

of such WTO adjudications, may strategically decide to construct their legal arguments accordingly.

The *Brazil—Retreaded Tyres* dispute raises significant issues for the WTO and the multilateral trading system. The system's ability to accommodate the nontrade policy goals of WTO members is a continuing challenge. In this case, the decision appears to play to the arguments of both proponents and opponents of trade liberalization. It arguably broadens the scope of Article XX by showing some deference to the nontrade policy objectives of WTO members and a greater appreciation of the complexity of environmental problems and the associated need for a comprehensive response involving a variety of measures. This approach is balanced by the need to ensure that in efforts to achieve such nontrade objectives, the requisite measures must be nondiscriminatory. Moreover, the Appellate Body seems to be receptive to the particular conditions and policy objectives of less economically developed WTO members, which may not be able to adhere to the multilateral trading system's neutral rules and requirements of non-discrimination. This change may indicate the early signs of accepting distinctions between WTO members based on their need for special or differential treatment when interpreting the GATT exceptions. Finally, the question of whether the system can coexist with FTAs continues to be a salient one since a WTO member's obligations under one treaty, including the enforcement thereof, may lead to violations of another.

KEVIN R. GRAY

*Trade Law Bureau, Government of Canada\**

*Expulsion of suspected terrorists—obligation of non-refoulement—diplomatic assurances—absolute prohibition of torture and inhuman or degrading treatment*

SAADI V. ITALY. App. No. 37201/06. At <<http://www.echr.coe.int>>.

European Court of Human Rights (Grand Chamber), February 28, 2008.

In *Saadi v. Italy*,<sup>1</sup> decided February 28, 2008, the European Court of Human Rights (ECHR) held that the deportation of Nassim Saadi to Tunisia would constitute a breach of Italy's positive obligations under Article 3 of the European Convention on Human Rights.<sup>2</sup> Citing *Soering v. United Kingdom*<sup>3</sup> and *Chahal v. United Kingdom*,<sup>4</sup> the ECHR reaffirmed the long-established principle that Article 3 prohibits the transfer of an individual to a country where there is a "real risk" that he will be subjected to torture or to inhuman or degrading treatment or punishment. The principle is not to be applied differently when an individual is suspected of involvement with terrorist activity. Since the Article 3 prohibition is absolute, the danger that an individual might pose to the community cannot be taken into account when assessing the risk to the individual upon transfer. States may rely on diplomatic assurances to

\* The opinions expressed in this case report are those of the author and in no way represent those of the Government of Canada.

<sup>1</sup> App. No. 37201/06 (Eur. Ct. H.R. Feb. 28, 2008).

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222, available at <<http://www.echr.coe.int>>.

<sup>3</sup> 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>4</sup> 1996-V Eur. Ct. H.R. 1831 (reported by Beate Rudolf at 92 AJIL 70 (1998)). The "real risk" language comes from this judgment, which is discussed further below.

satisfy their Article 3 obligations only when, in practical terms, the assurances constitute a sufficient guarantee that the individual rights of the proposed transferee will be respected.

Nassim Saadi was in Italy on a residence permit when, in October 2002, he was arrested and placed in pretrial detention. He remained in detention throughout a long prosecutorial and appellate process. Though not convicted of any terrorist offenses in Italy, he was convicted in absentia of terrorist offenses by a military court in Tunis and sentenced to twenty years' imprisonment. In August 2006, two days after Saadi's release from custody in Italy, the Italian minister of the interior issued a deportation order. Soon thereafter, Saadi was taken into pre-deportation detention. In issuing the order, the minister stated that "it was apparent from the documents in the file" that the applicant had played an "active role" in an organization responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad (para. 32). Consequently, his conduct was disturbing public order and threatening national security (*id.*). Saadi then applied for political asylum, claiming that he was at risk of torture and political and religious reprisals if returned to Tunisia. His application for asylum was deemed inadmissible on the basis of national security. Following the intervention of numerous nongovernmental organizations and the production of documentation relating to incidences of torture and ill treatment in Tunisia, the deportation was stayed by the Italian courts. Saadi also requested that the ECHR issue a stay.<sup>5</sup>

Before the ECHR, Saadi claimed that it was "a matter of common knowledge" that persons detained on the basis of terrorist involvement were subjected to torture and persecution in Tunisia (para. 98). On that basis, he claimed that there was a real risk of him being exposed to such treatment. Italy, joined by the United Kingdom as a third-party intervenor,<sup>6</sup> claimed that the ECHR's standard, as outlined in *Chahal*, ought to be amended and recast in the context of individuals who pose a particular danger to the community as a whole.

*Chahal* concerned a Sikh activist who had entered the United Kingdom illegally but subsequently benefited from a general amnesty for illegal entrants. He was active in the establishment of the International Sikh Youth Federation and was later arrested and charged with conspiracy to kill the prime minister of India. A deportation order was issued as a result of *Chahal*'s political activities, but he claimed that such deportation would violate his Article 3 rights because it would expose him to the risk of torture or inhuman or degrading treatment or punishment. The ECHR held that Article 3 conferred an absolute right on all within the jurisdiction of the state. As a result, the United Kingdom could not rely on national security interests to justify the deportation of the applicant. The ECHR held that the

prohibition provided by Article 3 against ill-treatment is absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment

<sup>5</sup> A full recital of the factual background, including Saadi's exhaustion of domestic remedies, is provided in paragraphs 9 to 57 of the judgment.

<sup>6</sup> Article 36 of the European Convention provides that the ECHR may permit member states to intervene when one of its nationals is an applicant (Article 36(1)) or when it would be in the interest of the proper administration of justice (Article 36(2)). Any time after giving the respondent state notice of an application, the ECHR may give a third party permission to submit written comments or, in exceptional cases, to take part in hearings (Article 36(2), Rule 44(2)). In *Saadi* the United Kingdom intervened under Article 36(2) and Rule 44(2).

is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.<sup>7</sup>

According to Italy and the United Kingdom in *Saadi*, this “real risk” standard is not appropriate in the prevailing climate of an international terrorist threat. The United Kingdom, in particular, argued (paras. 117–23) that a state ought to be entitled to take the danger to the public into account when the applicant is considered to be involved in terrorist activity; the applicant should be required to produce evidence showing a higher risk of exposure to prohibited treatment than is required under *Chahal*. The case of suspected terrorists causes special difficulties for states, the United Kingdom argued, because it is unlikely that another state will receive such individuals and because criminal sanctions or surveillance-type measures may not provide adequate protection to the community as a whole. Since states are entitled to use immigration measures to protect themselves against external security threats, they ought to be entitled to demand that dangerous individuals establish their being at greater risk before a prospective expulsion would engage Article 3.

Although the ECHR accepted that contracting states have a right to control the entry, residence, and expulsion of aliens and that the European Convention includes no right to political asylum (para. 124), it reasserted its long-standing position that state action relating to expulsion is restricted by the absolute nature of Article 3 and by the implied positive obligation not to send individuals to states where they are at real risk of prohibited treatment (para. 125). The absolute nature of the prohibition on torture and on inhuman and degrading treatment or punishment “enshrines one of the fundamental values of democratic societies” (para. 127) and must therefore be maintained, even in times of emergency or war. Notwithstanding that states now face “immense difficulties” in combating the contemporary international terrorist threat (para. 137), a person’s suspected involvement in terrorist activity does not affect the absolute nature of their rights under Article 3: “As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3” (para. 127 (citations omitted)).

The ECHR noted (para. 141) that it had reached a similar conclusion in *Chahal*, and held that, even if it were true that the terrorist threat has increased since the time of that decision, the change in background conditions does not undercut the absolute nature of Article 3. As to the United Kingdom’s first claim—that the sending state ought to be able to balance the community interest against the risk to the proposed transferee who is a suspected terrorist—the ECHR held that a person’s conduct is irrelevant to Article 3 assessments (para. 137). In this respect, Article 3 provides a greater degree of protection (para. 138) than that afforded by Articles 32 and 33 of the 1951 UN Convention Relating to the Status of Refugees.<sup>8</sup> The ECHR further concluded that the United Kingdom’s idea of balancing the risk to the individual and the dangerousness of that individual to the community as a whole was “misconceived” (para. 139):

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

<sup>7</sup> *Chahal*, para. 80 (citations omitted).

<sup>8</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150.

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. (*Id.*)

This finding led the Court also to reject the United Kingdom's second claim—that where an individual is considered to pose a considerable danger to national security, Article 3 would be breached only if he were “more likely than not” to be subjected to prohibited treatment in the receiving state. This is a more demanding standard than that which is required under the ECHR's established jurisprudence, which speaks only of a “real risk” of prohibited treatment.<sup>9</sup>

The ECHR considered the related matter of what evidence it should take into account when assessing whether the applicant has established a “real risk.” It held that the burden was on the applicant to adduce evidence to establish that risk (para. 129), though the ECHR might also consider evidence obtained *proprio motu* (para. 128). Using that evidence, the Court would “examine the foreseeable consequences” of the proposed expulsion, “bearing in mind the situation [in the receiving country] and [the applicant's] personal circumstances” (para. 130). Thus, although an Article 3 assessment is necessarily speculative, it must be conducted with care and rigor (para. 142) and take into account the circumstances of the case in relation to what the sending state knew or ought to have known at the time of the deportation (para. 133). The Court found in this case that there were substantial grounds to believe that Saadi was at a real risk of being subjected to treatment prohibited by Article 3 upon return to Tunisia and, as a result, that his deportation would constitute a breach of Italy's obligations under that article.

Although it did not form part of the unanimous judgment in the case, the concurrence of Judge Zupančič considered the role that evidentiary presumptions might play in Article 3 assessments of proposed transfers. Noting that such assessments were difficult in view of their speculative nature and the severity of the consequences for an individual if the risk is underestimated, Zupančič held that it “borders on the inquisitorial” to make the applicant bear not only the burden of establishing “real risk,” but also the risk of being subjected to such treatment itself. In his view, “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.” Thus, he argued that a person subject to expulsion ought to be required only to “produce a shadow of a doubt” as to his future safety, at which point a presumption in his favor would arise and the burden of rebutting that presumption would fall on the contracting state.

As a final matter the ECHR briefly considered the claim that a state's Article 3 obligations could be satisfied by means of diplomatic assurances from the receiving state. While implying that diplomatic assurances might be sufficient in some cases, the ECHR did not find Tunisia's representations—a mere outline of the domestic law applicable to Saadi—sufficient in this case. In a case where reliable sources report that prohibited treatment is either engaged in, or tolerated by, the receiving state, the mere existence of domestic prohibitions on torture and ill treatment is insufficient to ensure the adequate protection of an individual's Article 3 rights (para. 147). Diplomatic assurances alone are also not enough; such assurances need to be evaluated in the particular, practical circumstances of each case (para. 148).

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<sup>9</sup> See, e.g., *Soering; Chahal*.

The *Saadi* decision has been widely welcomed by human rights organizations, including Human Rights Watch, Amnesty International, and Human Rights First. While it constitutes a serious rebuff to Italy's deportation policy, which had been the subject of some concern on the part of the UN Committee Against Torture,<sup>10</sup> perhaps the case's greatest significance is in relation to the United Kingdom's assertion that the *Chahal* standard is inappropriate in the context of contemporary counterterrorism. In 2005, Prime Minister Tony Blair remarked that "the circumstances of our national security have now self evidently changed" and that states ought to be permitted to rely on diplomatic assurances when deporting individuals believed to present a danger.<sup>11</sup> This position reflects the United Kingdom's post-9/11 view that the challenge posed by international terrorism is radically different to that which existed before and therefore requires a recalibration of legal standards in international human rights law. In particular, the United Kingdom has asserted the right to deport non-UK citizens involved in terrorist activity pursuant to memorandums of understanding with, or diplomatic assurances by, the receiving states. This practice has been widely criticized; human rights advocates argue that such assurances are nonbinding, unenforceable, and therefore inadequate to protect the fundamental individual right to be free from torture or inhuman and degrading treatment or punishment. Although the *Saadi* Court did not hold that diplomatic assurances can never be sufficient to satisfy a state's positive obligations under Article 3, it did suggest that the circumstances in which such assurances would be sufficient are relatively narrow: situations in which "such assurances provided, in their practical application," effective protection against violation of European Convention rights. The laying down of such a test—vague though it is—gives rise to an especially important question: within the context of any particular deportation procedure, who is to assess the practical sufficiency of assurances?

At first blush, one might suspect that the assessment would be conducted at the executive level of the deporting state: having received such assurances through diplomatic channels, the executive branch would decide on whether the assurances were sufficient or not. The ECHR's approach in *Saadi* to diplomatic assurances seems to require, however, the active involvement of at least one other branch of government—at least if the deportation order is challenged, which would presumably happen almost always. In that context, the judiciary would be the natural choice, and the UK Court of Appeal has taken the view that the *Saadi* judgment essentially obligates courts to become involved (as opposed to deferentially deferring to the executive) in the process of determining whether any particular diplomatic assurances are sufficient to meet a state's Article 3 obligations.

In *AS & DD (Libya) v. Secretary of State for the Home Department*,<sup>12</sup> the Court of Appeal endorsed the ECHR's insistence in *Saadi* (para. 142) on the application of "rigorous criteria" and "close scrutiny" when considering whether diplomatic assurances are sufficient under Article 3. When the secretary of state for the Home Department claimed that this test was fulfilled by means of a memorandum of understanding between the United Kingdom and Libya, the Court held that the sufficiency of such agreements is to be determined on a case-by-case basis, taking into account the concrete circumstances in the receiving state. The Court of Appeal

<sup>10</sup> See UN Committee Against Torture, Consideration of the Fourth Periodic Report of Italy, UN Doc. CAT/C/SR.721 (May 11, 2007).

<sup>11</sup> [Prime Minister] Tony Blair, Press Conference (Aug. 5, 2005), at <<http://www.number-10.gov.uk/output/Page8041.asp>>.

<sup>12</sup> [2008] EWCA Civ 289.

therefore turned to the standard explicated in *Saadi*, where the ECHR rejected the United Kingdom's argument that the contemporary terrorist threat required a more permissive application of the *non-refoulement* principle in relation to individuals deemed (by the executive branch) to pose national security risks. In the particular circumstances presented in *AS & DD (Libya)*, the Court of Appeal found that the diplomatic assurances offered were inadequate. While Libya provided the assurances in good faith, the unpredictable personal and political pragmatism of the Qaddafi regime rendered those assurances unreliable, leading the Court to conclude that they failed to provide sufficient protection for the applicants' rights.<sup>13</sup>

The U.S. Supreme Court took a different approach to an analogous question in *Munaf v. Geren*.<sup>14</sup> The petitioners in that case were U.S. citizens detained in Iraq by U.S. forces serving as part of the Multinational Force–Iraq and due to be transferred to the Iraqi government to face various criminal charges. They argued that the United States could not transfer them into Iraqi custody, because doing so would expose them to a risk of torture. Eschewing an approach that would require “close scrutiny” of such decisions, the Supreme Court held that the question of whether or not to transfer an individual to the custody of another state was a question for the executive branch. Notwithstanding that the risk of torture was “a matter of serious concern” to the Court, it held “that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.”<sup>15</sup> This holding stands in strong contrast to the ECHR's approach in *Saadi* and that of the UK Court of Appeal in *AS & DD (Libya)*.<sup>16</sup> Notably, however, the Supreme Court did not completely foreclose the possibility that federal courts might scrutinize an “extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway.”<sup>17</sup>

The different approaches of the UK Court of Appeal in *AS & DD (Libya)* and the U.S. Supreme Court in *Munaf* may result in a serious operational difficulty for the United Kingdom and United States. The United Kingdom may find itself unable to surrender or transfer individuals captured and detained in the course of current military-support operations for the Iraqi and Afghan governments because UK troops are bound by the terms of the European Convention when they act abroad, with the consequence that any individuals in the custody of those troops enjoy Convention rights regardless of citizenship or location.<sup>18</sup> Although the United Kingdom may attempt to circumvent this limitation by means of diplomatic assurances, the adequacy of those assurances would be subject to challenge in the domestic courts.

<sup>13</sup> *Id.*, paras. 68–82.

<sup>14</sup> 128 S.Ct. 2207 (June 12, 2008).

<sup>15</sup> 128 S.Ct. at 2225.

<sup>16</sup> [2008] EWCA Civ 289.

<sup>17</sup> 128 S.Ct. at 2226. See also the concurring opinion of Justice Souter, joined by Justices Ginsburg and Breyer.

<sup>18</sup> *R (Al-Skeini) v. Sec'y of State for Defence*, [2007] UKHL 26 (see case report in this issue by Ralph Wilde). Although *R (Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58 (reported by Alexander Orakhelashvili at 102 AJIL 000 (2008)), provides that action otherwise prohibited by the European Convention may be permissible if undertaken pursuant to a Security Council resolution and limited to the extent required, it seems unlikely that this decision has the potential to undermine *Saadi*, given the *jus cogens* nature of the prohibition on torture and the absolute nature of Article 3. Decisions of the European Court of First Instance tend to support this analysis—see, for example, *Ayadi v. Council*, [2006] ECR II-2139—although a decision by the European Court of Justice is awaited.

By contrast, *Munaf* suggests that the United States—operating in broadly analogous circumstances—would not face the same potential limitations with regard to potential transfers. The apparent implication is that, depending on the identity of the custodial state, individuals detained in the course of the so-called war on terror may have different degrees of enforceable protections against *refoulement*, notwithstanding the absolute and *jus cogens* nature of the prohibition on torture. It remains to be seen whether this lack of parallelism will manifest itself in operational arrangements between the United Kingdom and United States, whereby (for example) individuals who are thought to be sought by the Iraqi or Afghan governments are taken into custody only by the United States and not by the United Kingdom. What is certain, however, is that the two states' different standards regarding judicial analysis of the risk of torture and the adequacy of diplomatic assurances has the potential to undermine the ECHR's effort in *Saadi* to reinforce the European Convention's absolute prohibition against torture.

FIONA DE LONDRAS

*University College Dublin School of Law, Ireland*

*Treaty enforcement—Vienna Convention on Consular Relations—International Court of Justice—federalism—self-execution of treaties—foreign affairs powers of the executive*

MEDELLÍN v. TEXAS. 128 S.Ct. 1346 (2008).

United States Supreme Court, March 25, 2008.

In *Medellín v. Texas*,<sup>1</sup> a 6-3 majority of the U.S. Supreme Court held that the decision of the International Court of Justice (ICJ) in the *Avena* case<sup>2</sup> was not automatically binding as domestic law within the United States, and that the president, absent a congressional act, lacked the power to enforce the decision against U.S. states. The ICJ had decided in *Avena* that with regard to 51 Mexican nationals on death rows in ten U.S. states, the United States was in breach of its obligations under Article 36 of the Vienna Convention on Consular Relations to provide consular notification to foreign nationals who are detained or arrested, and that the United States must provide “review and reconsideration” of the convictions and sentences of those 51 individuals.<sup>3</sup> The Supreme Court rejected petitioner José Medellín’s argument that as one those named in *Avena*, he was entitled to review of his state conviction and sentence because *Avena* preempted contrary Texas state law and also because Texas was bound by a February 2005 memorandum from President Bush stating U.S. intent to comply with *Avena*. The Supreme Court rejected Medellín’s claim, holding that “neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions” (p. 1348).

In 1969, the United States became party to the Vienna Convention and to its Optional Protocol, the latter of which provides that disputes arising out of the application or interpretation

<sup>1</sup> 128 S.Ct. 1346 (2008).

<sup>2</sup> *Avena* (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 31).

<sup>3</sup> See Sean D. Murphy, Contemporary Practice of the United States, ICJ Decision Regarding Mexicans on Death Row in United States, 98 AJIL 364 (2004); Dinah L. Shelton, Case Report: Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States), 98 AJIL 559 (2004).