

## **DOES ARTICLE THREE PRECLUDE THE ECtHR FROM BALANCING THE PROHIBITION OF TORTURE WITH OTHER INTERESTS?**

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### **Abstract**

In this article, there are two main arguments. First one is what the definition of an absolute right is, because although Article 3 is accepted as an absolute right, the Court has not defined it. Within the European Convention on Human Rights what an absolute right will be given. The essay describes it within each of cases heard by the Court and Article 15(2). The last one is whether inhuman and degrading treatment or punishment prevents the Court from balancing it against other interests such as national security. This part examines different case law of the ECHR.

Key words: absolute right, ECtHR, torture, balance, other interests

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## Introduction

The European Convention on Human Rights (ECHR) was signed on 4 November 1950 and entered into force on 3 September 1953. It established the European Court of Human Rights (ECtHR) whose decisions are binding for all state parties that have ratified the Convention.<sup>1</sup> Therefore, the states guarantee all rights and freedoms under the Convention. Article 3 is one of these. It states that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>2</sup> From this provision it can be seen that there are different types of ill-treatment. Although the Court does not always make a clear distinction between the types of treatments, the thresholds of treatment are essential, dictating whether these fall within Article 3 or not and in the same way, this “separates torture” from other treatment.<sup>3</sup>

Article 3 provides protection for everyone including non-citizens of member states.<sup>4</sup> The responsibility of the state may stem from its agents or actors,<sup>5</sup> non-state agents<sup>6</sup> or other states which contain non-members of the Convention.<sup>7</sup> In addition, Article 3 provides not only negative obligations but also positive obligations for member states.

Article 3 is known as an absolute right but the Court has not described it to an adequate depth yet.<sup>8</sup> It is said that even in times of war or for other public interests there is no derogation under it.<sup>9</sup> However, this absoluteness of Article 3 gives rise to arguments as regards a fair balance between the applicant and public national security, because it may hinder the court when giving a verdict.<sup>10</sup> The aim of this essay is to explain the meaning of 'absolute right' by referring to the case law of the ECtHR, and to discuss whether Article 3 precludes the Court from balancing the prohibition of torture with other interests.

Firstly, in order to gain a better understanding, the definition of torture, inhuman or degrading treatment or punishment will be explained and the key differences will be given. Secondly, positive obligations will be determined under Article 3. Then, the meaning of absolute right will be given in terms of the practices of the ECtHR. Finally, it will be discussed whether Article 3 prevents the Court from balancing it with other interests.

### 1. Defining Torture, Inhuman and Degrading Treatment or Punishment

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<sup>1</sup> ECHR, ‘The Convention for the Protection of Human Rights and Fundamental Freedoms’, Article 46(1).

<sup>2</sup> Ibid.

<sup>3</sup> Natasa Mavronicola, ‘What is ‘an absolute right?’ Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12:4 Human Rights Law Review 723.

<sup>4</sup> Example, *Soering v UK* no: 22414/93, *Othman (Abu Qatada) v UK* no: 8139/09.

<sup>5</sup> For instance *Ireland v UK* no: 5310/71.

<sup>6</sup> See *Z v UK Z and others* no. 29392/95.

<sup>7</sup> To illustrate this see, *Saadi v Italy* no: 37201/06, *N v UK* no: 26565/05.

<sup>8</sup> Mavronicola (n 3).

<sup>9</sup> ECHR (n 1) Art 15.

<sup>10</sup> See *Chahal v UK*, *Saadi v Italy*.

According to the Court:

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>11</sup>

It can be concluded that these elements are important in order to determine type of ill-treatment. Different types of ill-treatment which are determined by ECHR in Article 3 may be differentiated by the Court.<sup>12</sup> However, in some cases, the Court may only find a violation of Article 3, such as in *Soering v UK*.<sup>13</sup> The Court has also stated that “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions”.<sup>14</sup> Thus, “certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future.”<sup>15</sup> What can be understood from this is that the categorisation of ill-treatment may change over time. For instance, in *Ireland v UK*, the court held that the interrogation technique which includes wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink should not be defined as torture but as inhuman treatment. Nonetheless, when similar facts are taken into account today, such interrogation techniques would be defined as torture.<sup>16</sup>

The Court referred to Resolution 3452 which was adopted by the General Assembly of the United Nations regarding the definition of torture.<sup>17</sup> According to Article 1(2) “torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” As far as can be understood from this definition, there should be an intentional act for it to constitute torture. In addition to this, there must be a purpose to it.<sup>18</sup> The case of *Denizci and others v Cyprus* is a case in point.<sup>19</sup> The applicants were Turkish Cypriots who were detained by Cypriot police and ill-treated. The Court held that there was intentional ill-treatment; however, it was not done to extract a confession and it could be said that partly because of this, the case was not defined as torture. As a result, the aim is an important point for constituting it as torture. In the case of *Aksoy v Turkey*,<sup>20</sup> the applicant was subjected to ill-treatment through a technique known as ‘Palestinian hanging’. It included being stripped naked and hung up by his arms which were tied behind his back. The Court held that it was torture. It is a notable case as it was the first one in which the Court found a contracting state guilty of torture.

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<sup>11</sup> *Ireland v UK* para 162; *Price v. UK*, no: 33394/96 para.24; *Mouisel v France* no: 67263/01 para 37; *Naumenko v. Ukraine* no: 42023/98 para 108.

<sup>12</sup> DJ Harris et al, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 71.

<sup>13</sup> no: 22414/93.

<sup>14</sup> *ibid* para102.

<sup>15</sup> *Selmouni v France* no:25803/94 para 101.

<sup>16</sup> Robin CA White and Clare Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 172.

<sup>17</sup> UN, ‘Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 9 December 1975’

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeclarationTorture.aspx>> accessed 10 January 2014 .

<sup>18</sup> *İlhan v Turkey* no: [22277/93](#).

<sup>19</sup> nos: 25316-25321/94 and [27207/95](#).

<sup>20</sup> no: [21987/93](#).

In the case of *Ireland v UK*,<sup>21</sup> it was determined that mental suffering may constitute torture when it is serious enough. However, the Court has not held that any case constitutes torture based on mental suffering alone.<sup>22</sup> In addition to mental suffering, there must be physical suffering.<sup>23</sup> *Aydin and others v Turkey* is an example of this.<sup>24</sup> In that case, a girl who was seventeen years old was detained at a gendarmerie headquarters for three days. During her detention, she was beaten, kept blindfolded, spun in a tyre under water pressure and stripped naked. In addition, she was raped by an unidentified person. Consequently, there must be both mental and physical suffering to constitute it as torture.

When it comes to inhuman treatment, the Court has defined this as causing “intense physical and mental suffering.”<sup>25</sup> The essential difference between inhuman treatment and torture is the degree of “the suffering inflicted.”<sup>26</sup> Whether it is deliberate is not necessary to determine inhuman treatment.<sup>27</sup> Interrogation techniques,<sup>28</sup> condition of detention<sup>29</sup> and destruction of home<sup>30</sup> are some examples of it.

Degrading treatment “humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.”<sup>31</sup> While the Court has sometimes made a distinction between degrading and inhuman treatment, such as in *Abdulaziz, Cabales and Balkandili v UK*,<sup>32</sup> sometimes the differences are not clear, such as in *Tyrer v UK*.<sup>33</sup> When degrading treatment is compared with inhuman treatment, the differences between them can be stated as “humiliation or debasement rather than physical or mental suffering”.<sup>34</sup> An intention to humiliate or debase is not vital in order for it to be considered degrading.<sup>35</sup> The case of *Price v UK*<sup>36</sup> is a good illustration. Price is four-limb deficient. She was put in a cell which was not suitable for a disabled person, and she claimed that she suffered ill-treatment. The Court held that the absence of intention could not

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<sup>21</sup> no: 5310/71.

<sup>22</sup> Harris (n 12) 74.

<sup>23</sup> *ibid.*

<sup>24</sup> nos. 49197/06; 23196/07; 50242/08; 60912/08; 14871/09.

<sup>25</sup> no: 5310/71 para 167.

<sup>26</sup> *ibid.*

<sup>27</sup> *Labita v Italy* no 26772/95 para 120.

<sup>28</sup> no: 5310/71.

<sup>29</sup> *Ramirez Sanchez v France* no: 59450/00.

<sup>30</sup> *Bilgin v Turkey* no: [23819/94](#).

<sup>31</sup> *Pretty v UK* no: 2346/02 para 52.

<sup>32</sup> nos: 9214/80; 9473/81; 9474/81.

<sup>33</sup> no: 5856/72.

<sup>34</sup> Harris (n 12) 92.

<sup>35</sup> *ibid.*

<sup>36</sup> no: 33394/96.

affect the breach of Article 3.<sup>37</sup> It is clear that, when it comes to punishment, no distinction has generally been made between ‘inhuman’ and ‘degrading’ by the Court.<sup>38</sup>

## 2. Positive Obligations under Article Three

The Convention includes positive and negative obligations. A negative obligation is defined as refraining “from interfering with the individual’s rights.”<sup>39</sup> As for positive obligations, they are defined as “requiring member states to ... take action.”<sup>40</sup> Positive obligations stem from Article 1 which gives responsibility to states party to secure everyone rights and freedoms that are determined in Section 1 of the ECHR. The Court has improved the positive obligations through its jurisprudence.<sup>41</sup> Although Article 3 has a fundamental importance, it would be not effective if there were no positive obligations under it.<sup>42</sup>

Although positive obligations arise in a significant number of distinct contexts, it can be said that there are two main classifications.<sup>43</sup> The first is that a contracting state has a duty to find out alleged breaches effectively.<sup>44</sup> The latter is that there is also responsibility for the state to “take reasonable measures to prevent foreseeable risk” of ill-treatment which is determined by Article 3 by “officials of other states or non-state actors.”<sup>45</sup> For example, In *Z and others and UK*, the local authority failed to protect four children from neglect and abuse by their family. The Court held that the UK had failed to protect applicants against inhuman and degrading treatment.<sup>46</sup>

### DEFINITION OF ABSOLUTE RIGHT

Article 3 is known as an absolute right.<sup>47</sup> However, neither Article 3 nor the Convention defines the term ‘absolute right’ or ‘absolute prohibition.’<sup>48</sup> Gewirth is one of those who have defined absolute right. According to him, it is a right that “cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.”<sup>49</sup> As can be seen from this, there is no derogation in terms of article 3.

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<sup>37</sup> *ibid*; *Peers v. Greece*, no: 28524/95.

<sup>38</sup> *Mavronicola* (n 3).

<sup>39</sup> JG Merrills, *The Development of International Law by the European Court of Human Rights* (2 nd edn, Manchester University Press 1993) 103.

<sup>40</sup> Dissenting Opinion of Judge Martens in *Gul v Switzerland* [1996] no: 23218/94 para 7 .

<sup>41</sup> Stephanie Palmer, ‘A Wrong Turning: Article 3 ECHR and Proportionality’ (2006) 65(2) *Cambridge Law Journal* 438.

<sup>42</sup> *Vezenaroglu v Turkey* no: 32357/96 para 32.

<sup>43</sup> *Palmer* (n 41).

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.

<sup>46</sup> no: 29392/95.

<sup>47</sup> *Mavronicola*(n3).

<sup>48</sup> Michael K Addo and Nicholas Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’ (1998)9 *European Journal of International Law* 510.

<sup>49</sup> Alan Gewirth, ‘Are there any absolute rights?’ (1981)31 *The Philosophical Quarterly* 1.

In reality, the meaning of an absolute right remains “rather imprecise”.<sup>50</sup> The supervisory organs have not been sure regarding its scope.<sup>51</sup> When the Court gives its verdicts it uses principles, “effective protection” and “margin of appreciation.”<sup>52</sup> As a result, the practice of Article 3 is correlated to a subjective element, not an objective one.<sup>53</sup>

There are three main factors in terms of the Court’s approach which are related to the absolute nature of article 3.<sup>54</sup> Firstly, when article 3 is compared with other articles such as 8(2), it contains no lawful exceptions.<sup>55</sup> Then, there is no derogation under article 3.<sup>56</sup> Finally, the use of torture and inhuman or degrading treatment or punishment is prohibited regardless of the conduct of the victims.<sup>57</sup>

Article 3 should be examined in conjunction with Article 15(2) in order to understand the concept of absolute right because, under Article 15(2), there is no derogation during time of war or some other public emergency that threatens the existence of the nation. Therefore, the Convention does not allow contracting states to torture, to degrade or to conduct inhuman treatment or punishment even during a public emergency or in times of war.

A case of interest is that of *Gafgen v Germany*<sup>58</sup>. Gafgen kidnapped a child and killed it but the parents and police were not aware that the child had already been killed when Gafgen was apprehended. During his interrogation, they threatened him with torture if he would not say where the child was. In this case, the Grand Chamber did not agree with threatening the applicant with ill-treatment even if this may have saved the child’s life.<sup>59</sup> This case appears to confirm that there is no derogation for an absolute right even if it might have saved a life.

In the case of *Soering v UK*<sup>60</sup>, Soering killed his girlfriend’s parents and then fled to the UK. The US wanted to extradite him owing to the extradition agreement that it had. However, if he was extradited he would have been sentenced to death under Virginia Law and he would have been subjected to the “death row phenomenon”. The evidence set out by the US authorities did not satisfy the Court. Therefore, the Court held that it would be a violation of article 3 if he was extradited and it stated that there were no exceptions or the possibility of derogation under article 15(2).<sup>61</sup> Even if the US was not a member of the ECHR, the Court held that it would be violation of Article 3 if he was extradited. This case indicates that an absolute right provides an absolute protection irrespective of the ability to extradite any person to a receiving state.

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<sup>50</sup> Addo and Grief(n48).

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> Mavronicola (n 3).

<sup>55</sup> *ibid.*

<sup>56</sup> Article 15.

<sup>57</sup> *ibid*; *Chahal v UK* para 79.

<sup>58</sup> no:22978/05.

<sup>59</sup> *ibid.*

<sup>60</sup> no: 22414/93.

<sup>61</sup> *ibid* para 88.

Another case in point is *Chahal v UK*.<sup>62</sup> Chahal was a Sikh leader and the Indian authorities sought his return on account of ‘terrorist’ activities. He claimed that if he was deported to India, he would be subject to torture and inhuman or degrading treatment. The UK wished to deport him on account of national security. The Court held that if Chahal was deported to India, he would be subject to ill-treatment. The UK authorities argued that “the guarantees afforded by Article 3 were not absolute in cases where a Contracting State proposed to remove an individual from its territory.”<sup>63</sup> In contrast to the UK’s position, the Court said that “the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.”<sup>64</sup> In addition to this case, the absolute nature of the prohibition in Article 3 was reaffirmed by the Grand Chamber in the case of *Saadi v Italy*.<sup>65</sup>

The above shows that although the Court has not defined absolute right, its definition can be understood from the practices of states. Therefore, it could be said that there is no derogation from absolute right even in times of war; public emergencies; or other situations such as when trying to save the life of an innocent child. Furthermore, there is no discrimination between the citizens of member states and non-member states; this right is for everyone.

### **3. Does Article Three Preclude the Court from Balancing the prohibition of Torture with Other Interests?**

The test of proportionality aims to maintain a “strict and proper balance between various competing interests.”<sup>66</sup> This stems from the general principle of the Convention.<sup>67</sup> Different variations are applied by the Court for different contexts with respect to proportionality.<sup>68</sup> The assessment of proportionality is done by balancing “the importance of the interference against the seriousness of interfering with a fundamental right.”<sup>69</sup> This can be seen easily between qualified and unqualified rights, when qualified rights, which include their limitation in the provision, are compared with unqualified rights that do not contain any expression as to their limitation.<sup>70</sup> To illustrate this, Article 9 describes rights relating to freedom of thought, conscience and religion; with 9(1) describing the right in general and 9(2) determining its limitation. However, in Article 3 there is no statement regarding its limitation. Furthermore, there can be no derogation under it.<sup>71</sup>

The Court adopts the absoluteness of the prohibition of the ill-treatment under Article 3 consistently and, due to this absoluteness, there is no opportunity to balance this against other interests.<sup>72</sup>

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<sup>62</sup> no: 22414/93.

<sup>63</sup> *ibid* para 76.

<sup>64</sup> *ibid* para 80.

<sup>65</sup> no: 37201/06.

<sup>66</sup> Pieter van Dijk and others, *The Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 80.

<sup>67</sup> *ibid* 81.

<sup>68</sup> Van Dijk and others (n 66) 81.

<sup>69</sup> Palmer (n41).

<sup>70</sup> *ibid*.

<sup>71</sup> ECHR (n 1) Art 15.

<sup>72</sup> Hemme Battjes, ‘In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed’ (2009) 22 *Leiden Journal of International Law* 583.

However, when the practices of the Court are examined, it can easily be seen that the Court adopts a balancing test under some circumstances. For instance, the case of *Soering v UK*<sup>73</sup> is concerned with the extradition of the applicant to the US. As mentioned above, if he had been extradited to the US, he may have faced the real risk of ill-treatment because of ‘death row phenomenon’. Therefore, a contracting state would be responsible under Article 3. The Court held that it would be violation of Article 3, in particular concerning inhuman and degrading treatment or punishment, by emphasising the need for “a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>74</sup> Another example is *N v UK*.<sup>75</sup> In that case, N was from Uganda and she was HIV positive and her health would deteriorate if she were expelled to her country. The Court held that if she were expelled to Uganda, it would be a breach of Article 3 in terms of inhuman and degrading treatment or punishment.

The above examples show that the Court has found a fair balance between inhuman and degrading treatment and punishment. However, as for torture, when the practices of states and Article 15 are examined, it will be seen that the situation is different. According to 15(2) of the ECHR, there is no derogation in times of war or other public interests under Article 3. This provision expressly prevents fair balancing among other interests. The effect of the provision can be seen most clearly in the case of national security. When the Court has proof that the applicant would face a real risk of torture or similar, Article 3 precludes the court from balancing it against other interests. In the case of *Chahal v UK*,<sup>76</sup> which was discussed above, the future events in the receiving State were uncertain and so various factors had to be taken into account. Thus, “there was an implied limitation to Article 3 entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds.”<sup>77</sup> The UK government based its decision in *Soering v UK* on fair balancing. On the other hand, the Court emphasised that:

It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition ... that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.<sup>78</sup>

Moreover, the Court stated that the prohibition of Article 3 which provides protection against ill-treatment is “equally absolute in expulsion cases.”<sup>79</sup> The article would be violated if an individual is removed to a country and “substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3.”<sup>80</sup> Hence, a contracting party has responsibility to protect him or her against such treatment.<sup>81</sup> As a result, the Court did not adopt a fair balancing test. It can be said that in this case, torture prevented the court from balancing it against national security.

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<sup>73</sup> *Soering*(n60).

<sup>74</sup> *ibid* para 89.

<sup>75</sup> no: 26565/05.

<sup>76</sup> *Chahal*(n62).

<sup>77</sup> *Ibid* para 76.

<sup>78</sup>*ibid* para 81.

<sup>79</sup>*ibid* para 80.

<sup>80</sup> *ibid*para 80.

<sup>81</sup> *ibid*.

A further point can be made from the case of *Saadi v Italy*.<sup>82</sup> The UK joined this case as a third-party intervener.<sup>83</sup> It argued that the decision of the court in *Chahal* should be altered and clarified in three ways.<sup>84</sup> Firstly, it should balance the public interest against the risk of the suspected terrorist.<sup>85</sup> Secondly, when the sending states adduce evidence about national security, the applicant has to adduce stronger evidence to show how he would face ill-treatment under article 3 if he were removed to the receiving country.<sup>86</sup> Finally, if there is a diplomatic assurance which determines that the applicant would not be subject to ill-treatment under Article 3, this will be satisfactory in order to remove an applicant.<sup>87</sup> The Court responded to the claimants of the UK. It said that the UK argument was not acceptable and stated that “a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole.”<sup>88</sup> The second UK argument was incompatible with the absolute nature of article 3 and “it amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual.”<sup>89</sup> The Court also rejected the third UK argument.<sup>90</sup>

The Court handed down a new decision in 2012 that related to Article 3. In *Othman (Abu Qatada) v UK*,<sup>91</sup> Othman was from Jordan and he was known as Osama bin Laden’s right-hand man in Europe. He did not want to return to his country on account of the possibility of facing torture. Nevertheless, the UK wanted to deport him owing to national security and the government submitted assurances to the SIAC<sup>92</sup> which indicated that he would not face torture. The court stated that the assurance was sufficient and Article 3 would not be breached if he was removed and returned to Jordan.<sup>93</sup> This decision appears to show that Article 3 did not prevent the Court from balancing it with other interests after it obtained such assurances. When all examples are examined, it is possible that Article 3 can preclude the Court from balancing with other interests.

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<sup>82</sup> *Saadi*(n65).

<sup>83</sup> ECHR (n 1) Art 36 and 44(2) may allow member states to intervene in any case.

<sup>84</sup> *Saadi* (n65)para 122.

<sup>85</sup> *ibid*.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid*para 123.

<sup>88</sup> *ibid*para 138.

<sup>89</sup> *ibid*para 140.

<sup>90</sup> *ibid*para 141.

<sup>91</sup> no: 8139/09.

<sup>92</sup> The Special Immigration Appeals Commission.

<sup>93</sup> (n90)para 163-67.

## CONCLUSION

The Court has not defined what an absolute right is. However, when each of the cases heard by the Court are examined next to Article 15(2) it appears that it describes absolute right and its scope. Therefore, an absolute right does not allow for any derogation even in times of war or situations of public interest, such as national security. Moreover, there is no derogation even if there is the possibility of saving the life of an innocent child and absoluteness includes every one without taking into account nationalities and membership of the ECHR.

Inhuman and degrading treatment or punishment does not prevent the Court from balancing it against other interests. However, up to the present, except in the *Abu Qatada* decision given in 2012, torture precludes balancing it against other interests. If there is an assurance which shows that the applicant who is generally suspected of terrorist activities, faces no real risk of torture when removed to their country of origin, the court could hold that this balances other interests with torture. Otherwise, torture prevents it from balancing with other interests.

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