody was six days, during which time the prisoners' families had to be informed. However, these rules were frequently ignored. Persons detained by the police were very often held incommunicado and the authorities extended the duration of police custody by recording a false date of arrest.

92. The Tunisian government denied that there were any political prisoners, so their exact number was impossible to determine. However, the Association internationale de soutien aux prisonniers politiques had drawn up a list of 542 political prisoners, nearly all of whom were said to be religious fundamentalists belonging to proscribed opposition movements who had been arrested for belonging to illegal organisations which endangered public order.

93. The report mentioned a wide range of infringements of the right to respect for the private and family life of political prisoners and their families, including censorship of correspondence and telephone calls and the confiscation of identity documents.

H. Other sources

94. Before the Court, the applicant produced a document from the Association internationale de soutien aux prisonniers politiques concerning the case of a young man named Hichem Ben Said Ben Frej who was alleged to have leapt from the window of a police station on 10 October 2006 shortly before he was due to be interrogated. Mr Ben Frej's lawyer asserted that his client had been savagely tortured and held in the cells of the Ministry of the Interior in Tunis for twenty-four days.

Similar allegations are to be found in statements by local organisations for the defence of prisoners' and women's rights and in numerous press cuttings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

95. The applicant submitted that enforcement of his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

96. The Government rejected that argument.

A. Admissibility

97. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) **The applicant**

98. The applicant submitted that it was “a matter of common knowledge” that persons suspected of terrorist activities, in particular those connected with Islamist fundamentalism, were frequently tortured in Tunisia. He had lodged a request for political asylum which had been refused by the Milan police authority without his being interviewed by the Italian refugee-status board. His attempts to obtain a residence permit had failed because the Tunisian consulate had refused to renew his passport, a document which the Italian authorities had asked him to produce. In the aggregate these circumstances amounted to “persecution”.

99. In addition, the investigations conducted by Amnesty International and by the US Department of State showed that torture was practised in Tunisia and that some persons deported there had quite simply disappeared. The numerous press articles and witness accounts he had produced condemned the treatment of political prisoners and their families.

100. The applicant’s family had received a number of visits from the police and was constantly subject to threats and provocations. His sister had twice tried to kill herself because of this.

101. In view of the serious risks to which he would be exposed if he were to be deported, the applicant considered that a mere reminder of the treaties signed by Tunisia could not be regarded as sufficient.

(b) The Government

102. The Government considered it necessary in the first place to provide an account of the background to the case. After the attacks of 11 September 2001 on the Twin Towers in New York, the Italian police, after it had been tipped off by intelligence services, uncovered an international network of militant Islamists, mainly composed of Tunisians, and placed it under surveillance. In May 2002 one of the leaders of this network, Mr Faraj Faraj Hassan, was arrested in London. The applicant had in the meantime left Milan for Iran, where he had spent time in an al-Qaeda training camp. He then returned to Italy, from where he frequently travelled to the Côte d'Azur. There, with the help of another Tunisian living in San Remo, Mr Imed Zarkaoui, he met his brother, Mr Fadhal Saadi.

103. Mr Zarkaoui had been given the job of finding fulminate of mercury to make detonators, while in Italy another accomplice was seeking information about night-filming cameras. Contact was established with Malaysia, where the group which was to carry out the attacks were standing by, and weapons were distributed to some militants. The Islamist cell to which the applicant belonged had embarked on a large-scale enterprise involving the production of false identity papers and their distribution to its members. The Government rejected the applicant's argument that the offence – forgery – of which he had been convicted in Italy was not linked to the activity of terrorist groups; in that connection they pointed out that although the applicant and one of his co-defendants held legal residence permits they had provided themselves with false papers.

104. In that context, in October 2002, a number of European police forces launched "Operation Bazar", as a result of which the applicant, Mr Zarkaoui and three other persons were arrested in Italy. Mr Fadhal Saadi managed to evade an attempt by the French police to arrest him. He was later to die in a suicide bombing in Iraq. When the applicant's family informed him of this, he was delighted to learn that his brother had died a "martyr" in the war against "the infidel". In the criminal proceedings against the applicant in Italy, the prosecution was convinced of three things: that the cell he belonged to was associated with al-Qaeda: that it was preparing an attack against an unidentified target; and that it was receiving instructions from abroad.

105. The Government next observed that a danger of death or the risk of being exposed to torture or to inhuman and degrading treatment must be corroborated by appropriate evidence. However, in the present case the applicant had neither produced precise information in that regard nor

supplied detailed explanations, confining himself to describing an allegedly general situation in Tunisia. The “international sources” cited by the applicant were indeterminate and irrelevant. The same was true of the press articles he had produced, which came from unofficial circles with a particular ideological and political slant. As this information had not been checked, nor had an explanation been requested from the Tunisian government, it had no probative value. The provocations that the applicant’s family had allegedly suffered at the hands of the Tunisian police had nothing to do with what the applicant sought to prove before the Court.

106. The Amnesty International report cited three isolated cases, connected to the prevention of terrorism, which did not disclose “anything to be concerned about” (certain persons had been convicted of terrorism or were awaiting trial). Regarding the allegations of ill-treatment, the report used the conditional tense or expressions such as “it seems”. There was therefore no certainty as to what had happened. The superficial nature of the report was “obvious” in the passages concerning Italy, which described as a human rights violation the deportation to Syria of Muhammad Said Al-Shari, whose application to the Court had been rejected as manifestly ill-founded (see *Al-Shari and Others v. Italy* (dec.), no. 57/03, 5 July 2005).

107. The report by the US Department of State cited (a) the case of Moncef Louhici or Ouahichi, in which the investigation into a complaint by the family of a person allegedly killed by the police was still in progress; (b) the case of Bedreddine Rekeii or Reguii, which concerned crimes without a political motivation, and about which the Tunisian authorities had provided complete and reassuring details; (c) the case of the “Bizerte” group, in which five of the eleven defendants had been acquitted on appeal and the sentences of the other six had been considerably reduced; and (d) imprecisely identified cases to which vague reference was made or cases involving offences without political motivation or concerning freedom of expression or association.

108. The Government argued that these documents did not portray Tunisia as a kind of “hell”, the term used by the applicant. The situation in the country was, by and large, not very different from that in certain States which had signed the Convention.

109. The misfortunes of Mr Hichem Ben Said Ben Frej, cited by the applicant (see paragraph 94 above), were not relevant in the present case, since he had committed suicide.

110. The Government further observed that in numerous cases concerning expulsion to countries (Algeria in particular) where subjection to ill-treatment as a regular practice seemed much more alarming than in Tunisia, the Court had rejected the applicants’ allegations.

111. The Government also noted that Tunisia had ratified numerous international instruments for the protection of human rights, including the International Covenant on Civil and Political Rights, the International

Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all adopted by the United Nations. Under Article 32 of the Tunisian Constitution, international treaties took precedence over statute law. In addition, Italy and Tunisia had signed bilateral agreements on the question of emigration and combating transnational crime, including terrorism (see paragraph 61 above). That presupposed a common basis of respect for fundamental rights. The effectiveness of the agreements concerned would be jeopardised if the Court were to assert as a principle that Tunisians could not be deported.

112. Tunisia had also signed an association agreement with the European Union. A precondition for implementation of that agreement was respect for fundamental freedoms and democratic principles (see paragraph 62 above). The European Union was an international organisation which, according to the Court's case-law, was presumed to provide a level of protection of fundamental rights "equivalent" to that provided by the Convention. Moreover, the Tunisian authorities permitted the International Committee of the Red Cross and "other international bodies" to visit prisons (see paragraphs 80-81 above). In the Government's submission, it could be presumed that Tunisia would not default on its obligations under international treaties.

113. In Tunisia the terrorist danger was a grim reality, as shown by the explosion on the island of Djerba on 11 April 2002, for which al-Qaeda had claimed responsibility. To meet that danger the Tunisian authorities had, like some European States, enacted a law for the prevention of terrorism.

114. In these circumstances, the "benefit of the doubt" should be given to the State which intended to deport the applicant and whose national interests were threatened by his presence. In that connection, account had to be taken of the scale of the terrorist threat in the world of today and of the objective difficulties of combating it effectively, regard being had not only to the risks in the event of deportation but also to those which would arise in the absence of deportation. In any event, the Italian legal system provided safeguards for the individual – including the possibility of obtaining refugee status – which made expulsion contrary to the requirements of the Convention "practically impossible".

115. At the hearing before the Court the Government had agreed in substance with the arguments of the third-party intervener (see paragraphs 117-23 below), observing that, before the order for the applicant's deportation was made, the applicant had neither mentioned the risk of ill-treatment in Tunisia, although he must have been aware of it, nor requested political asylum. His allegations had accordingly come too late to be credible.

116. Lastly, the Government observed that, even though there was no extradition request or a situation raising concern regarding respect for

human rights (such as, for example, the one described in *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V), Italy had sought diplomatic assurances from Tunisia (see paragraphs 51-52 above). In response, Tunisia had given an undertaking to apply in the present case the relevant Tunisian law (see paragraphs 54-55 above), which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner's lawyer and family.

2. *The third-party intervener*

117. The United Kingdom Government observed that in *Chahal* (cited above, § 81) the Court had stated the principle that, in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures. The Government observed in that connection that it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community.

118. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond a reasonable doubt, since it was frequently impossible to use confidential sources or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement, provided only partial protection.

119. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights. According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 § 1 (f) of the Convention authorised the arrest of a person "against whom action is being taken with a view to deportation", and thus recognised the right of States to deport aliens.

120. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention

was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations, the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

121. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

122. In the light of the foregoing considerations, the United Kingdom argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was "more likely than not" that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

123. Lastly, the United Kingdom Government emphasised that Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in the above-mentioned *Chahal* case, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable, as had been shown by the opinions of the majority and the

minority of the Court in that case, that identical assurances could be interpreted differently.

3. *The Court's assessment*

(a) **General principles**

(i) *Responsibility of Contracting States in the event of expulsion*

124. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

125. 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 concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

126. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

127. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for

exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, 18 January 1978, § 163, Series A no. 25; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-16, ECHR 2006-IX).

(ii) *Material used to assess the risk of exposure to treatment contrary to Article 3 of the Convention*

128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present one, the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal*, cited above, § 96).

129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US Department of State (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no. 53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, ECHR 2005-VI; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an

unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Müslim*, cited above, § 68).

132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-49).

133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85-86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

(iii) *The concepts of "torture" and "inhuman or degrading treatment"*

134. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX).

135. In order for a punishment or treatment associated with it to be "inhuman" or "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 treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

136. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydın v. Turkey*, 25 September 1997, § 82, *Reports* 1997-VI, and *Selmouni*, cited above, § 96).

(b) Application of the above principles to the present case

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see *Chahal*, cited above, § 79, and *Shamayev and Others*, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in *Chahal* (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, § 80, and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of “risk” and “dangerousness” in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government’s arguments, to the effect that where an applicant presents a threat to national security stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present one that it be proved that subjection to ill-treatment is “more likely than not”. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

141. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.

142. Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment (see *Jabari*, cited above, § 39) in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always

been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof (see paragraphs 128 and 132 above) before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion.

143. In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia (see paragraphs 65-79 above), which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US Department of State (see paragraphs 82-93 above). In particular, these reports mention numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported – said to be often inflicted on persons in police custody with the aim of extorting confessions – include hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Article 3. It is reported that allegations of torture and ill-treatment are not investigated by the competent Tunisian authorities, that they refuse to follow up complaints and that they regularly use confessions obtained under duress to secure convictions (see paragraphs 68, 71, 73-75, 84 and 86 above). Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources (see paragraph 94 above), the Court does not doubt their reliability. Moreover, the Government have not adduced any evidence or reports capable of rebutting the assertions made in the sources cited by the applicant.

144. The applicant was prosecuted in Italy for participation in international terrorism and the deportation order against him was issued by virtue of Legislative Decree no. 144 of 27 July 2005 entitled “urgent measures to combat international terrorism” (see paragraph 32 above). He was also sentenced in Tunisia, in his absence, to twenty years’ imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. The existence of that sentence was confirmed by Amnesty International’s statement of 19 June 2007 (see paragraph 71 above).

145. The Court further notes that the parties do not agree on the question whether the applicant’s trial in Tunisia could be reopened. The applicant asserted that it was not possible for him to appeal against his conviction with suspensive effect, and that, even if he could, the Tunisian authorities could imprison him as a precautionary measure (see paragraph 154 below).

146. In these circumstances, the Court considers that in the present case substantial grounds have been shown for believing that there is a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention if he were to be deported to Tunisia. That risk cannot be excluded on the basis of other material available to the Court. In particular, although it is true that the International Committee of the Red Cross has been able to visit Tunisian prisons, that humanitarian organisation is required to maintain confidentiality about its fieldwork (see paragraph 80 above) and, in spite of an undertaking given in April 2005, similar visiting rights have been refused to the independent human rights protection organisation Human Rights Watch (see paragraphs 76 and 90 above). Moreover, some of the acts of torture reported allegedly took place while the victims were in police custody or pre-trial detention on the premises of the Ministry of the Interior (see paragraphs 86 and 94 above). Consequently, the visits by the International Committee of the Red Cross cannot exclude the risk of subjection to treatment contrary to Article 3 in the present case.

147. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian government asked the Tunisian government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51-52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second *note verbale*, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions" (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.

149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

150. The applicant alleged that the criminal proceedings against him in Tunisia had not been fair and that his expulsion would expose him to the risk of a flagrant denial of justice. He relied on Article 6 of the Convention, the relevant parts of which provide:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

151. The Government rejected that argument.

A. Admissibility

152. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

153. The applicant submitted that there was a serious risk of a denial of justice in Tunisia, where the minimal safeguards provided by international law were disregarded. All Tunisians accused in Italy of terrorist activities had had unfair trials after being repatriated. The applicant cited as typical in that respect the case of Mr Loubiri Habib, who had been acquitted of terrorism charges by the Italian courts but imprisoned in Tunisia and deprived of the possibility of seeing his family. Mr Loubiri had succeeded in obtaining “revision” of the Tunisian criminal proceedings which had resulted in his conviction, but the revision proceedings in the Military High Court in Tunis had resulted in a substantial increase in his sentence, from ten to thirty years’ imprisonment.

154. The applicant further observed that the operative part of the judgment pronouncing his conviction *in absentia* had been served on his father, Mr Mohamed Cherif, on 2 July 2005. As a result, an appeal was no longer possible. In any event, even supposing that an appeal was possible and that such an appeal could stay execution of the sentence, that would not prevent the Tunisian authorities from imprisoning him as a precautionary measure. Moreover, in view of the serious infringements of political prisoners’ civil rights in Tunisia, even the theoretical possibility of an appeal out of time could not exclude the risk of a flagrant denial of justice. In addition, it could not be known with certainty whether the court having jurisdiction to hear such an appeal would be a civilian or a military court of appeal.

155. Lastly, the applicant noted that the trial had been conducted in Tunisia in a military court and that the defendant in such proceedings had no possibility of adducing evidence, appointing a lawyer or addressing the court. Moreover, in the present case, neither his family nor his lawyers had been able to obtain a copy of the military court’s judgment (see paragraph 30 above).

(b) The Government

156. The Government asserted that because the file did not contain the original or a certified copy of the judgment against the applicant given in Tunisia it was impossible to check whether the information he had supplied was correct. They further submitted that an expulsion could engage the responsibility of the Contracting State under Article 6 only in exceptional circumstances, in particular where it was apparent that any conviction in the

receiving country would amount to a “flagrant” denial of justice, which was not the position in the present case. On the other hand, a Contracting State was not required to establish whether proceedings conducted outside its territory satisfied each of the conditions laid down in Article 6. To rule otherwise would run counter to the current trend, encouraged by the Court itself, of strengthening international mutual assistance in the judicial field.

157. Under the relevant provisions of Tunisian law, a person convicted in his absence was entitled to have the proceedings reopened. The right to a reopening of the proceedings could be exercised in good time and in accordance with the requirements of Article 6. In particular, a person convicted in his absence who was living abroad could appeal within thirty days of the judgment *in absentia* being served. Where such service had not been effected, an appeal was always admissible and would stay execution of the sentence. Furthermore, the possibility of appealing against a conviction *in absentia* in Tunisia was confirmed by the declarations of the Director of International Cooperation at the Tunisian Ministry of Justice, which were reassuring on the point (see paragraph 40 above). In addition, the applicant had not adduced any evidence that in the light of the relevant rules of Tunisian law there had been shown to be substantial grounds for believing that his trial had been conducted in conditions contrary to the principles of fair trial.

158. Admittedly, in the States party to the Convention, trial before a military court might raise an issue under Article 6. However, in the case of an expulsion, an applicant had to prove that the denial of justice he feared would be “flagrant”. Such proof had not been produced in the present case. In addition, in December 2003 Tunisia had amended its domestic provisions relating to terrorist crimes committed by civilians, with the result that military judges had been replaced by civilian judges and an investigating judge took part in the investigation.

159. Lastly, the Government argued that the case of Mr Loubiri, cited by the applicant, was not relevant as an increase of the sentence on appeal was something that could occur even in those countries which were most scrupulously compliant with the Convention.

2. *The Court’s assessment*

160. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

161. The applicant alleged that his expulsion to Tunisia would deprive his partner and his son of his presence and assistance. He relied on Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

162. The Government rejected that argument.

A. Admissibility

163. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) **The applicant**

164. The applicant observed that he had a family life in Italy which would be disrupted by enforcement of his expulsion: he had been living with Mrs V. since 1998 and their child had been born the following year. At that time he had already requested a residence permit, which was not issued until 2001. When that permit expired he had tried unsuccessfully to regularise his situation in order to find work. The applicant's child attended school in Italy, which would not be possible in Tunisia, where the applicant himself was at risk of imprisonment or even death. Mrs V. had been out of work for about a year as she suffered from a serious form of ischaemia, which frequently made it necessary for her to be taken into hospital and also prevented her from travelling to Tunisia. The applicant was therefore the family's sole means of financial support.

165. Any allegation concerning the applicant's dangerousness to society had been refuted by his acquittal at first instance on the charge of international terrorism. As matters stood, this was the only judicial decision

given in the proceedings against him, since the appeal proceedings were still pending. No new evidence had been adduced by the Government.

166. Moreover, the authorities had many other means to keep an eye on the applicant, expulsion being a measure to be adopted only in extreme cases. In that connection, the applicant pointed out that, since 3 November 2006, he had to report three times a week to a police station in Milan and that he had been forbidden to leave Italian territory (see paragraph 43 above). He had always complied with these obligations and had thus been able to obtain the return of his driving licence, which had been withdrawn from him – illegally in his submission – by the vehicle licensing authority (*motorizzazione civile*).

(b) The Government

167. The Government submitted that account had to be taken of the following facts: (a) the applicant's family unit had been created at a time when his presence in Italy was unlawful, as he had had a son by an Italian woman in 1999, whereas the residence permit granted to him for family reasons had not been issued until 29 December 2001; (b) the child had not attended school for very long in Italy and had had no significant exposure to Italian culture (he was currently in the second year of primary school), so that he would be able to continue to attend school in Tunisia; (c) the applicant had never lived with Mrs V. and his son: they had lived in Arluno, until 7 October 2002, when they moved to Milan; the applicant had never lived in Arluno, had often travelled abroad, had been arrested on 9 October 2002 and had married another woman in a Muslim ceremony (see paragraph 57 above); and (d) the unit of family life could be preserved outside Italian territory, given that neither the applicant nor Mrs V. were in work in Italy.

168. The interference in the applicant's family life had a legal basis in domestic law, namely Law no. 155 of 2005. In addition, account had to be taken of the negative influence which, because of his personality and the scale of the terrorist danger, the applicant represented for national security, and of the particular importance which should be attached to the prevention of serious crime and disorder. Any interference with the applicant's right to respect for his family life therefore pursued a legitimate aim and was necessary in a democratic society.

169. In addition, no disproportionate or excessive burden had been imposed on the applicant's family unit. In the context of crime-prevention policy, the legislature had to enjoy broad latitude to rule both on the existence of a problem of public interest and on the choice of arrangements for the application of an individual measure. Organised crime of a terrorist nature had reached, in Italy and in Europe, very alarming proportions, to the extent that the rule of law was under threat. Administrative measures (such

as deportation) were indispensable for effective action against the phenomenon. Deportation presupposed the existence of “sufficient evidence” that the person under suspicion was supporting or assisting a terrorist organisation. The Minister of the Interior could not rely on mere suspicions but had to establish the facts and assess them objectively. All the material in the file suggested that that assessment, in the present case, had been correct and not arbitrary. The evidence used in the administrative deportation proceedings was the evidence taken in the course of public and adversarial proceedings in the Milan Assize Court. During those criminal proceedings the applicant had had the opportunity, through his lawyer, of raising objections and submitting the evidence he considered necessary to safeguard his interests.

2. The Court’s assessment

170. The Court observes its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7

171. The applicant submitted that his expulsion would be neither “necessary in the interests of public order” nor “grounded on reasons of national security”. He alleged a violation of Article 1 of Protocol No. 7, which provides:

“1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- (a) to submit reasons against his expulsion,
- (b) to have his case reviewed, and
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

172. The Government rejected that argument.

A. Admissibility

173. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

174. The applicant submitted that he was lawfully resident in Italian territory. He argued that the condition of “lawful residence” should be assessed by reference to the situation at the time of the deportation decision. When arrested he had a valid residence permit, which expired only because he was in prison. He had subsequently attempted to regularise his situation, but had been prevented from doing so on account of his internment in the temporary holding centre.

175. The applicant’s situation could now be regularised, since the terrorism charges had not led to his conviction, he was cohabiting with his Italian partner and son, and was able to work. However, any administrative step he might take was blocked by the fact that he had no document which could prove his nationality and could never obtain one from the Tunisian authorities (see paragraph 45 above).

176. The applicant submitted that he was being prevented from exercising the rights listed in paragraph 1 (a), (b) and (c) of Article 1 of Protocol No. 7, whereas his expulsion could not be regarded as “necessary in the interests of public order” or “grounded on reasons of national security”. In that connection, he observed that the considerations of the Minister of the Interior were contradicted by the Milan Assize Court, which had acquitted him of international terrorism. In any event, the Government had not adduced any evidence of the existence of dangers to national security or public order, so that the decision to take him to a temporary holding centre with a view to his expulsion had been “unlawful”.

(b) The Government

177. The Government observed that, according to the explanatory report accompanying Article 1 of Protocol No. 7, the word “lawfully” referred to the domestic legislation of the State concerned. It was therefore domestic legislation which should determine the conditions a person had to satisfy in order for his or her presence within the national territory to be considered

“lawful”. In particular, an alien whose admission and stay had been made subject to certain conditions, for example a fixed period, and who no longer complied with those conditions could not be regarded as being still “lawfully” present in the State’s territory. Yet after 11 October 2002, a date which preceded the deportation order, the applicant no longer had a valid residence permit authorising his presence in Italy. He was therefore not “an alien lawfully resident in the territory” within the meaning of Article 1 of Protocol No. 7, which was accordingly not applicable.

178. The Government further observed that the deportation order had been issued in accordance with the rules established by the relevant legislation, which required a simple administrative decision. The law in question was accessible, its effects were foreseeable and it offered a degree of protection against arbitrary interference by the public authorities. The applicant had also had the benefit of “minimum procedural safeguards”. He had been represented before the justice of the peace and the Regional Administrative Court by his lawyer, who had been able to submit reasons why he should not be deported. A deportation order had also been issued against the applicant when he was sentenced to four years and six months’ imprisonment, and hence after adversarial judicial proceedings attended by all the safeguards required by the Convention.

179. In any event, the Government submitted that the applicant’s deportation was necessary in the interests of national security and the prevention of disorder. They argued that these requirements were justified in the light of the information produced in open court during the criminal proceedings against the applicant and pointed out that the standard of proof required for the adoption of an administrative measure (a deportation order issued by the Minister of the Interior by virtue of Legislative Decree no. 144 of 2005) was lower than that required to ground a criminal conviction. In the absence of manifestly arbitrary conclusions, the Court should endorse the national authorities’ reconstruction of the facts.

2. The Court’s assessment

180. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 1 of Protocol No. 7.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

181. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

182. The applicant requested in the first place 20,000 euros (EUR) for loss of income. He observed that the deportation order had caused him to fall into an irregular situation, that he had been detained unlawfully in the Milan temporary holding centre for three months and that this had prevented him from carrying on his occupation.

183. In respect of non-pecuniary damage, the applicant claimed EUR 50,000 and suspension and/or annulment of the deportation order.

184. The Government observed that the deportation had not been enforced, so that the applicant, an alien who had contravened the laws of the Italian State and been lawfully detained after 9 October 2002, was not entitled to claim any pecuniary damage or loss of income.

185. On the question of non-pecuniary damage, the Government submitted that there was no causal link between the conduct of the Italian authorities and the sufferings and inconvenience alleged by the applicant. In any event, the applicant had not indicated what criteria had been used for the calculation of the sum claimed.

186. The Court reiterates that it is able to make awards by way of the just satisfaction provided for in Article 41 where the loss or damage on which a claim is based has been caused by the violation found, but that the State is not required to make good damage not attributable to it (see *Perote Pellon v. Spain*, no. 45238/99, § 57, 25 July 2002).

187. In the present case, the Court has found that enforcement of the applicant's deportation to Tunisia would breach Article 3 of the Convention. On the other hand, it has not found any violations of the Convention on account of the deprivation of the applicant's liberty or the fact that his presence in Italy was unlawful. Consequently, it can see no causal link between the violation found in the present judgment and the pecuniary damage alleged by the applicant.

188. With regard to the non-pecuniary damage sustained by the applicant, the Court considers that the finding that his deportation, if carried out, would breach Article 3 of the Convention constitutes sufficient just satisfaction.

B. Costs and expenses

189. The applicant did not request reimbursement of the costs and expenses incurred during the domestic proceedings. He did, however, request reimbursement of his costs relating to the proceedings before the Court, which, according to a bill from his lawyer, amounted to EUR 18,179.57.

190. The Government considered that amount excessive.

191. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Belziuk v. Poland*, 25 March 1998, § 49, *Reports* 1998-II).

192. The Court considers the amount claimed for the costs and expenses relating to the proceedings before it excessive and decides to award EUR 8,000 under that head.

C. Default interest

193. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention;
3. *Holds* that it is not necessary to examine whether enforcement of the decision to deport the applicant to Tunisia would also be in breach of Articles 6 and 8 of the Convention and Article 1 of Protocol No. 7;
4. *Holds* that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 February 2008.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Zupančič;
- (b) concurring opinion of Judge Myjer, joined by Judge Zagrebelsky.

J.-P.C.
V.B.

CONCURRING OPINION OF JUDGE ZUPANČIČ

1. To the majority opinion with which I agree, I would like to add the following remarks in order to pinpoint two additional issues. I have explained the first question to some extent in my concurring opinion in *Scozzari and Giunta*¹ several years ago. One problem in family-law cases, in pre-trial detention cases and in emergency-assessment cases, as in *Saadi v. Italy* here, is that the judicial assessment does not have to do with a past historical event. Because I have dealt with this question in *Scozzari and Giunta* it is not necessary to reiterate the whole problem, except that I might add that the legal paradigm is retrospective. Legal process as a conflict-resolution context, together with all its evidentiary apparatus, is always retrospective. It is the insurance companies that are used to making “speculative” probabilistic assessments of the likelihood of future events. In American legal literature one may find many serious mathematical contributions concerning the descent from abstract probability to the concrete assessment of risk. When one is dealing with large numbers, as insurance companies, for example, often do, one may use a fairly simple formula known as “Bayes’ theorem”. However, when one is dealing with rare events, the use of Bayes’ formula becomes impossible, given that in rare events there is no statistical reality one could refer to. In paragraph 142 of the judgment the majority rightly say that, although the assessment of risk remains to some degree speculative, the Court has always been very cautious in examining the material placed before it in the light of the requisite standard of proof (paragraphs 128-32) before indicating an interim measure under Rule 39 or finding that enforcement of removal from the territory would be contrary to Article 3 of the Convention.

Of course, the reference in this context has always been to *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V). In § 74, the standard rule was established as follows: “where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to [torture or to inhuman or degrading treatment or punishment] in the receiving country ..., Article 3 implies the obligation not to expel the person in question to that country.” This standard has been used by the United Nations Committee against Torture when applying Article 33 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1. *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII.

While superficially logical, the *Chahal* test has an inherent problem which I describe in the beginning of this opinion. No matter how precise the wording of the *Chahal* test, it applies to the probability of future events rather than something which has already happened. It is therefore at least

inconsistent to say that a certain standard of proof as referred to in the judgment in paragraph 142 could be applied. The simple reason for that is, of course, that one cannot prove a future event to any degree of probability because the law of evidence is a logical rather than a prophetic exercise. It is therefore an understatement to say that the application of the *Chahal* test is “to some degree speculative”.

The cognitive approach to future events may be only a rational probabilistic assessment in the spectrum of experiment which moves from abstract probability to concrete probability. The correctness of that probabilistic assessment – one might use the word prognosis – critically depends on the nature of information (not evidence!) adduced in a particular situation.

Whether law deals with past events and their proof on the one hand or with the probabilities of future events on the other hand, the information supplied for the purpose is never 100% complete. When dealing with historical events, the problem is that they are un-repeatable by nature and are in some sense irretrievably lost in the past. This, in contrast with repeatable events, makes for the difference between the scientific approach and proof on the one hand, and a legal assessment of what has happened in the past on the other hand.

Consequently, there is a parallelism between the evidentiary problem in assessing the actual occurrence of past events on the one hand, and the probabilistic assessment of future events as in the present case on the other hand. However, while in both cases we are dealing with situations that are cognitively never completely accessible, the “evidentiary” problem concerning future events is far more radical.

From time immemorial the legal process has dealt with these problems and has invented a way of resolving situations despite this cognitive insufficiency. I refer to the use of presumptions in Roman law where the magistrate (*praetor*) was required to make a decision about the past event although the evidence adduced was insufficient. The formula concerning presumptions, therefore, referred to situations of doubt and it required the decision-maker to assume a particular position when in doubt, as indicated by the legally mandated presumption. In other words, this enabled the system to reach a *res judicata* level even without being able to ascertain the whole truth.

The mirror image of presumption is what at common law we call “the burden of proof” and “risk of non-persuasion”. The person bearing the burden and risk in the legal process is therefore put in a situation in which he must adduce sufficient evidence – or else lose the case.

This logic works very well with past events, but it does not work very well either in family-law cases (*Scozzari and Giunta*) or in pre-trial detention cases or for that matter in Rule 39 cases.

The latter are clearly emergency situations in which a person is, for example, arrested at an airport in order to be expelled (“*refoulement*”). To say in such a situation that this person must bear both the burden of proof and the risk of non-persuasion – while being held at the airport detention centre! – is clearly absurd. To make such a person bear the burden and the risk without redistributing both the burden and the risk and placing a large portion of it on the expelling State, borders on the inquisitorial. This kind of superficial formalism goes against the very grain of the European Convention on Human Rights.

Moreover, the purpose of injunctions as per Rule 39 of the Rules of Court is not to adjudicate a particular case. In every legal system, emergency measures of this kind apply in order to freeze the situation so that the court dealing with the situation may have the time and the opportunity to make justice prevail. In such situations the issue is not whether the person being expelled will or will not be tortured or subjected to inhuman or degrading treatment in the country to which he is being expelled, but simply to create a delay without irremediable consequences should the person be irretrievably expelled. The aim therefore is not some kind of truth-finding. The aim is to create conditions in which truth-finding may yet happen.

It therefore becomes obvious that the role of presumptions and of the “burden of proof” is here completely different because it does not serve an ultimate decision over the subject matter; it only serves to preserve the future scope of judicial decision-making over the subject matter. It follows inexorably that the role of the person being expelled in Rule 39 situations is to produce a shadow of a doubt, whereupon the burden of proof shifts to the country concerned. This is human rights. In evidentiary doctrine this is called “bursting the bubble”, as for example in the case of presumption of sanity, where a minimum of doubt suffices to eliminate this presumption and shifts the burden to the prosecution. The reasons for that shift are, of course, completely different in the context of criminal trial, but are extenuated to the nth degree in an airport emergency situation in which the person is being expelled. In the context of human rights the minimal empathy and the humanness of human rights dictate that a person threatened with expulsion should not bear an excessive burden of proof or risk of non-persuasion. The expelling State, in other words, is morally responsible for the mistaken assessment of risk, whereas the Court must in such situations favour the security of the person being expelled.

2. I am in complete agreement with paragraph 139 of the judgment in which the majority say that there is simply no *quid pro quo* between “serious threat to the community” on the one hand, and “the degree of risk of ill-treatment that the person may be subject to on return” on the other hand. The police logic advanced by the intervening Contracting State simply does not hold water. The question of the danger posed by the person

to be expelled to the expelling party does not have an immediate bearing of any kind on the danger he might face if in fact expelled. Certainly, there will be cases in which a confirmed or notorious terrorist will for that reason face a harsher sentence in the country, usually a non-signatory of the Convention, to which he is being expelled. The fact, however, that these two sets overlap does not in itself prove that there should be a *quid pro quo* between them.

It is intellectually dishonest on the other hand to suggest that expulsion cases require a low level of proof simply because the person is notorious for his dangerousness. From the policy point of view it is clear that the expelling State will in such situations be more eager to expel. The interest of a party, however, is no proof of its entitlement. The spirit of the Convention is precisely the opposite, that is, the Convention is conceived to block such short-circuit logic and protect the individual from the unbridled “interest” of the executive branch or sometimes even of the legislative branch of the State.

It is thus extremely important to read paragraph 139 of the judgment as a categorical imperative protecting the rights of an individual. The only way out of this logical necessity would be to maintain that such individuals do not deserve human rights – the third-party intervener is unconsciously implying just that to a lesser degree – because they are less human.

CONCURRING OPINION OF JUDGE MYJER, JOINED BY JUDGE ZAGREBELSKY

I voted with the other judges that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention. I also fully agree with the reasoning which is contained in paragraphs 124 to 148 of the judgment.

Still, I would like to add the following remarks.

As far as the procedure is concerned:

The question of principle in *Saadi v. Italy*, as raised by the intervening government (is there reason to alter and modify the approach followed by the Court in *Chahal* in cases concerning the threat created by international terrorism?), was earlier raised in some other cases which are at present still pending before a Chamber of the Third Section (*Ramzy v. the Netherlands*, no. 25424/05, and *A. v. the Netherlands*, no. 4900/06). In these cases against the Netherlands, leave to intervene as a third party was granted to the governments of Lithuania, Portugal, Slovakia and the United Kingdom and to some non-governmental organisations. These governments submitted a joint third-party intervention; separate third-party submissions and a joint third-party submission were filed by some non-governmental organisations.

It then happened that the case of *Saadi v. Italy* (earlier referred to as *N.S. v. Italy*) was ready for decision while the cases against the Netherlands were not. In the *Saadi* case the Chamber of the Third Section relinquished jurisdiction on 27 March 2007 in favour of the Grand Chamber. In Case-law report 95 of March 2007 (the provisional version, which appeared in April 2007), mention was made on p. 38 of the *N.S. v. Italy* case (relinquishment in favour of the Grand Chamber), indicating that this was a case concerning the expulsion of the applicant to Tunisia on grounds of his alleged participation in international terrorism. The same appeared in the final version of Information Note No. 95 on the case-law of the Court, March 2007, which appeared some time later. The government of the United Kingdom requested leave to intervene as a third party in good time.

As far as the question itself is concerned:

Paragraph 137 of the judgment gives the answer in a nutshell: “The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence ... It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.”

I would not be surprised if some readers of the judgment – at first sight – find it difficult to understand that the Court by emphasising the absolute nature of Article 3 seems to afford more protection to the non-national applicant who has been found guilty of terrorist-related crimes than to the protection of the community as a whole from terrorist violence. Their

reasoning may be assumed to run as follows: it is one thing not to expel non-nationals – including people who have sought political asylum – 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 (see for instance the judgment of 11 January 2007 in *Salah Sheekh v. the Netherlands*, no. 1948/04) or even not to expel non-nationals who fall in the category of Article 1F of the Convention on the Status of Refugees of 28 July 1951 (decision of 15 September 2005 in *Bonger v. the Netherlands*, no. 10154/04) as long as these people pose no potential danger to the lives of the citizens of the State, but it makes a difference to be told that a non-national who has posed (and maybe still poses) a possible terrorist threat to the citizens cannot be expelled.

Indeed, the Convention (and the Protocols thereto) contain legal human rights standards which must be secured to everyone within the jurisdiction of the High Contracting Parties (Article 1). Everyone means everyone: not just terrorists and the like. The States also have a positive obligation to protect the life of their citizens. They should do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge (*Osman v. the United Kingdom*, 28 October 1998, §§ 115-16, *Reports of Judgments and Decisions* 1998-VIII). They have, as was laid down in the preamble of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (adopted on 11 July 2002), “*the imperative duty*” to protect their populations against possible terrorist acts. I even daresay that the Convention obliges the High Contracting States to ensure as far as possible that citizens can live without fear that their life or goods will be at risk. In that respect I recall that “Freedom from Fear” ranks among the Four Freedoms mentioned in Roosevelt’s famous speech.

However, States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those “absolute” rights from which no derogation may be made even in times of emergency (Article 15). During a high-level seminar on Protecting human rights while fighting terrorism (Strasbourg, 13-14 June 2005), the former French Minister of Justice Robert Badinter rightly spoke of a dual threat which terrorism poses for human rights: a direct threat posed by acts of terrorism; and an indirect threat because anti-terror measures themselves risk violating human rights. Upholding human rights in the fight against terrorism is first and foremost a matter of upholding our values, even with regard to those who may seek to destroy them. There is nothing more counterproductive than to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards. Such a

course of action would only serve to create fertile breeding grounds for further radicalisation and the recruitment of future terrorists.

After the events of 11 September 2001, the Committee of Ministers of the Council of Europe reaffirmed in the preamble of the above-mentioned guidelines the States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member States in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. Point XII § 2 of the guidelines makes it clear that it is the duty of a State that intends to expel a person to his or her country of origin or to another country not to expose him or her to the death penalty, to torture or to inhuman or degrading treatment or punishment.

The Court found that in this case substantial grounds have been shown for believing that the applicant would risk being subjected to treatment, contrary to Article 3 of the Convention, if he were to be deported to Tunisia.

Then there is only one (unanimous) answer possible.