CHAPTER IV

PRINCIPLE OF NON-REFOULEMENT AND THE DOCTRINE OF EXTRADITION: A STUDY OF CASES FROM 1973 TO 2014

IV.1 INTRODUCTION

The present chapter focuses on the detailed case study and their analysis on the conflict between the principle of non-refoulement and extradition between the years 1973 to 2014. These chapters have been divided into section which deals with a period of 10 years and the cases pertaining to the same are discussed there under.

IV.2. CASES BETWEEN 1973 AND 1983

In the case of *Kakis* v. *Government of the Republic of Cyprus*[509], the applicant was accused of having an important part in the EOKA killing which happened in the year 1973. Based on such accusation, the government of Cyprus filed an application seeking his Extradition. After the warrant regarding his arrest was filed, the applicant left his house and has been hiding since 15 months. He then settled in England along with Mr. Alexandrou who was the applicant's only alibi witness, who swore that he would not return to give evidence in Cyprus. The authorities of the state after finding the applicant wanted him to be extradited to which he stated that the steps taken by the authorities are unjust and oppressive. The authorities were blamed by the applicant for their delay in finding the applicant and then carrying on the process of Extradition. The court in this case regarded that the fact the authorities carried out the process so late is not enough to prove that the process has been unjust. The court

[509][1978] 1 WLR 779, [1978] 2 All ER 634

regarded that the hindrance in the extradition proceedings was brought about by the applicant himself. If he would have not left the place of his residence and kept hiding for months he would have not gone through such delay. Therefore his extradition request was held valid by the court.

IV.3. CASES BETWEEN 1983 AND 1993

The case of *Canada* v. *Schmidt*[510], concerns extradition of the respondent who was being accused of kidnapping and child stealing of a two year old girl based on the extradition treaty signed between the United States of America and Canada. In this case, Schmidt hereby referred as respondent with the help of her son and her son's friend was suspected to have kidnapped a girl of two years from a Cleveland sidewalk. She was taken to New York and then raised her as her own child. On the other hand, the child's parents, the complainants complained to the authorities regarding her absence. When the authorities could not find the child, the father in anguish committed suicide.

After two years when the respondent attended a family reunion along with her daughter, she happened to meet a particular person who helped the complainants in the process of finding their daughter. He recognized the child and informed about the same to the Cleveland police authorities after which she was returned to her parents. After the respondent was arrested, she was charged with the federal offence of kidnapping and the state offence of child stealing .

The respondent accepted the charges of abduction, which was filed against her, but in defense she contended that she believed the child to be illegitimate daughter of her son and was living with her mother in a home of bad reputation.[511] Even though the court did not found her guilty for kidnapping, the state offence of child stealing was still pending against her. In the middle of the case, the respondent left the country and returned back to the Canada. The authorities therefore filed an extradition request against her based on the Canada-United States extradition treaty following which the Canadian authorities arrested her.

[510][1987] 1 S.C.R. 500, 524
[511]Ibid.

In her defense the representatives of the respondent stated that she will not have the benefit of raising her previous federal prosecution in bar of her prosecution under state law.[512] While under the Fifth Amendment of the Constitution of the United States, a person is protected from double jeopardy against federal prosecutions that provision does not apply to the states although at some point the cruelty of harassment by multiple prosecutions, by a state that would violate the due process clause of the Fourteenth Amendment. [513] Basically, the contention, which the respondent was trying to put forward, was that the proceedings, which could have taken against her for the same in the origin of her country, would be different from the standards of the foreign trial. The court based its judgment on the basis of Section 6 of the Canadian charter on rights and freedoms, which state that every individual has a right to life, liberty and security. They should not be deprived of these rights unless required by the general principles of elemental justice. They extended the article and connected with Section 7 that protected the rights of the respondent in the extradition proceedings and subjected her to the protection under the charter.

In the case of *Soering* v. *United Kingdom*[514], Mr. Jens Soering, a German national who was detained in the United Kingdom prison, filed an application against United Kingdom for his pending extradition to United States of America, where he is charged for committing murder in the commonwealth of Virginia. He was accused of murdering his girlfriend's parents, which both the applicant and his girlfriend, Miss Haysom's planned together. Moreover, the police investigator from the Sheriff's Department of Bedford Country stated that the applicant has also confessed of him being guilty for committing murder in the presence of him and other two police officers.

The government of the United States of America requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty which was signed between the United Kingdom and United States of America. Upon the request for extradition made by the United States of America, the government of United Kingdom contended that since they have abolished death penalty in their state it

[512][1987] 1 S.C.R. 500, at para. 8 available at https://scc-csc.lexum.com/scc-csc/scccsc/en/item/210/index.do
[513]Dugard and Wyngaert, *supra note* 294 at 187.
[514] [1989] 11 E.H.R.R 439

becomes the duty of the government of USA to make sure that the application is not subjected to such death penalty. Even if such order of death penalty is passed then it becomes the duty of the government to make sure that it is not implemented. Later a German prosecutor in prison interviewed the applicant. The applicant to the prosecutor claimed that he had no intentions of killing the deceased and also he had no conversation with Miss Haysom with respect to such activity. The Government of Federal republic of Germany thus requested the extradition of the applicant on the basis of the Extradition Treaty signed between both the countries and also that the country had right to exercise its jurisdiction over the applicant.

To the Extradition request made by Germany the government of United Kingdom informed that the United States had already submitted a request for the extradition of Mr Soering with the sufficient evidence. Therefore, the United Kingdom Government opted to follow the normal process by the considering the application of U.S.A first. They also expanded their point by stating that they had already asked the government of USA to provide confirmation for not subjecting the applicant to death penalty, only after which such extradition process shall follow. Moreover, they also got assurance through a diplomatic note stating that no such punishment of death penalty will be awarded to the applicant.

Later on, while the proceedings were going on the government of United Kingdom got notification that the USA was planning to award the applicant the punishment of death penalty because according to them the crime that the claimant committed deserved capital punishment.

The applicant therefore claimed that if he will be extradited then that would lead to violation of Article 3 of the ECHR, which would be pushing him to circumstances where the authorities are already aware would expose him to death penalty. So the court held that the decision of Secretary of State to extradite the applicant to United Kingdom would expose him to inhuman conditions and torture and would also lead to contravention of Article 3.

In the case of *Immigration and Naturalization Service* v. *Elias-Zacarias*[515], Respondent was a native of Guatemala, who was caught for entering the United States without inspection. While the deportation proceedings conducted by the Immigration and Naturalization Service (INS), the petitioner took place the respondent accepted his mistake for illegally entering the country. Moreover, along with that he requested the authorities to provide him asylum and to withhold his deportation. The respondent to support his asylum request informed the authorities that he was afraid of the guerrillas in his country. Since they tried recruiting him once, he had the fear that they would return and will force him to go against the government. The Immigration judge held that the respondent was unsuccessful in establishing any type of persecution or a well founded fear of persecution on account of either race, religion, nationality, membership in a particular social group, or political opinion and hence he could not be granted asylum. Hence, she held that the deportation proceedings against the respondent will not stop. The case even after being denied by the BIA went further to the Court of Appeals for the Ninth Circuit. The court ruled that the acts of conscription by a non-governmental group constitute persecution on account of political opinion, and determined that the respondent had a well founded fear of such conscription.[516]

The Court of Appeals stated that Section 208(a) of the Immigration and Nationality Act[517], authorized the Attorney General, in his discretion, to grant asylum to an alien who is a refugee as defined in the Act, i.e. an alien who is unable or unwilling to return to his home county because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion [518] According to the Court of Appeal, the attempt made by the Guerrilla Organization to conscript a person into its military forces constitutes persecution on account of political opinion because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political.[519] The INS to the point established by the Court of Appeal explained that the motive behind guerrilla

[515] 502 U.S 478 (1992)
[516] Ng v. Canada, 98 ILR 479.
[517] 8 U.S.C & 1158(a)
[518] *Supra note* 516.
[519] *Ibid.*

movement is completely opposite to how it has been portrayed. There are people who are in support of these movements, few of the reasons being fear of combat, a desire to be with family and friends or to have a better standard of living in civilian life. They also explained that in the entire case it has also not been established that the guerillas wanted to persecute the respondent because his refusal was politically based. On the points laid down by the INS, respondent in his defence stated that not having a political opinion is itself the affirmative expression of a political opinion.[520] Moreover the court laid down that it is not necessary under the statute that an applicant applying for asylum has to prove the action of his persecutors and the reason behind it. The only thing the respondent needed to prove is a well founded fear of persecution on account of political opinion.[521] This according to the court was properly established in this case. Therefore, going by the decision of the Court of Appeals the applicant had well founded fear of persecution on account of his political opinion and hence gave him permission to seek asylum in the United States.

In the *Matter of Mogharrabi*[522], the respondents were inhabitants and citizens of Iran who were inside the United States as non-immigrant students. They were allowed to stay in the country till a specific date, but both of them ended up overstaying their visit. Upon their deportation as ordered by the Immigration and Naturalization Service (INS), they upheld the same by filing an application seeking for asylum and withholding of deportation. The authorities to this application stated that in order to establish the appropriate grounds for a grant of asylum, it is the duty of the respondents to establish that they are refugee within the meaning of Section 101(a)(42)(A) of the Immigration and Nationality Act. They also stated that in order to determine themselves as refugees they need to demonstrate their unwillingness to return to their country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[523] The respondents in order to establish their fear of persecution explained the situation faced by him in the Iranian Interests Section at the Algerian Embassy where his was to document his continuing student status in order to enable him to continue receiving

[520] *Supra note* 516.
[521] *Supra note* 516.
[522] 19 I&N Dec. 439 (BIA 1987), United States Board of Immigration Appeals, 12 June 1987, available at: http://www.refworld.org/cases,USA_BIA,3ae6b6b11c.html [accessed 11 March 2016]
[523] *Ibid.*

funds from relatives . Further incidents occurred because of which the student working in the embassy drew a gun at the respondent and his friend. As a result of such an incident, the respondent is of the view that he is now known to Khomeini officials because of which he has a suitable reason to fear persecution if returned to Iran. He also testified on participating in the demonstrations that took place in United States against the Khomeini.[524]

The court after looking at both the sides concluded that "the respondents did have a reasonable fear of persecution based on his political opinions to be plausible, detailed, and coherent."[525] Moreover, the political views of the respondent were completely derogatory regarding the ruling party, which makes it reasonable why his life will be in danger keeping in mind his statement made to the agents of the Khomeini regime. Therefore, the applicant was granted the asylum.

IV.4. CASES BETWEEN 1993 AND 2003

In *United States* v. *Lui Kin-Hong*[526], the extradition of the respondent was being sought by the United States on the reliability of the extradition treaty signed between the United States of America and Hong Kong. In this case the respondent was charged in Hong Kong for committing the offence of conspiring to receive money amounting to over 3 million U.S dollars as bribe from a company called as Wing Wah Company. The respondent who worked as a senior officer a company called Brown & Williamson Co. became the director of exports upon its affiliation with the British American Tobacco Co. He was held responsible for taking bribes for a virtual monopoly on the export of specific brands of cigarettes to the People's Republic of China and to Taiwan.[527] One of the shareholders of the company who used to work with the respondent gave the important evidence related to the case when the investigation was being done by the Hong Kong Independent Commission against Corruption. Later on it was found out that the shareholder was abducted, tortured and killed by few of the people who are expected to be involved in the forgery done by the respondent in order to stop him from testifying against the respondent.

[524]Dugard and Wyngaert, s*upra note* 294, at 35.
[525]Ibid.
[526]110 F3d 103 (1st Cir. 1997)
[527]Ibid.

In the year 2005, at the request of the United Kingdom who was substituting on behalf of Hong Kong, the authorities of United States detained the respondent at Bostan's Logan Airport. The arrest was not made on the extradition request of the respondent by Hong Kong for the charges he was held responsible along with the fact that he has not returned to the country nor did he have any of such intentions.

The extradition request was made with regard to the Extradition Treaty between the government of the United States of America and the Government of the United Kingdom of Great Britain, where the United Kingdom as mentioned above requested for the respondent's extradition on behalf of the Hong Kong. Therefore, the original treaty was actually made applicable to the Hong Kong, among other British territories, by an exchange of the diplomatic notes [528]

The government of the United States contended that respondent and his acts or the crime committed by him lies within the plain term of the treaty signed between the United Kingdom and the United States. It is the responsibility of the court to go by each term mentioned in the treaty. The main objective of the treaty when signed was to fight the battle against the crime, and in this case the purpose behind the extradition needs to be sought. Moreover, the authorities also stated that the court cannot rely on the terms of prohibition on refoulement or non-refoulement because he has no proper grounds to prove his fear of persecution on the grounds of race, religion, nationality, political opinion. Along with the basic principle of non-refoulement the court also looked at the only exception to the extradition treaties considered by the court which is that of committing a political offense. The respondent also cannot claim that the crime committed by him is political in nature because of which his extradition process needs to be challenged.

The court therefore held that the ultimate safeguard that extradition proceedings which were brought before the courts of the United States, comply with the clause which talks about the due process of the constitution. Therefore, they did not found any stage unconstitutional because of which such process needs to be withheld. Hence, the extradition process of the respondent was granted by the court.

[528]United States Court of Appeals, 1st Cir. No. 97-1084

In the case of *GRB* v. *Sweden*[529], the applicant was a Peruvian citizen having residence in Sweden where an application was filed by her seeking asylum. She claimed that the immigration authorities forcing her to go back to Peru will amount to the violation of Article 3 of the CAT.

The applicant states that her family is one of the politically dynamic families in Pilcomayo in the Department of Junin. Her parents were members of the Communist Party of Peru and took active participation in the party meeting which used to take place in their home. Along with her parents even the applicant started taking interest in the party matters and became a part of it. After completing her education in medicine from Ukraine the applicant went to Peru to visit her parents where she intended to stay for few months.

During the time she went to Peru, she got to know that the political conditions in the state are not proper. The house of her parents was being searched by the government soldiers and when being caught they were taken to prison and were badly beaten and tormented before they were discharged. The applicant was therefore warned to return back to Ukraine as her life was at risk if she would have stayed in Peru for few more days. Even after knowing that her life was at risk, the applicant decided to visit her parents during which she was raped and was in wrongful confinement for two nights. Since the police authorities did not take any interest in the torture faced by the applicant, she decided to return back to Ukraine.

The applicant therefore went to Sweden seeking for asylum where the Swedish Immigration Board rejected her application on the ground that there was no proof that she was persecuted by the Peruvian authorities and moreover the actions by the soldiers could not be considered as persecution but criminal activities by the authorities. The Aliens Appeals Board also rejected the application filed by the applicant. They stated that the risk of persecution from non-governmental entities can be considered as a ground to grant refugee status in exceptional cases but could not in this case because an internal flight alternative existed in this case. Internal flight or relocation alternative is a concept that is considered in refugee status determination

[529]CAT/C/20/D/083/1997

which have been located in the well founded fear of being persecuted and others in the unwilling or unable to avail himself of the protection of that country clause.[530] The applicant after this filed another two applicants claiming for refugee status on humanitarian grounds but both were rejected by the Aliens Appeals Board.

The applicant contended that that if she will be returned back to Peru there exists considerable hazard for her to be subjected to torment by the experts for which interior flight does not count as a safe solution.[531]

The state party with respect to determination of Refugee status explained their process in detail. According to Sweden, determination of Refugee Status can be done in two ways, either by the Swedish Board of Immigration or by the Aliens Appeals Board. In cases where either of the board cannot follow up with the process they forward the same directly to the government for their decision. So in cases where both the board do not refer the application to the state, they themselves cannot consider such applications directly. In such circumstances, the board prohibits any kind of meddling by the government, the parliament or any other public authority. Hence, the state contended that both the boards have the independence like that of a court of law and they do not have power to interfere in their decisions.[532] Moreover they also contended that to acquire residence permit in Sweden it is important for the alien to establish that he or she experiences a fear of being subjected to capital punishment or to torture or other inhuman or degrading treatment or punishment.[533] They also claimed that if an alien is refused entry then he or she can reapply for a residence permit if the application is based on circumstances which have not been previously examined in the case and if either the alien is entitled to asylum in Sweden or if it will otherwise be in conflict with humanitarian requirements to enforce the decision on refusal of entry or expulsion .[534]

[530]UNHCR, Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, (July 23, 2003), http://www.unhcr.org/3f28d5cd4.pdf
[531]CAT/C/20/D/083/1997, UN Committee Against Torture (CAT), 15 May 1998, available at: http://www.refworld.org/cases,CAT,3f588ee53.html
[532][1987]1 S.C.R. 500.
[533]Section 4 of the Aliens Act (Amendment)
[534]Section 5(b) of the Aliens Act'1997

The committee while deciding the case held that the claims made by the applicant in this case are not at all in dispute. The fact that she left Peru in 1985 proves that since then she has been politically inactive so there are no chances of her been subjected to torture by the Peruvian Authorities. They also expanded their decision on the point that the applicant has to establish substantial and proper grounds in order to prove that she would be in danger of being subjected to torture. The committee considered that "the issue where the state party has an obligation to refrain from expelling a person, who might risk pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention against Torture".[535]

The committee after taking into considerations the medical evidence and the serious condition of the applicant held that she suffered severely from the incident which occurred during her visit to Peru. Moreover, the fact that such condition was the consequence of her deportation will not be a sufficient ground to prove the cruel, inhuman or degrading treatment established by the Article 16 of the convention against torture convention, which is attributable to the state party. Hence, the committee held that there has been no violations by the state party with respect to the contentions established by the applicant.In the case of *József Németh and Józsefne Németh* v. *Barreau du Québec, Québec Immigration Lawyers Associationand Canadian Council for Refugees (Németh v. Canada (Justice))*[536], Németh, a couple of Roma ethnic origin arrived in Canada in 2001. After coming to Canada they applied for refugee status for themselves and their children, alleging that acts of violence, which has been committed against them in their country of origin, Hungary. In the year 2002, the Németh and their children were granted refugee status after which they later became permanent residents. Few years later, Hungary issued an international arrest warrant in respect of a charge of fraud that had been laid against the Németh and requested Canada to extradite them. The Minister of Justice eventually ordered the Court of Appeal to upheld their surrender in charge for extradition and the decision on review. The issues which were in question in this case were that: Whether the Minister has the legal authority to surrender for extradition a

[535]*Supra note* 531.
[536]2010 SCC 56, [2010] 3 S.C.R. 281

refugee whose refugee status has not ceased or been revoked? And if so, did the Minister exercise that authority reasonably in this case?

In this case, the Minister's approach to the exercise of his powers failed to give sufficient weight or scope to Canada's non-refoulement obligations in light of which those powers must be interpreted and applied. The Minister's consideration of the Németh's' case was fundamentally flawed. He focused exclusively on s. 44(1)(*a*) of the EA in requiring the Németh to establish, on the balance of probabilities, that they would face persecution on their return to Hungary and that the persecution they face would shock the conscience or be fundamentally unacceptable to Canadian society. He imposed too high a threshold for determining whether the Németh would face persecution on their return and placed the burden of proof on this issue on the Németh notwithstanding the earlier finding that they were refugees. Further, the Minister failed to address s. 44(1)(*b*) which is the most relevant provision of the EA in relation to their surrender. The Minister applied incorrect legal principles and acted unreasonably in reaching his conclusions. Therefore, in this case the appeal was allowed and the matter was remitted to the Minister of Justice for reconsideration [537]

In another landmark judgment, *Ahmed* v. *Austria*[538], Mr. Ahmed[539] was a Somali citizen living in Graz. In the year 1990, he left Somalia and reached Vienna Airport where he requested for refugee status. Few days later the lower Austria Public Security Authority interviewed him. During his interview he stated that his uncle had been an active member of the United Somali Congress[540]. He further stated that his father and brother were also executed only for the reason that his uncle had been a part of the USC. Hence, because of the close link of his family they have always been in the line of suspects because of which even the car of the applicant was confiscated and he was physically assaulted for the same. He therefore, because of the fear of being arrested and executed left Somalia.

[537]Supreme court judgments, Nemeth v. Canada, (Nov. 25, 2011), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7899/index.do
[538][1996] ECHR 63
[539]Hereby referred as "the applicant"
[540]Hereby referred as "the USC"

The Syria Public Security Authority, at first rejected his refugee application but on appeal the authorities reversed their decision and granted him refugee status within the meaning of the Geneva Convention. They analyzed the situation in Somalia and came to the conclusion that the applicant cannot be returned to his homeland because of the activities of the opposition group and the general situation prevailing in the country. Such situation increases his chances of facing persecution in the country.

Later in the year 1994, on the charges of hitting a passerby in the face along with the offence of trying to commit robbery by making an attempt to steal his pocket, the Federal Refugee Office in Graz ordered the forfeiture of Refugee Status of the applicant. In the light of these charges the applicant was put behind bars for two and a half years on accounts of attempted robbery. Even the appeal made by the applicant was dismissed on the grounds that in accordance with Section 5(1)(3) of the Right to Asylum Act, the refugee status stands to lose on the grounds of him committing a particular serious crime, which in this case holds evidential relevance.

While he was serving his sentence period, the Graz Federal Police Authority lodged an exclusion order against the applicant holding that the applicant committed a very serious crime. Therefore, there can be chances of him committing such crimes again. Such kind of activities can affect the public peace and security of the security so it was necessary for the state to pass such expulsion order.

The applicant in his defence brought the attention of the authorities to the current situation prevailing in Somalia because of which he had to apply for refugee status on the very first stage. He pointed out that the situation in Somalia has become even worse than what it was before. The group also known as the Hawiye clan, of which he was a member, has been targeted by the party in power in the country because of their relationship. Therefore, if he will be returned to the country in such situation his life would be at major risk.

The authorities looked at it with two different perspectives. One perspective was if they will stop this expulsion then the peace of the society at large would get affected but if they will carry on their decision then the society as a whole will be benefitted. In this case, the authorities kept the interest of the society as a priority over personal interest

of the applicant constituting him as a danger to the community. They also contended that there are no proper reasons to consider that upon the applicants transfer to Somalia he might suffer treatment, which is prohibited under the Aliens Act.

When the case went to the court, they came up with their own set of interpretations based upon the facts of the case. As provided in Article 3 of the Convention the court was of the view that since the agencies granted refugee status to the applicant, it makes it clear that they were very well aware of the fear of persecution the applicant will face in his home country in the very first place. Moreover, the only reason why the applicant lost his refugee status was because of criminal conviction, which as a reason was not justified to put his life at risk by getting him extradited. Therefore, the court opined that that the order of extradition of the applicant to Somalia will be in contradiction to Article 3 of the Convention. It is the obligation of the state not to deport him till the time the applicant has a real danger to his life or has an existing fear of persecution. The court also insisted the authorities to take the liability of the losses the applicant had to face during the time period in which he was forced to be in prison, so it becomes their responsibility to cover all the pecuniary damages the applicant had to bear during that time period as well.[541]

In *D* v. *The United Kingdom*[542], the applicant was born in St. Kitts and has lived there for most of his life. The applicant in the year 1989 visited his family living in United States. During the period of his stay there he was arrested in the year 1991 on the charges for possessing cocaine and was put behind bars for a period of three years. In the term of his 1-year imprisonment, he was thoroughly observed and was therefore paroled for his good behavior and was deported to St. Kitts in 1993.

After being deported, the applicant took leave to visit United Kingdom as a visitor. At the airport he was caught with cocaine valuing 120,000 pounds sterling (GBP). Therefore, the officer in charge of immigration refused to grant him permission to enter the United Kingdom on the pretext of public good and provided him notice with respect to his removal to St. Kitts as soon as possible. He was again arrested and prosecuted for possessing and being involved in importing drugs for which he was

[541] *Supra note* 531.
[542] 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997

again sentenced to six years imprisonment.

In the year 1994, during the time the applicant was serving his prison sentence, it was noted that he suffered an attack of *pneumocystis carinii* pneumonia[543] and was diagnosed as HIV[544] positive and suffering from acquired immunodeficiency syndrome[545]. The court looking at the infection and chronic conditions of the applicant granted him a compassionate leave to be with his mother. Immediately after his release, the authorities gave orders for the applicant's exclusion to St. Kitts. On such directions passed by the immigration authorities the advocates of the applicant requested the Secretary of State to grant him leave from such removal on compassionate grounds since his removal to St. Kitts would put him in a peril. Such removal at this stage would hasten his death and expose him to a real risk of dying under most distressing circumstances and thus inhuman treatment with no medical treatment, no shelter, no family support in receiving country. They expanded their argument by stating that such circumstances would put humanitarian considerations at stake and the removal would thus end up violating Article 3 of the European Convention on Human Rights[546] which states the "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Thus, the court held that during such conditions it becomes the responsibility of the authorities to make sure that person is not subjected to live in such inhumane conditions where his life is at risk. Therefore, the court granted him leave from such expulsion and ordered the respondent state to pay him a specific amount as compensation.

In the case of *Chitat Ng* v. *Canada*[547], The petitioner, Charles Chitat was a British born in Hong Kong, and residing in the United States of America. He was detained in a prison in Alberta, Canada and was extradited to United States of America. The petitioner questioned the decision of his extradition on the contention of him being a sufferer of an abuse of his human rights by Canada. He was arrested, charged and

[543]Hereby referred as "PCP"
[544]Also known as Human immunodeficiency virus
[545]Hereby referred as "AIDS"
[546]The aim of convention is to maintain and realise Human Rights and Fundamental Freedoms.
[547]Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994)

convicted for making an attempt to commit theft in a store and shooting a security guard including kidnapping and 12 murders for which the United States wanted to stand trial in California.

According to the contention laid down by the petitioner, Canada and the United States has entered or signed an extradition treaty. According to Article 6 of the Extradition Treaty:

When the offence for which extradition is requested is punishable by death under the laws of the requesting state and the laws of the requested state do not permit such punishment for that offence, extradition may be refused unless the requesting state provides such assurances as the requested state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.

The applicant moved the Federal Court for a review of the Minister's decision to prove his contentions. The supreme court of Canada to which held that "the petitioner's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights nor the standards of the international community." Thus, the petitioner was extradited the day when the decision was passed.

The petitioner appealed against the decision of his extradition stating that such action violated Articles 6,7,9,10,14 and 26 of the Covenant. He further added that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitutes cruel and inhuman treatment or punishment per se, and that the conditions on death row are cruel, inhuman and degrading. He further contended that the judicial procedures in the California, in as much as they related specifically to capital punishment, do not meet basic requirements of justice. He alleged that in the United States racial bias influences the imposition of the death penalty.[548] The state in its response to claim made by the petitioner against the accusation for which he was held responsible stated that the petitioner has no right to establish himself as a victim in this case since he made allegations based on some uncertain future events whose

[548]U.N Doc. CCPR/C/49/D/469/1991 (1994)

possibility to occur are not predictable and that they are completely reliant upon the law of the United States' authorities. They also established that the petitioner along with this has also failed to validate his allegations with respect to any of the possibility of his ill-treatment in the United States which might infringe his human rights under the international law.[549]

In response to laid down by the State, the petitioner stated that they are not challenging his right of not to be extradited but only claims that they he should not be handed over to the United states' authorities without getting the assurance that the punishment of death penalty will not be imposed on him.

The committee after looking at the contentions established down by both the parties, decided to consider each one of them individually. They first considered the contention, which the state party came up with regarding the claim by the petitioner is inadmissible. In cases where an individual is legally extradited, in such cases the state party cannot be expected to be held liable for the violation of the rights of the person which takes place in another country over which the state party cannot expand its jurisdiction or be expected to do so. The committee with this respect expanded its view that if a country can foresee the possibility of such violations to occur even before passing the order of extradition or expulsion, then such decision would definitely lead to the violation of the International Covenant by the state party itself. The foresee ability however, means that although there was a violation of rights by the state at current but no such situations would occur in the future.

The committee with its furtherance to the above-mentioned issue decided to take into consideration whether the state party is in violation of the covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 entered into between the United States and Canada along with the Extradition Act of 1985 .

The committee laid down that in order to consider whether the Extradition order passed by the state party is valid consideration should be on the merits of the circumstances because of which the order for passed, the extradition procedure, and

[549]International Covenant on Civil and Political Rights (ICCPR)

all its effects. With respect to the question raised by the committee on the extradition process followed by Canada, the state party elaborated by stating that "the Extradition Act and the terms of the applicable treaty with the respective state governing Extradition process is followed by Canada." "The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies." Under Canadian law, extradition is a two-step process, the first involves a hearing in which a judge considers whether in matters of extradition a factual and legal basis exists or not. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase . Therefore, the decision in such case depends on factors such as, "Canada's obligations under the applicable extradition treaty, the character of the crime for which expulsion is sought." Along with these processes, it is also the duty of the Minister to consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. [550]

After looking at the state's explanation with respect to the process of extradition followed in the country, the commission diverted their attention on the final contention laid down by the petitioner. The contention of him questioning the implementation of the punishment the death penalty imposed on him after such extradition. The state party stated that "the Government of Canada does not use extradition as a vehicle for imposing its concepts of Criminal Law policy on other states. Moreover in the absence of exceptional circumstances, Canada would be dictating to the requesting state, in this case which is United States regarding how it should punish its criminal law offenders." The Canadian Government recognized such governance as an intrusion with the internal matters of another state.

Looking at the explanations made from the side of both the parties the Human Rights Committee opined that the process of extradition is valid but it becomes the responsibility of the state passing such order to make sure that the rights of the person does not get affected. Especially in the cases where such degrading treatment is easily predictable the states have to be even more careful. Therefore the Committee in their

[550]Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994)

decision asked the state party to make such representations because of which "it can be possible to avoid the imposition of death penalty and appeals to them to ensure that a similar situation should not arise in future".

In the case of *Suresh* v. *Canada (Manickavagsagam Suresh* v. *The Minister of Citizenship and Immigration)*[551], Suresh was a Tamil from Sri Lanka, who came to Canada and was found to be a Convention refugee. The Canadian Security Intelligence Service claimed that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam because of which the government of Canada apprehended him and initiated deportation proceedings against the applicants on the grounds of security. The organization, of which he was being considered a member, was an organization engaged in terrorist activity and the members of this organization are subjected to torture in Sri Lanka.[552] The Federal Court after the proceedings, in accordance with Section 40.1 of the Immigration Act held that Suresh should be deported. Following which the Minister of Citizenship and Immigration issued an official opinion declaring him to be a danger to the security of Canada under Section 53(1) (b) of the Act. The appellant after which applied for judicial review challenging the decision of the Minister. He contended that the decision taken by the minister was unreasonable and also that the procedures laid down under the Aliens Act were unfair. He expanded his contentions by stating that the Act infringed Sections 7, 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms.

The court held that the appellant has the right to a new deportation hearing. The court examined the Immigration Act and the Canadian Charter of Rights and Freedoms[553] and was of the view that "deportation to face torture is generally unconstitutional and that some of the procedures followed by the authorities in this case did not meet the constitutional requirements at all".

The issue brought in question by the court whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the rights provided in the charter of free expression and free association and whether the

[551]1999 CanLII 8314 (F.C); 65 C.R.R (2d) 344; 173 F.T.R 1
[552][2002] 1 SCR 3, 2002 SCC 1
[553]Hereby referred to as "Charter"

deportation scheme of Canada contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death. [554]

The court regarded that in order to manifest evil of terrorism the government of Canada should not end up taking certain steps that would compromise values that are essential to the Canada's democratic society which are liberty and the principles of natural justice. The court held that deporting a refugee to a situation where there are substantial chances of risk of torture would end up violating Section 7 of the Charter. It is the responsibility of the Minister of Citizenship and Immigration to exercise his discretion to expel a refugee under the Immigration Act accordingly. The court also held the arguments made by the state regarding appellant being a threat to the security of Canada constitutionally vague. With respect to Immigration Act, the court was of the view that the Sections 19 and 53(1) (b) of the act stands in violation with the right of expression and free association guaranteed in the Charter. Hence, the court accepted the appellants appeal that on returning him to Sri Lanka, he will have to face risk of torture therefore they allowed him to stay in Canada.

The case of *Chahal* v. *The United Kingdom*[555] involves four applicants. These all are Sikhs and are the members of the same family. Mr. Karamjit Singh Chahal[556], an Indian Citizen entered United Kingdom illegally in the year 1971 searching for employment. After few years he made an application to the Home Office to grant him a stay, which was granted to him under the terms and conditions for an illegal entrant to reside in United Kingdom and hence has been detained for the purposes of deportation.[557] Darshan Kaur Chahal[558], an Indian citizen, came to England after getting married to the first applicant along with their two children who were given birth in the United Kingdom and hence possessed British nationality. Both the applicants thus applied for British citizen out of which the first applicants request was rejected and the second applicant request is yet to be determined.

[554] *Supra note* 552.
[555] [1996] ECHR 54
[556] Hereby referred as the "first applicant"
[557] *Supra note* 555.
[558] Hereby referred as the "second applicant"

The applicants visited Punjab to meet their relatives. During their stay they visited Golden Temple numerous occasions. During his stay the first applicant was baptized after which he began to follow Sikhism, the result of which was that he started taking active participation in sorting out detached resistance in support of self-governance for Punjab.[559] Later on the police authorities of Punjab arrested him because of his practices. He was then kept in detention. After his detention period got over he came back to United Kingdom after which he never visited India again.

After coming back to the United Kingdom, the first applicant became representative of the Sikh community and helped organizing demonstrations in London to demonstrate against the actions taken by the Indian Government, and started serving as a member of the committee of the Gurudwara in Belvedere.[560] He therefore played an important part in the foundation and organization of the International Sikh Youth Federation.

In the year 1985, the first applicant was arrested for being a part of the plot to kill the then Prime Minister of India, Mr. Rajiv Gandhi. He was accused of the charges under the Prevention of Terrorism Act 1984. The authorities did not enough evidence to prove their contention because of which he was released.

Also in the year 1986, he was again arrested and questioned for being involved in an ISYF conspiracy to murder temperate Sikhs in the United Kingdom.[561] Therefore, a deportation order was issued against the first applicant because of his political activities and criminal investigations taken against him, and was detained until the European Court of Human Rights set out its ruling.

The Home Secretary contended that it was important for the state to carry out the extradition proceedings for the betterment of the internal security of the United Kingdom. Moreover, the crimes committed by the applicant were political nature and hence, the case gave a view of international fight against terrorism.

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[559] Aliens Act'1997, Sec. 5(b).
[560] *Ibid.*
[561] *Ibid.*

The first applicant in his defence claimed that he has a well founded fear of persecution upon being returned to India.[562] He applied for political asylum on the grounds that he will be subjected to torture and persecution because of the legal situations he was being involved in. These included his detention in Punjab prison, political activities in United Kingdom, evidence regarding his parents and relatives being tortured in India before, interest shown by the Indian national press in his Sikh militancy and reports of Amnesty international of the torture and murder of those perceived to be Sikh militants by the Indian authorities, particularly the Punjab police. [563]

The authorities stated that the incidents which happened with applicant during his visit to India are not relevant because those incidents were partly because of the tension at that time in Punjab and has no connection with this issue. They also stated the grounds on the basis of which they intend to deport the applicant which includes him being the central figure in directing the support for terrorism, playing major role in group's agenda of threats focused towards others, being involved in providing monetary benefits and supplying arms to terrorists in Punjab, having a history of violent involvement in Sikh terrorism and for having being planning and moderating terrorist attacks in India, UK and other countries respectively.

With respect to Article 3 of ECHR the court looked at various factors involved. First, they focused on the point of time for the assessment of the risk. The court focused on the point that it is important to consider the risk the applicant will be subjected to in case of deportation and if such real risk of ill-treatment and torture actually exists. To consider this point, the court went on to do the assessment of the risk of ill-treatment. It was established by several reports that security forces in India violated the human rights and that such violations happened at a disquieting rate. Amnesty international in its written submissions informed the court that "prominent Sikh separatists still faced a serious risk of disappearance, detention without charge or trial, torture and extrajudicial execution, mostly at the hands of the Punjab police."[564] The court stated that even though there has been improvement in the political conditions prevalent in

[562] 1951 Refugee Convention
[563] *Supra note* 555
[564] *Ibid.*

Punjab there has been no recent material to consider as an evidence for the same. The Court was of the opinion that applicant, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, because the problems with respect to human rights issue still persist in the state. The court strongly considered the United Nations' Special Rapporteur on torture which has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. The National Human rights commission has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India.[565]

Therefore, the court held that in case if the applicant will be expelled back to India, it will violate Article 3 of ECHR. The applicant also claimed for damages under Para 4 of Article 5 of the Convention. It enumerates that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"[566]. He contended the fact that since he was accused to be threat to the national security, the domestic courts from considering whether his detention has been lawful and appropriate. The commission further considered that contention under Article 12 of the Convention. It includes "Everyone whose rights and freedoms are set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".[567] Therefore the ECHR found violation of Article 3, Article 5 para 4 and Article 13. They stated that Article 3 provides absolute guarantees with respect to no exclusion, so UK relying on national security as a reason to expel the applicant cannot be consider as a valid reason as there is a real risk of ill-treatment exists if he will be deported to India.

[565]Ibid.
[566]Article 5 para 4 of European Convention on Human Rights
[567]Article 13 of the European Convention on Human Rights

IV.5. CASES BETWEEN 2003 AND 2013

In the case of *Abid Naseer* v. *United States of America*, the petitioner, a citizen of Pakistan of 24 years of age was residing in the United Kingdom on student visa and studied in Manchester and Liverpool. He was arrested in the month of July by the police officers on suspicion of playing a major role in a plan to attack indeterminate targets in Manchester. On the other hand, the United States of America came forward with its contention to put Naseer on examination for his involvement in plotting to place bombs in the United Kingdom, New York and Norway as well.[568]

The case was then brought before the Westminster Magistrates court where the decision lied in their hands with respect to the petitioner's extradition. They had to consider whether his case proceeding should continue in the United Kingdom or he should be extradited to United States of America on their request for terrorist offences that took place in their country along with the other two countries as well.

According to the United States of America authorities the petitioner, i.e. Abid Naseer was alleged to be guilty for three charges which included[569]:

> **Firstly,** for providing material support or resources to a designated foreign terrorist organization, specifically Al-Qaeda, in violation of 18 United States Code sections 2339B that is punishable by a maximum penalty of 15 years of imprisonment.
>
> **Secondly**, for conducting conspiracy to provide material support to a foreign terrorist organization, specifically Al-Qaeda, in violation of 18 United States Code section 2339B, that is punishable by a maximum penalty of 15 years of imprisonment.
>
> **Thirdly**, for conspiracy to use a destructive device during and in relation to one or more crimes of violence, specifically for providing and conspiring to provide material support to a designated foreign terrorist organisation, in

[568] Vesna Stefanovska, "The Concept of Political and Terrorist Offences in Extradition Matters: A Legal Perspective", 3 Vol. 11 No. 34, ESJ, 69, 71 Dec (2015).

[569] The United States of America put forward that the petitioner, Abid Naseer was working under the assistance of Al-Qaeda and was the source of UK contact in the whole broad international network. They also stated that Abid Naseer was planning bomb attacks in the United Kingdom under the their direction and control of the terrorist group.

violation of 18 United States Code, Section 924 i.e punishable by a maximum penalty of life.

Furthermore, the evidence showcased by the United States of America highlighted that "there were communications, e-mails about weddings, marriage, girlfriends, and computers and weather which were used as codes that referred to attacks, bomb ingredients, travel documents and target sites."

They further contended that before preparing to conduct a terrorist attack in Manchester, England Naseer received proper training from Al-Qaeda in Pakistan where he was taught the ways to purchase ingredients and components for explosives, conducted reconnaissance at several possible target locations, transported reconnaissance photographs back and forth to Pakistan and thus, maintained frequent e-mail contact with Al-Qaeda during the entire period.

The advocates representing the petitioner were against the whole process of extradition because they apprehended that if he was deported back to Pakistan, he could be tortured or killed by Pakistan's secret services. The government of United States to which gave their assurance that they will not pass any such order for deporting Naseer back to Pakistan.

The court of Westminster Magistrates' approved the application made by the US for extraditing the applicant which was later sent to the Home Secretary for approval according to Section 87 of the Extradition Act 2003. This case after the approval of the extradition request was fought in the United States Department of Justice under the cause title *United States of America v. Abid Naseer.*

In the case of *Gaforov* v. *Russia*[570], the petitioner was born in the year 1973 and since then till the time of his arrest he lived in Khudzhand, Tajikistan. In the year 2005, several people in the city were arrested on suspicion of them being a part of a transnational Islamic Organization being called as Hizb-ut-Tahrir, which was banned in several countries like Russia, Germany and some Central Asian Republics. The

[570]Application No. 25404/09

petitioner was able to know that some people who were arrested along with him submitted that he was one of the members of the said organization. Later, the prosecutor's office of the Sogdiyskiy Region of Tajikistan initiated criminal proceedings against the petitioner on notion of membership of a radical organization.[571]

He was alleged of being closely involved with the Islamic Organization by printing out leaflets and religious literature for them. Because of which he was arrested and put behind bars. The charges he was suspected for committing were:

- Having studied extremist literature secretly,
- For working with the organization as an IT specialist.
- For printing out their leaflets and other literature and for distributing it among people who are not members of the said organization secretly.

It was further noticed that while he was in custody, the petitioner escaped the prison and was accused of hiding somewhere in the Tajikistan for few months after which he moved to Russia. In the year 2008, he was arrested in Moscow after which the Tajikistan Prosecutor office requested the Russian Prosecutor Office for the extradition of the petitioner to Tajikistan for the charges he was being accused of connected with his membership to the Islamic Organization.

The Russian Prosecutor Office decided that "Gaforov should be extradited to Tajikistan on the ground that he had not obtained Russian Citizenship and there were no particular criteria for which he should not be extradited to Tajikistan."

After dismissal of his complaint by the City Court he appealed to the Supreme Court stating that if he is sent back to Tajikistan, he will face a risk of being tortured in breach of Article 3 of the European Convention of Human Rights[572]. He pleaded defence under Article 13 and Article 5 of the Convention[573] stating that "he had no efficient remedies in respect of his allegations of possible ill-treatment in Tajikistan

[571] *Ibid*.
[572] It prohibits torture and inhuman or degrading treatment or punishment.
[573] European Convention of Human Rights

and also contended that his detention has been unlawful in such case."

In year 2010, the European Court of Human Rights held that "the extradition of Gaforov by the Russian Authorities to Tajikistan would violate Russia's obligation under the European Convention on Human Rights to respect the principle of non-refoulement in countries specifically where there is a real risk that the extradite would be subject to torture or inhuman or degrading treatment"[574] . Moreover, he was sought by the authorities on the basis of suspicion being a member of such organization which are being measured as terrorist organizations by the Russian and Tajik authorities.

The court held that "the respondent state is to pay the applicant, within three months from the date on which the judgment becomes final in accordance to the convention. The court also held that the suspect did not have at his disposal any procedure for a judicial review of the lawfulness of its detention pending extradition, and that at least part of this detention period was not in accordance with the law, in breach of Article 5 of the European Convention of Human Rights."[575]

In the case of *Mamatkulov and Askurov* v. *Turkey*[576], The applicants Mamatkulov and Askurov were residents of Uzbekistan and were members of an opposition party. The first applicant, Mr. Rustam Mamatkulov was arrested in Istanbul and after two days of which the second applicant, Mr. Zainiddin Askarov was also arrested in Turkey. After getting the information regarding their arrest by the authorities of Turkey the Republic of Uzbekistan requested his Extradition under a bilateral treaty with the country. It was contended by the state that both the applicants were suspected of Homicide, causing injuries to others by the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the president of Uzbekistan. They further substantiated they further substantiated their claim by stating that such offences committed by the applicants are considered as "ordinary criminal" offences and accordingly the order to remand the applicants in custody to which an extradition request was made. Such claims were put forward in the extradition proceedings, which were conducted by the

[574]The aim of the Convention is to maintain and realize Human rights and Fundamental Freedoms.
[575]Judgment of the ECHR (Application no. 25404/09) - Strasbourg
[576](46827/99) 14 B.H.R.C 149 (ECHR)

Turkish Public Prosecutor in the Turkish criminal courts.

The candidates to such claims made by the state fought that the offences for which they were being held at risk were political in nature and the individuals submitting such political offences in Uzbekistan were first captured by the specialists and were then subjected to torment in jail.

The applicants took the case to the European Court of Human Rights, who directed the Turkish government on the Rule 39 of the Rules of Court to conduct due court proceeding before subjecting them to such extradition. After a court meeting, the Turkish government issued an order for the extradition of both the applicants'. Even after passing of such order, at least for a period of 8 years the applicants were not sent to Uzbekistan, by which time the court had met and had decided to extend the interim measure until further notice. After their return to Uzbekistan, the Supreme Court there found the applicants guilty and sentenced them to 20 and 11 years imprisonment respectively, the former being the maximum sentence possible under the Uzbek Criminal Code.[577]

In the original applications filed by the applicants to the court they specifically relied on the European Convention on Human Rights[578], specifically referring to certain Articles including Article 2 including their right to life, Article 3 including right of the applicants not to be subjected to torture or to inhuman or degrading treatment or punishment and Article 6 talking about their right to fair trial. Along with relying on the Articles of the ECHR, they also requested the court to take Rule 39 of the Rules of Court in consideration. The court reviewed the application filed by the Applicants and looking at its nature they decided to admit the same. The Chamber in its judgment, reversed the earlier decision passed by them and found Turkey in violation of Article 34 for failing to comply with Rule 39. The court further did not find any violation with respect to Article 3 or Article 6 of the Convention. The Turkish Government then requested, the case to be referred to the Grand Chamber for a review. The court decided the case by taking into account the individual capacity of Articles 2 and 3,

[577]Bryony Poynor, "Mamatkulov and Askurov v. Turkey: The Relevance of Articles 6 to Extradition Proceedings, Case Comment", European Human Rights Law Review, 2005
[578] Hereby referred as "ECHR"

Article 6(1) and Article 34 of the Convention.

IV.5.i. Articles 2 and 3 of European Convention on Human Rights

The grand chamber decided to consider Articles 2 and 3 together rather than considering them individually. Under these Articles the counsels for the applicants claimed that after their extradition they were unable to contact them and moreover they also gave reference of reports by various international forums responsible for investing human rights violations to claim that the prison conditions in Uzbek were unacceptable and the inmates were regularly subjected to ill-treatment. They further submitted that the applicants' full admission of accusations to the Uzbek authorities, identical to those they had refuted with evidence during the extradition proceedings in Turkey, demonstrated that they were tortured to accept their guilt for the crimes they had not committed.[579]

The Turkish government questioned the claims made by the counsel for the petitioners by stating that in order for the Extradition to amount to breach of Article 3, they must come with clear and certain grounds with proper evidence proving the fact that substantial grounds existed for believing that such treatment would occur.

The court under this point held that an assessment of liability should be made in light of the material placed before it and with reference to those facts, which were known, or ought to have been known, by the Turkey at the time of the Extradition. In this case to prove their point the State provided them with their medical certificates and the current situation prevailing in the country, which according to the court reliable enough to prove the point that the applicants were in good health. But the counsels reiterated it by putting forward a set of conditions making the court to think about its decision again. They stated that consideration should be given to the report submitted by the third party interveners, Human Rights Watch and AIRE Centre[580] which stated that although there has been no direct torture inflicted on the applicants but their relatives has been subjected to such torture. They also contended that there has been certain situations where the prisoners of Uzbekistan prison, who were being subjected

[579]Communication No. 469/1991, U.N Doc. CCPR/C/49/D/469/1991 (1994).
[580]Advice on Individual Rights in Europe Centre

to punishment for committing offences political in nature has died as a result of ill-treatment. Such point does not reduce the probability of the applicants being subjected to such treatment in future. They also contended that the assurances given the government of Uzbekistan could not be relied upon because of the lack of Judicial Supervision of the security forces in Uzbekistan. Upon voting the majority of the judges agreed to the point that the evidence provided by the counsels was insufficient to conclude that the applicants were at the real risk of being subjected to torture or inhuman or degrading treatment or punishment and hence there was no proper ground to believe that Article 3 was violated.

IV.5.ii Article 6(1) of European Convention on Human Rights

The application challenged the violation of their right to fair trial on two grounds. Firstly, by challenging the Extradition proceedings that took place in Turkey contending it to be violating Article 6(1) because of the reason that they were not allowed to access all the matter in their case file or to argue in the court for the offences they were alleged with. Secondly, they contended that there could be no fair trial in the criminal proceedings in Uzbekistan, which violated Article 6(1) extraterritorially and also a claim was made that they might face a real risk of being sentenced to death and executed. They were not allowed to communicate to get into detailing of the case until their trial actually started along with no choice of representation. The court under this point considered there has been insufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice and hence, held that there has been no violation of Article 6 as contended by the applicants.

IV.5.iii. Article 34 of the European Court of Human Rights

The applicants submitted that because of the extradition order passed by the court it was impossible for them to make inquires and obtain evidence in order to support their allegations made by them subjecting to breach of Article 3 thus constituting a breach of the rights to individual petition under Article 34. The counsels of the applicants took the focus of the courts towards the International perspective which

included a look at UN Human Rights Committee, UN Committee against Torture, the Inter-American Court of Human Rights and International Court of Justice Jurisprudence. The representatives of the applicants stated that they were mostly unsuccessful in their attempts to contact the applicants and that there should be equality of arms for the duration of the proceedings to which the court established that a breach of Rule 39 could be seen as infuriating any ensuing violation of Article 3 and could hinder their rights under Article 34. The judges after considering all the arguments concurred that there was a violation of Article 34 but then they took the view that not all breaches of indications made pursuant to Rule 39 would result in such violation, and that for indications made by the court to become binding, legislation would be needed rather than judicial action.

In the case of *Saadi v Italy*[581], the applicant Nassim Saadi, a Tunisian national, was born in 1974 lived in Milan (Italy), and was married to an Italian national. The case focuses on the Extradition of the applicant to Tunisia, where the applicant claimed to have been sentenced in 2005, in his absence, to 20 years imprisonment for membership of terrorist organization acting abroad in peacetime and for incitement to terrorism. During the year 2001, the applicant was issued with an Italian residence permit for family reasons which were valid only till October 2002, when Mr. Saadi was arrested on the suspicion of terrorism and was put in a pre-trial imprisonment. The authorities alleged that he was involved as a conspirator to commit attacks not only on Italy but also on other States and also involved in acts of provocation to arouse terror and receive stolen goods. However, on May 2005, Milan Assize Court amended the offence of international terrorism to criminal conspiracy. They held him guilty of the said offences along with that of forgery and receiving, and sentenced him to four years and six months imprisonment. "After getting released on August 2006, the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of the law on urgent measures to combat international terrorism." The observation made by the Minister included that "it was apparent from the documents in the file that the applicant has played an active role in an organization responsible for providing logistical and financial support to persons belonging to fundamentalist

[581]"Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008, *available at* http://hudoc.echr.coe.int/eng?i=001-85276"

Islamist cells in Italy and abroad." Thus, Mr. Saadi requested for getting political asylum, which got rejected on September 2006, therefore, he lodged an application with the European Court of Human Rights under Rule 39, which talks about interim measures of the Rules of Court, the court thereby asked the Italian Government to put hold on the Applicant's expulsion until further notice. On May 2007 the Italian embassy in Tunis asked "the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia, along with 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 European Convention on Human Rights, that he would have the right to have the proceedings reopened and that he would receive a fair trial."

The applicant alleged that enforcement of his deportation to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment contrary to Article 3 of the Convention, which discusses about prohibition of torture and inhuman or degrading treatment. Relying on Right to Fair Trial[582], the applicant further complained of a flagrant denial of justice he had allegedly suffered in Tunisia on account of being convicted in his absence and by a military court. Under Article 8, which gives right to respect for private and family life, he alleged that his deportation to Tunisia would deprive his partner and his son of his presence and support. Lastly, relying in Article 1 of Protocol No. 7, procedural safeguards relating to expulsion of aliens, he complained that his expulsion was neither necessary to protect public order nor grounded on reasons of national security

Italy and the United Kingdom claimed that the climate of international terrorism called into question the appropriateness of the ECTHR's existing jurisprudence on states' non-refoulement obligation under Article 3 of the European Convention on Human Rights (European Convention). Article 3 had earlier been interpreted to prohibit return or extradition of individuals to states in which they faced a real risk of torture, inhuman or degrading treatment. Both states also claimed that diplomatic assurances from a receiving state were sufficient to satisfy a sending state's Article 3 obligations. The ECTHR unanimously reasserted its existing jurisprudence and noted that involvement in terrorism did not affect an individual's absolute rights under

[582] Article 6 of the Convention

Article 3 Although the ECTHR accepted the right of contracting states to control the entry, residence and expulsion of aliens from the state and confirmed that there is no Convention regarding right to political asylum. It also reasserted its longstanding position that state action relating to expulsion is restrained by the absolute nature of Article 3 and hence it is an implied obligation to not send individuals to a state where they are at real risk of prohibited treatment. The absolute nature of the prohibition on torture, inhuman and degrading treatment or punishment enshrines one of the fundamental values of democratic societies and must therefore be maintained, even in times of emergency or war. In spite of the fact that States have to undergo immense difficulties in combating the contemporary international terrorist threat, one's suspected involvement in terrorist activity does not take away from the absolute nature of their rights under Article 3 as it 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.

As a result of the absolute nature of Article 3, the Court rejected the UK's argument that the test to be applied when assessing whether expulsion would engage Article 3 ought to (a) allow for the community interest to be weighed against the individual's rights; and (b) be assessed on a more likely than not standard where the individual is considered to pose a threat to national security .

Regarding the first claim, the Court held that conduct of the individual being deported is irrelevant to Article 3 assessments. In this respect, Article 3 in fact provides a greater degree of protection than that afforded by Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees . The Court also held that "the UK's proposal of balancing the risk to the individual and the dangerousness of the individual was misconceived."

The prospect that the applicant 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. This contention led the Court to reject the UK's second claim that, where an individual is considered to pose a considerable danger to national security, Article 3 would only be breached if he were "more likely than not" to be subjected to prohibited treatment in the receiving state . This would place a higher

burden of proof on the applicant than that which is required under the ECTHR's established jurisprudence, which speaks of a real risk of prohibited treatment. Having reaffirmed the real risk standard of proof, the Court also reasserted its principles of assessing an Article 3 claim from previous jurisprudence. In this context, the Court held that "when assessing risk it would consider evidence lay before it by the applicant, who generally has the burden of proof in these circumstances, but may also consider evidence obtained by the Court. Using this evidence, the Court will examine the foreseeable consequences of the proposed expulsion bearing in mind the situation there and [the applicant's] personal circumstances." Thus, although an Article 3 assessment is necessarily speculative, it takes into account the circumstances of the case in the context of what the sending state knew or ought to have known at the time of the deportation and is carried out in a measured and cautious manner. Employing these principles in the present case the Court found 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 Article 3 of the Convention.

As a final matter the Court briefly considered the claim that a state's Article 3 obligations could be satisfied by means of diplomatic assurances from the receiving state. While the Court implied that diplomatic assurances might be sufficient in some cases, it did not find the representations of the Tunisian government sufficient in this case. These representations merely outlined that Tunisian law would be applied to Saadi. However the Court held that the mere existence of domestic prohibitions on torture and ill-treatment was not sufficient to ensure the adequate protection of an individual's Article 3 rights if reliable sources report that prohibited treatment is either engaged in or tolerated by the receiving state. When assessing the sufficiency of any particular diplomatic assurances, the Court is obliged to consider whether the assurances provide a sufficient guarantee of protection from prohibited treatment in their practical application and taking the circumstances into account. As the assurance was insufficient to adequately protect the applicants' absolute Article 3 rights, and as there was a real risk of torture or ill treatment in the absence of adequate assurances,

deportation of the applicants would violate Article 3. [583]

In another case of *The Queen (On application of Adel Abdul Bary and Khalid Al Fawwaz)* v. *The Secretary of State for the Home Department*[584], the court discussed about the fact that in order to establish that there are substantial ground to fear torture which would be faced by the claimant what the degree of proof required to be given by the authorities seeking such Extradition. In this case the United States of America accused two claimants viz .*Adel Abdul Bary and Khalid Al Fawaz* on the charges of murder of its citizens and diplomats along with other internationally protected persons living in the country for whose security they automatically become liable. The government related the known Osama Bin Laden, as a key figure involved with these set of synchronized bombings which took place in United States embassies in Nairobi and Dar Es Salaam for which are claimants are being held responsible.

After the investigation of the case took place, the government of United States of America filed an Extradition application of the two claimants along with a third person knows as Eiderous. The proceedings of the case were governed by the Extradition Act 1989 and the magistrate in the same took the decision to send them to United States of America. Out of the three suspects, two of them being the claimants the court decided not to involve the third person because of his ill health, who eventually died in few years.

With respect to the extradition proceedings the United States of America through its Diplomatic Notes provided assurance to the Secretary of the State that, if the permission to extradite the claimants will be granted then the State takes the responsibility to make sure that:

- Death Penalty will not be granted or requested as a punishment,
- The claimants will be prosecuted in accordance with the rules of law. Due rights and protections will be provided to them before a federal court, and

[583]Fiona De Londras, "Saadi v Italy, European Court of Human Rights Reasserts Absolute Prohibition", American Society of International Law, Vol. 12, Issue 9, (May 13, 2008) available at: https://www.asil.org/insights/volume/12/issue/9/ saadi-v-italy-european-court-human-rights-reasserts-absolute-prohibition

[584][2009] EWHC 2068

- The claimants will not in any case be treated as an enemy combatant neither they should be prosecuted before a military commission.

The entire point regarding which the case has been put on focus is with respect to Article 3 of the European Convention on Human Rights and Fundamental Freedom[585]. It focuses entirely on the rights of the people against whom Extradition application has been sought. It states that "No person shall be subjected to torture or to inhuman or degrading treatment or punishment". This right is a basic right awarded to every human and it becomes the responsibility of the state to make sure such rights does not stands violative by any state agency or authority.

Along with the granting the sentence of Death Penalty the other point which was to be considered was the condition of the prison where the prisoners were supposed to be kept. It was taken into account that this also holds important criteria. It was stated that various prisoners suffered mental problems because of such conditions therefore this should be given equal priority as well.

It was brought to the notice of the court that out of the two claimants, Adel Abdul Bary, who was detained in Long Lartin prison at that time suffered from a recurrent depressive illness. Moreover, his report by one of the doctors pointed out he had "a history of low mood, disturbed sleep, disturbed appetite, anhedonia reduced energy, disturbed concentration, hopelessness and suicidal feelings which together reflected a severe depressive disorder"[586]. Further, it was also claimed that in such condition if the claimant will be extradited to the United States of America, his mental health will deteriorate which will in fact increase the probability of him trying to commit suicide.

The government of the United States sent a letter through the U.S. Department of Justice to the Home Office and tried to find an answer to the query posed by the representatives of the claimants had with respect to them being tortured in the United States prisons. The letter offered a guarantee under Eighth Amendment of U.S Constitution which restricts any kind of brutal as well as strange punishment. Moreover it also provided that the prison officials should provide the inmates with

[585]Hereby referred as "UCHR"
[586]Hereby referred as the "first applicant".

humane condition inside the prisons as well as to provide them with adequate food, shelter, clothing, medical facilities and that reasonable measures should be taken to guarantee the minimum standards of safety to the inmates.

The court in this case established that when a claimant files an application on the basis that upon Extradition his rights will be violated in the place where he will extradited, the burden of proof lies entirely on the claimants. They have to establish proper grounds with respect to their rights getting violated and that upon Extradition they will face torture. Therefore, the court held that the claimants failed to establish their fear of persecution in the United States of America. Moreover, they also stated that all the assurances provided by the government comes out to be reliable enough that the claimants will not face torture with respect to which complete confidence on the authorities is a must. Hence, the court allowed the Extradition request filed by the United States of America.

In the case of *Muminov* v. *Russia*[587], Muminov[588] was an Uzbek national who came to Russia and got himself registered as a temporary resident for a particular time period specifically from December 2005 to March 2006. After living in Russia for few years he filed for an application to renew his residence registration along with an application to apply for Russian Citizenship. The respective authorities concerned rejected both his applications. Moreover in the year 2005 the Uzbek authorities initiated criminal proceedings against the applicant by filing and arrest warrant claiming him to be a member of a transnational Islamic Organization.

On the basis of such charges the applicant was arrested in Russia following which Uzbek Prosecutor General's Office filed an application requesting Extradition of the applicant. Russian authorities further rejected the request because some of the charges on which the Uzbek authorities wanted to punish the applicant were not regarded as an offence under the Russian Law. During the time he was in custody of the Russian Authorities, he thoroughly made applications seeking for refugee status along with a temporary asylum requested which were subsequently refused by the government. Later he was also held responsible for unlawfully residing in Russia for which he was

[587](2011) 52 E.H.RR. 23
[588]Hereby referred as the "Applicant"

tried in the year 2006 and therefore was arrested for the same. Following which the authorities ordered for his administrative expulsion. It was further noticed that while the hearing for the same was going on the applicant was not granted any legal representation neither he was allowed to speak to put forward his contentions.

The applicant thus lodged an appeal where he contended relief for an interim measure under Rule 39 of the Rules of Court to prevent his removal to Uzbekistan. Even after filing such appeal the court granted his removal. After his removal to Uzbekistan the applicant was sentenced to five and a half years of custody. Throughout the whole process the counsels of the applicants tried approaching him or tried getting access of his location but it all failed.

The applicant thus on the basis of Article 3 and Article 13, claimed that his expulsion had put him at risk of ill-treatment and there has been no effort from the side of the court with respect to his pending appeal. Further, by relying on Article 3 and 5 the claimant also claimed that his detention to Uzbekistan has been unlawful and the detention of the applicant was not conducted with due diligence.

The court after looking at the contentions and claims made by the claimant came to the conclusion that the court before passing such order of expulsion should ensure that he should not be subjected to any torture or ill treatment in the country where he will be extradited. Although out of all the claims made by the claimant and his representatives the court only considered the complaint concerning risk of ill treatment in Uzbekistan and Russia, the inefficiency of domestic remedies, unlawfulness of deprivation of liberty and unavailability of judicial review of detention as admissible.[589]The Uzbekistan authorities with respect to their process of extradition held that the applicant has the freedom to leave country after serving his period of punishment. They also ensured the representatives that the state also takes the responsibility that the applicant will not be further extradited to any third party where his rights will be violated or will stand in question.

[589][1996] ECHR 54.

The court in conclusion held that there had been a violation of Article 3 and Article 13 where the applicant expulsion to Uzbekistan has been unlawful and that the court failed to provide effective and accessible remedy to the applicant regarding the same.

IV.6. CASES BETWEEN 2013 AND 2016

In the case of *The Queen on the application of Philip Harkins* v. *the Secretary of State for the Home Department* v. *the Government of the United States of America*[590], Mr. Harkins[591] who was born in Scotland and raised by his grandparents was taken to the USA at the age of 14 to live with his parents. On August 1999 Mr. Harkins was arrested in Florida on charges of suspicion of the murder and attempted robbery of Joshua Hayes[592]. Upon getting investigated by the police with respect to the murder of the deceased he informed them that the night when the murder of deceased took place he was at home with his fiancée, Keisha Thompson, where his friend Mr. Terry Glover dropped him.

Going by the information provided by Mr. Harkins, Mr. Glover was arrested and further investigated. The Co-accused in his statement to the police authorities denied having any kind of information with respect to the murder but later on he went on to confess the fact that he and the claimant along with Mr. Randle were jointly reliable for the murder of the deceased.

The police authorities upon such confession went on to discuss the same with the claimant where he denied all the allegations put on him by Mr. Glover. Further, the authorities went on to question his fiancé, who accepted the fact that the day when the murder of the deceased took place the claimant was present with her in her house. After further investigation and looking at the statements of the people who were supposed to be present at the location where murder happened, the authorities came to the conclusion that there is no involvement of the claimant in this case and all the charges for which he was being held liable were being further dropped.

[590][2014] EWHC 3609
[591]Hereby known as the "Claimant"
[592]Hereby known as the "Deceased"

In the year 2000, a different prosecutor was arranged somehow for a meeting with Mr. Glover regarding the case. The meeting ended up with a written agreement between the prosecutor and him which stated that "he has accepted to allow the police to conduct an investigation with his co-operation." It was taken into consideration that because of the nature and history of the case there occurred some problems because of which Mr. Glover was not able to consult the Attorneys properly. Moreover, this agreement also stated that in the time period of this investigation any information, any part of the conversation or material which will be provided by Mr. Glover to the prosecutors will, in any case not be used against him and will be used only against Mr. Harkins with respect to his cases. When questioned about such procedure being followed in this case which is completely unusual it was stated that such procedures happen only in the rarest of the rare cases and being the circumstances of this case totally unusual such procedures need to be followed.

As a result of the agreement which was signed between the prosecutor and Mr. Glover the State gave its consent to not charge him with murder but instead contended that he will be charged with the other particular offences like that of robbery and being a source of the first degree murder to which he duly agreed. As soon as the agreement was signed the claimant was further charged with murder of the deceased and attempted robbery. Moreover, during the entire case preceding the claimant was not provided with any information with respect to the entire case scenario along with which he was only given the information that the death penalty would be sought against him in this case. The counsels of the claimants raised objections against the late filing of the case because of which a pre-trial conference was scheduled. As a result of which the claimant was therefore released on an unconditional bail by the authorities. The case proceedings extended throughout the years 2000 and 2001 during which the claimant attended all the court proceedings which required him to be present in the court. After attending the proceedings continuously, looking at the delay which has been taking place in the case the claimant travelled to the United Kingdom to stay along with his grandparents. After few years the claimant again got involved in an accident in Scotland because of which he was charged with an offence of killing a person because of rash and negligent driving. However, the claimant was arrested in the hospital itself because of the provisional arrest warrant issued by the

Bow Street Magistrates' Court pursuant to the Extradition Act 1999[593]. While the proceedings of this case was going on the government of United States of America on the charges of murder and attempt to robbery filed an extradition application against the claimant. The claimant in his defence claimed that such application of extradition would hamper his interest because it was contended by the opposition party that he should be given death penalty to which the court gave its verification that the State of Florida had reserved the notice provided by them earlier with their intention to award the claimant with death penalty and instead they are trying to pursue life sentence. The claimant extended their argument by stating that the court cannot rely on the evidence provided by the united states government, bringing the agreement the prosecutor signed with Mr. Glover and hence, the credibility of such documents are always questionable.

The counsel of the claimants questioned the evidence provided by the state on various grounds. The first ground being that there has been insufficient evidence provided by the state claiming such extradition. Secondly, it was being claimed that the manner in which the state has obtained such evidence is improper. Signing an agreement with Mr. Glover and assuring him that he will not be charged for claims being made against him only to prove their point amounts to abuse of power. Thirdly, they claimed that the time gap between the case proceedings and also the time taken by the court to announce its decision or to request claimant's extradition will be unjust according to rules of law. Lastly, they questioned the undertaking given by the state with respect to death penalty to be not given to the claimant comes out to be inadequate and not reliable.

The Extradition Application against the claimant was made solely on the basis of the affidavit submitted by Mr. Glover on this case. The affidavit contained completely different picture of the case which was different from the original facts being stated.

The claimant thus submitted that the affidavit filed my Mr. Glover should not be the sole reason behind the application for his Extradition. Along with this point he also

[593][2007] EWHC 639

stated that it was very clear by the circumstances that such statement was obtained because of the abuse of process by the side of the prosecution. This ground should have been sufficient for the Secretary of the State to not rely on such statements and pass such an order of Extradition. Therefore, the Secretary of State concluded that "this was not a case in which the claimant's extradition is barred because the application of his return is not made in good faith in the interests of justice."[594]

The claimant also questioned the guarantee provided by the state with respect to the punishment of death penalty. He expanded his contention by stating that the circumstances in which the Secretary of the State passed the decision of Extradition is irrational and also it infringes claimant's rights under Articles 2[595] and 3[596] of the European Convention on Human Rights. Also Section 12(2) (b) of the Extradition Act 1989 provides in relevant part: "the Secretary of State may decide to make no order for the return of a person accused or convicted of an offence not punishable with death in Great Britain if that person could be or has been sentenced to death for that offence in the country by which the request for his return is made."[597]

The claimant contends that the conviction on the charge of first degree murder amounts to the punishment of death penalty in the state of Florida. He supported his argument by stating that there has already been a case reported in Florida, where the prosecution did not even requested the court for the death penalty but they still went on to implement the same.

The court, after looking at the arguments by both the parties was of the view that there was no negligence on part of the Secretary of State while considering the diplomatic note by Mr. Glover and in holding it to be effective. Moreover the assurance given by the state that the death penalty would not be sought or imposed seems to be reliable. Therefore the court concluded that "the order for the return of the claimant to the United States of America is neither unjust nor oppressive, or nor does it constitute a breach of the claimant's rights under the European Convention on Human Rights." Hence, the order of extradition was passed.

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[594]Refugee Convention, 1951, Art. 33
[595]Article 2 of the Convention talks about Right to Life.
[596]Article 3 of the Convention talks about Prohibition of Torture.
[597]*Supra note* 593

Therefore, after conducting a detailed analysis of the cases between 1973 and 2016, it can be formulated that, although there exists the jus cogens principle of non-refoulement, there is confusion amongst state parties whether to extradite an individual or not. Even the courts sometimes find it difficult to come to a conclusion as to determine the status of that individual. It can also be observed through these cases that the municipal laws in general and immigration or extradition laws of the countries in particular are given more weightage when it comes to the security of a country. The pretexts of national security and the nature of crime committed play an important role in determining the status of an individual.

The process of whether to extradite an individual or not to refoule him depends on case to case basis and is a rigorous assessment of the wanted person's eligibility for refugee protection, based on a careful examination of all relevant facts and due observance of procedural fairness compliance. As seen above, persons responsible for crimes may not qualify for refugee status, either because they do not meet the inclusion criteria of the refugee definition set out in Article 1A(2) of the 1951 Convention, or because their involvement in certain serious crimes or heinous acts gives rise to an exclusion clause of Article 1F of the 1951 Convention.

However where an extradition request concerns a refugee or an asylum-seeker, States must ensure compliance with their protection obligations under international refugee and human rights law. These obligations form part of the legal framework governing extradition and most importantly, in considering the extradition of a refugee or an asylum-seeker, States are bound to ensure full respect for the principle of non-refoulement under international refugee and human rights law. Extradition and asylum processes must be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner which is fully consistent with their international protection obligations.